



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2019-0277; FRL-10002-86-Region 3]

**Approval and Promulgation of Air Quality Implementation Plans; Virginia;
Source-Specific Reasonably Available Control Technology Determinations for 2008 Ozone
National Ambient Air Quality Standard**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving three state implementation plan (SIP) revisions submitted by the Commonwealth of Virginia. These revisions address reasonably available control technology (RACT) requirements under the 2008 ozone national ambient air quality standard (NAAQS) for three facilities in Northern Virginia through source-specific determinations. This action is being taken under the Clean Air Act (CAA).

DATES: This final rule is effective on **[insert date 30 days after date of publication in the Federal Register]**.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA-R03-OAR-2019-0277. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not

placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <https://www.regulations.gov>, or please contact the person identified in the “For Further Information Contact” section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Emlyn Vélez-Rosa, Planning & Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814-2038. Ms. Vélez-Rosa can also be reached via electronic mail at velez-rosa.emlyn@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On August 1, 2019 (84 FR 37607), EPA published a notice of proposed rulemaking (NPRM) for the Commonwealth of Virginia. In the NPRM, EPA proposed approval of three separate SIP revisions from Virginia addressing RACT under the CAA for the 2008 ozone NAAQS for three facilities in Northern Virginia. The formal SIP revisions were submitted by the Virginia Department of Environmental Quality (VADEQ) on February 1, 14, and 15, 2019 and address the following facilities: Possum Point Power Station, Covanta Fairfax, and Covanta Alexandria/Arlington.

RACT is important for reducing oxides of nitrogen (NO_x) and volatile organic compounds (VOC) emissions from major stationary sources within areas not meeting the ozone NAAQS. Since the 1970's, EPA has consistently defined “RACT” as the lowest emission limit that a particular source is capable of meeting by the application of the control technology that is

reasonably available considering technological and economic feasibility.¹ RACT is applicable to ozone nonattainment areas which are classified as moderate or above, or any areas located within the Ozone Transport Region (OTR). General RACT requirements are set forth in section 172(c)(1) of the CAA, while ozone specific requirements are found in sections 182 and 184 of the CAA.

On March 12, 2008, EPA revised the 8-hour ozone standards, by lowering the standard to 0.075 parts per million (ppm) averaged over an 8-hour period (2008 ozone NAAQS). *See* 73 FR 16436. Under the 2008 ozone NAAQS, only the Northern portion of Virginia is subject to RACT due to its location in the OTR, as there are no moderate nonattainment areas in Virginia under the standard. The OTR portion of Virginia consists of the Arlington County, Fairfax County, Loudoun County, Prince William County, Alexandria City, Fairfax City, Falls Church City, Manassas City, Manassas Park City, and Stafford County. The three facilities which are the subject of this rulemaking action are located in Northern Virginia.

II. Summary of SIP Revision and EPA Analysis

Virginia's February 1, 14, and 15, 2019 SIP revisions address NO_x and/or VOC RACT for the following facilities: Virginia Electric and Power Company- Possum Point Power Station, Covanta Alexandria/Arlington, Inc., and Covanta Fairfax, Inc. VADEQ is adopting as part of these SIP revisions additional NO_x control requirements for these three facilities to meet RACT under the 2008 ozone NAAQS, all of which are implemented via federally enforceable permits issued by VADEQ. These RACT permits, as listed on Table 1, have been submitted as part of each SIP revision for EPA's approval into the Virginia SIP under 40 CFR 52.2420(d).

¹ See December 9, 1976 memorandum from Roger Strelow, Assistant Administrator for Air and Waste Management, to Regional Administrators, "Guidance for Determining Acceptability of SIP Regulations in Non-Attainment Areas," and also 44 FR 53762; September 17, 1979.

Virginia’s source specific RACT determinations include an evaluation of NOx and/or VOC controls that are reasonably available for the affected emissions units at each facility and its determination of which control requirements satisfy RACT. VADEQ submitted federally enforceable permits with the purpose of implementing the requirements of 9VAC5, Chapter 40 (9VAC5-40), sections 7400, 7420, and 7430.

