



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2015-0642; FRL-9950-91-Region 3]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Minor New Source Review Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking direct final action to approve revisions to the Commonwealth of Virginia state implementation plan (SIP). These revisions pertain to preconstruction permitting requirements under Virginia's minor New Source Review (NSR) program. EPA is approving these revisions to the Virginia SIP in accordance with the requirements of the Clean Air Act (CAA).

DATES: This rule is effective on **[insert date 60 days after date of publication in the Federal Register]** without further notice, unless EPA receives adverse written comment by **[insert date 30 days after date of publication in the Federal Register]**. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. **EPA-R03-OAR-2015-0642** at <http://www.regulations.gov>, or via email to campbell.dave@epa.gov. For comments submitted at Regulations.gov, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit

electronically any information you consider to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the “For Further Information Contact” section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: David Talley, (215) 814-2117, or by e-mail at talley.david@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On July 15, 2013, the Commonwealth of Virginia submitted a formal revision to its SIP. The SIP revision consists of amendments to the Virginia Department of Environmental Quality’s (VADEQ) minor New Source Review (NSR) program, as well as a complete recodification of those regulations.

On July 24, 1996, EPA took final action to approve in part and disapprove in part a revision to the Virginia SIP relating to minor NSR permitting requirements. *See* 61 FR 38388. EPA disapproved revisions to the public participation requirements which were, at the time, codified

at Virginia Regulations (VR) section 120-08-1. Specifically, EPA disapproved sections 120-08-01G.1 and .01G.4.b because they purported to exempt major modifications of less than 100 tons per year (tpy) from the prescribed public participation procedures, contrary to the requirements of 40 CFR 51.161. This left the previously approved SIP requirements of VR section 120-08-01C.4 in place to govern public participation. EPA approved the remainder of the submittal into Virginia's SIP.

Subsequently, on April 21, 2000, EPA took final action to approve a revision to the Virginia SIP which did not revise any of the substantive requirements, but included in the SIP Virginia's reorganized and recodified regulations from the VR-120-08-01 format to match the Virginia Administrative Code (VAC) format (e.g. 9VAC5-80-10). *See* 78 FR 21315.

II. Summary of SIP Revision and EPA Analysis

Virginia's July 15, 2013 submittal encompasses a number of revisions to Virginia's regulations that were completed at the Commonwealth level, but not submitted to and approved by EPA as revisions to the Virginia SIP. VADEQ compiled the various revisions and submitted them so that EPA could review the program as a whole. A thorough discussion of the details of the regulatory changes made by Virginia as well as EPA's analysis of those changes to the regulations and the Virginia SIP are located in the technical support document (TSD) in the docket for this action, available at www.regulations.gov, and will not be restated here.

Among those revisions was the evolution and recodification of VADEQ's minor NSR program from 9VAC5 Chapter 80 sections 10 and 11 to Article 6 of Part II of 9VAC5 Chapter 80. Sections 10 and 11 of 9VAC5-80 are being removed from the SIP and replaced as part of this action. Additionally, the submittal includes revisions to 9VAC5-50, sections 240, 250, and 260.

The submittal also includes revisions to the requirements for public participation under Article 6 which correct the deficiencies which were the reason for EPA's previously-mentioned July 24, 1996 disapproval action.

9VAC5-50-240 has been revised to maintain consistency with revisions in the new Article 6; to clarify which emissions units are subject to the minor NSR regulations; and to appropriately exempt hazardous air pollutants (HAPs) regulated under 9VAC5-60, consistent with 40 CFR 51.166.

Additionally, a number of revisions have been made to the best available control technology (BACT) requirements under Virginia's minor NSR program. The definition of BACT under 9VAC5-50-250 has been revised to provide for the consideration of additional factors in determining BACT (e.g. nature and amount of emissions, control efficiencies across industry source types, etc.). 9VAC5-50-260 has been revised to require BACT determinations for all emissions units subject to the minor NSR program, and to require that, for phased construction projects, BACT must be reviewed within 18 months of construction of each individual phase. 9VAC5-50-260 has also been revised to require BACT for all emissions units which are subject to the minor NSR program. These changes to 9VAC5-50 have been made in order to simplify the minor NSR program, and are appropriate and meet the federal requirements of 40 CFR 51.160 and 51.161, and CAA section 110(a)(2)(C). Additionally, the revisions are in accordance with section 110(l) of the CAA because they will not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable CAA requirement.

Generally, the new Article 6 regulations represent a recodification of the minor NSR program

from section 10 and 11 of 9VAC5-80. Sections 10 and 11 are being deleted from the SIP because they are largely duplicative with the new provisions. In addition, the deficiency related to the public participation requirements identified in EPA's 1996 disapproval action has been corrected. Therefore, the previously approved public participation requirements under VR 120-08-01 are being removed from the SIP as well. Additionally, as discussed in more detail below, the revisions include new regulations designed to confer federal enforceability upon Virginia's program for regulating HAPs (consistent with 40 CFR parts 61 and 63) and the removal of provisions which were inadvertently included in the SIP by EPA's 1996 approval, and which inappropriately conferred federal enforceability upon Virginia's state-only enforceable provisions for regulating toxic air pollutants. Virginia's definition of "toxic air pollutant" is more broad than the federal "hazardous air pollutant," and by inadvertently applying the minor NSR program to the former, Virginia's SIP went beyond what VADEQ intended. Specifically, the requirements of sections 1100I, 1105F, and 1170A are being added, and paragraph 1200B is being deleted from the SIP. These revisions are appropriate and meet the federal requirements of 40 CFR 51.160 and 51.161, and CAA section 110(a)(2)(C). Additionally, the revisions (and in particular the deletions) are in accordance with section 110(l) of the CAA because they will not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable CAA requirement.

The unit reconstruction requirements of 9VAC5-80-1100 have been revised to evaluate applicability for the reconstruction of an emissions unit via the replacement of some of its components in the same manner as any other modification. Additionally, provisions have been added to allow sources to opt into permit review, and to clarify applicability of fugitive emissions. Provisions have been added to sections 80-1100M, 1105C and D, and 1100 C to

regulate fine particulate matter with an aerodynamic diameter less than 2.5 micrometers (PM_{2.5}) in a manner consistent with federal requirements, particularly related to the condensable fraction of PM_{2.5}.

9VAC5-80-1105 contains the exemptions formerly codified at section 80-11. Many of the revisions to these exemptions are administrative or clarifying in nature. However, there are some additions and deletions as well. New exemptions include, but are not limited to, those for mulch recycling operations, replacement units where the potential to emit (PTE) does not increase, engines and turbines which do not exceed 500 hours per year of operation, and exhaust flares at natural gas and coal bed methane extraction wells. Additionally, the emission-rate based exemption for VOC coating operations, and the provisions which prohibit the exemption of certain New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) sources have been deleted. Exemption thresholds for PM_{2.5} have been added, below which minor NSR will not apply.

The new (and existing) exemptions exist because VADEQ considers the associated emissions to be de minimis, and not worth the administrative effort required to issue permits for de minimis emissions. As a safeguard, however, provisions have been added to state that any exemption from the minor NSR requirements does not create an exemption from major NSR. All such sources would be considered emissions sources for purposes of determining major source status under Virginia's SIP approved major NSR program.

The definitions under 9VAC5-80-1110 have been revised to make the minor NSR program more compatible with the major NSR program. Additional revisions of note include: the addition of provisions for ensuring that permit terms relating to emissions caps are practically enforceable

(9VAC5-80-1180B, C, and D); criteria relating to invalidation of permits due to delays in construction (9VAC5-80-1210B); criteria for issuance of general permits (9VAC5-80-1250); provisions relating to permit modifications (9VAC5-80-1260 through 1300); as well as several non-substantive, clarifying revisions.

All of the new and revised provisions of 9VAC5-80 Article 6 meet the federal requirements of 40 CFR 51.160 and 51.161, and CAA section 110(a)(2)(C). Additionally, the revisions (and in particular the deletions) are in accordance with section 110(l) of the CAA because they will not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable CAA requirement as EPA finds Virginia's conclusions regarding de minimis emissions reasonable.

Additional details regarding Virginia's amended regulations for its minor NSR program and EPA's detailed analysis of those regulations for the Virginia SIP are located in the TSD in the docket for this action, available at www.regulations.gov, and will not be restated here.

III. Final Action

EPA is approving Virginia's July 15, 2013 submittal as a revision to the Virginia SIP because it meets the federal requirements of 40 CFR 51.160 and 51.161, and CAA section 110(a)(2)(C). Additionally, the revisions (and in particular the deletions) are in accordance with section 110(l) of the CAA because they will not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable CAA requirement given de minimus emissions impacts and removal of duplicative measures. EPA is publishing this rule without prior proposal because EPA views this as a noncontroversial amendment and anticipates no adverse comment. However, in the "Proposed Rules" section of this **Federal Register**, EPA

is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on **[insert date 60 days after date of publication in the Federal Register]** without further notice unless EPA receives adverse comment by **[insert date 30 days after date of publication in the Federal Register]**. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

IV. General Information Pertaining to SIP Submittals from the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) “privilege” for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed.

Virginia’s legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia’s Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1-1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information that: (1) Are generated or developed before the commencement of a voluntary environmental assessment; (2) are prepared independently of the assessment process; (3) demonstrate a clear, imminent and substantial danger to the public health or environment; or

(4) are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege Law, Va. Code Sec. 10.1-1198, precludes granting a privilege to documents and information “required by law,” including documents and information “required by federal law to maintain program delegation, authorization or approval,” since Virginia must “enforce federally authorized environmental programs in a manner that is no less stringent than their federal counterparts. . . .” The opinion concludes that “[r]egarding § 10.1-1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by federal law to maintain program delegation, authorization or approval.” Virginia’s Immunity law, Va. Code Sec. 10.1-1199, provides that “[t]o the extent consistent with requirements imposed by federal law,” any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any federally authorized programs, since “no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with federal law, which is one of the criteria for immunity.”

Therefore, EPA has determined that Virginia’s Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its NSR program consistent with the federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can

affect only state enforcement and cannot have any impact on federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law.

V. Incorporation by Reference

In this rulemaking action, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of the Virginia regulations as described in the amendments to 40 CFR part 52 set forth below. Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference by the Director of the Federal Register in the next update of the SIP compilation.¹ The EPA has made, and will continue to make, these documents generally available electronically through www.regulations.gov and/or may be viewed at the appropriate EPA office (see the ADDRESSES section of this preamble for more information).

VI. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided

¹ 62 FR 27968 (May 22, 1997).

that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land as defined in 18 U.S.C. 1151 or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[Insert date 60 days after date of publication in the Federal Register]**. Filing a petition for reconsideration by the

Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of this **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking action. This action pertaining to Virginia's minor NSR program may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: August 9, 2016.

Shawn M. Garvin,
Regional Administrator,
Region III.

40 CFR part 52 is amended as follows:

PART 52 – APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart VV—Virginia

2. In § 52.2420, the table in paragraph (c) is amended by:

- a. Removing the section entitled “9VAC5, Chapter 80 Permits for Stationary Sources [Part VIII]” including the entries for Sections 5-80-10, 10A through 10P, VR120-08-01C.4.b and .01C.4.c, and 5-80-11;
- b. Revising the entries for Sections 5-50-240, 5-50-250, and 5-50-260;
- c. Adding the heading “Article 6 – Permits for New and Modified Stationary Sources” and entries for Sections 5-80-1100 through 5-80-1300 immediately following the entry for 5-80-1040.

The revisions and additions read as follows:

§ 52.2420 Identification of plan.

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(c) * * *

EPA-APPROVED VIRGINIA REGULATIONS AND STATUTES

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
* * * * *				
9 VAC 5, Chapter 50 New and Modified Stationary Sources [Part V]				
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Article 4 Standards of Performance for Stationary Sources (Rule 5-4)				
5-50-240	Applicability and designation of affected	11/7/12	<u>[Insert date of Federal Register]</u>	Paragraphs A and C are revised.

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
	facility.		<u>publication date</u> [Insert Federal Register Citation]	
5-50-250	Definitions.	11/7/12	[Insert date of Federal Register publication date] [Insert Federal Register Citation]	Paragraphs A-C are revised.
5-50-260	Standards for stationary sources.	11/7/12	[Insert date of Federal Register publication date] [Insert Federal Register Citation]	Paragraphs A-D are revised.
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9 VAC 5, Chapter 80 Permits for Stationary Sources [Part VIII]				
* * * * *				
Article 6 – Permits for New and Modified Stationary Sources				
5-80-1100	Applicability.	11/7/12	[Insert date of Federal Register publication date] [Insert Federal Register Citation]	
5-80-1105	Permit Exemptions.	11/7/12	[Insert date of Federal Register publication date] [Insert Federal Register Citation]	Paragraph E is excluded.
5-80-1110	Definitions.	11/7/12	[Insert date of Federal Register publication date] [Insert Federal Register Citation]	The definition at paragraph 5 under “Regulated air pollutant,” and the definition of “Toxic pollutant” are excluded.
5-80-1120	General.	11/7/12	[Insert date of Federal Register publication	

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
			<u>date</u> [Insert Federal Register Citation]	
5-80-1130	Reserved.			Excluded from SIP
5-80-1140	Applications.	11/7/12	[Insert date of Federal Register publication date] [Insert Federal Register Citation]	
5-80-1150	Application information required.	11/7/12	[Insert date of Federal Register publication date] [Insert Federal Register Citation]	
5-80-1160	Action on permit application.	11/7/12	[Insert date of Federal Register publication date] [Insert Federal Register Citation]	The latter portion of paragraph D (beginning with "...direct consideration by the board...") is excluded.
5-80-1170	Public participation.	11/7/12	[Insert date of Federal Register publication date] [Insert Federal Register Citation]	Paragraphs F and G are excluded. <i>See</i> §52.2423(o).
5-80-1180	Standards and conditions for granting permits.	11/7/12	[Insert date of Federal Register publication date] [Insert Federal Register Citation]	The portion of paragraph A.1 pertaining to hazardous air pollutant sources as proscribed under 9VAC5-60 is excluded.
5-80-1190	Application review and analysis.	11/7/12	[Insert date of Federal Register publication date] [Insert Federal Register Citation]	Paragraph 2 is excluded.

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
			<u>Register Citation]</u>	
5-80-1200	Compliance determination and verification by performance testing.	11/7/12	[<u>Insert date of Federal Register publication date]</u> [<u>Insert Federal Register Citation]</u>	
5-80-1210	Permit invalidation, suspension, revocation and enforcement.	11/7/12	<u>Register publication date]</u> [<u>Insert Federal Register Citation]</u>	Paragraph B is excluded.
5-80-1220	Existence of permit no defense.	11/7/12	<u>Register publication date]</u> [<u>Insert Federal Register Citation]</u>	
5-80-1230	Compliance with local zoning.	11/7/12	<u>Register publication date]</u> [<u>Insert Federal Register Citation]</u>	
5-80-1240	Transfer of permits.	11/7/12	<u>Register publication date]</u> [<u>Insert Federal Register Citation]</u>	
5-80-1250	General permits.	11/7/12	<u>Register publication date]</u> [<u>Insert Federal Register Citation]</u>	
5-80-1260	Action to combine permit terms and conditions.	11/7/12	<u>Register publication date]</u> [<u>Insert Federal Register Citation]</u>	
5-80-1270	Actions to change permits.	11/7/12	<u>Register publication date]</u> [<u>Insert Federal Register</u>	

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
			<u>Citation]</u>	
5-80-1280	Administrative permit amendments.	11/7/12	<u>Register publication date]</u> <u>[Insert Federal Register Citation]</u>	
5-80-1290	Minor permit amendments.	11/7/12	<u>Register publication date]</u> <u>[Insert Federal Register Citation]</u>	
5-80-1300	Significant amendment procedures.	11/7/12	<u>Register publication date]</u> <u>[Insert Federal Register Citation]</u>	
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