Table 1. Facilities with Proposed Source-Specific RACT Determinations

Facility Name	Source Type	Facility ID	RACT Permit (Effective Date)	SIP Submittal Date
Virginia Electric and Power Company- Possum Point Power Station	Electric generation utility	Registration No. 70225	Permit to Operate (1/31/19)	2/1/19
Covanta Fairfax, Inc.	Municipal waste combustor	Registration No. 71920	Permit to Operate (2/8/19)	2/14/19
Covanta Alexandria/Arlington, Inc.	Municipal waste combustor	Registration No. 71895	Permit to Operate (2/8/19)	2/15/19

As part of the February 1, 2019 SIP revision, VADEQ is addressing RACT for the Possum Point Power Station, an electrical generation utility (EGU) facility located in Prince William County owned and operated by Virginia Electric and Power Company. This EGU facility is considered a major source of NOx and VOC. VADEQ has adopted additional NOx RACT requirements for Possum Point Power Station’s electric generating boiler ES-5 as part of the facility’s Permit to Operate issued on January 31, 2019 and included for approval into the SIP. Given the potential retirement of boiler ES-5, VADEQ determined RACT for boiler ES-5 based on the two possible operating scenarios: (1) the installation and operation of selective non-catalytic reduction (SNCR) by June 1, 2019, in the scenario that the unit remains operational after such date; or (2) the retirement of the unit by June 1, 2021, in the scenario that the unit is or will be retired.

As part of the February 1, 2019 SIP revision, VADEQ also recertified applicable NO_x and VOC controls for the other two electric generating boilers (ES-3 and ES-4) at Possum Point Power Station as well as VOC controls for boiler ES-5, all of which were previously approved as RACT on a source-specific basis. VADEQ also determined that additional VOC controls are not economic or technically feasible for this facility, given the size and VOC emissions from individual emissions units.

As part of the February 14, 2019 and February 15, 2019 SIP revisions, VADEQ is addressing NO_x RACT for two municipal waste combustion (MWC) facilities with energy recovery: Covanta Fairfax, Inc. (Covanta Fairfax) and Covanta Alexandria/Arlington, Inc. (Covanta Alexandria/Arlington). These MWC facilities are located in Lorton, in Fairfax County and the City of Alexandria, respectively, and are considered major sources of NO_x. VADEQ determined the following control measures as NO_x RACT for each MWC unit at Covanta Fairfax and Covanta Alexandria/Arlington: the installation and operation of Covanta's proprietary low NO_x combustion system, the operation (and optimization as needed) of the existing SNCR, a daily NO_x average limit of 110 parts per million, volumetric dry (ppmvd) corrected at 7% oxygen (O₂), and an annual NO_x average limit of 90 ppmvd at 7% O₂. The NO_x RACT control requirements for the four MWC units at Covanta Fairfax have been adopted as part of the facility's Permit to Operate issued on February 8, 2019; while those for the three MWC units at Covanta Alexandria/Arlington have been adopted as part of the facility's Permit to Operate issued by on February 8, 2019.

EPA believes that VADEQ has considered and adopted reasonably available NO_x and/or VOC controls for each of these facilities. EPA finds that the additional NO_x control requirements

adopted by VADEQ in the respective federally enforceable permits are adequate to meet RACT for these sources. EPA also finds that re-certification of existing source-specific requirements for Possum Point Station is adequate to meet RACT. Further, EPA determines that the additional NO_x RACT control requirements adopted for each facility are more stringent than the applicable SIP-approved NO_x RACT requirements, so that approval of these permits into the SIP would be consistent with section 110(l) of the CAA. Other specific requirements of VADEQ's source-specific determinations and the rationale for EPA's proposed action are explained in the NPRM and the related Technical Support Document (TSD) and will not be stated here.

III. Public Comments and EPA Response

EPA received three comments on the August 1, 2019 NPRM. One comment EPA considers to not be adverse to this action and does not require a response. The other two comments each contend that EPA should not approve Virginia's RACT SIP, alleging effects of this rulemaking action on nuclear power facilities. A summary of the comments and EPA's response is discussed in this Section. A copy of the comments can be found in the docket for this rulemaking action.

Comment: The first commenter claims that EPA should not approve Virginia's RACT SIP determinations because it would make the State's nuclear power plants too expensive and prevent the development of the State's commercial nuclear program.

EPA Response: The commenter did not indicate how the imposition of RACT controls on the three facilities that are the subject of this rulemaking would negatively affect Virginia's nuclear power program. EPA finds that the subject of the effects of these SIP revisions on Virginia-based nuclear power is irrelevant to this rulemaking action. The SIP revisions addressed in this rulemaking evaluate air pollution controls for NO_x and VOC at three facilities in Northern

Virginia, none of which are nuclear power plants.

Comment: The second commenter claims that Virginia's RACT determination for Possum Point lacks adequate information and that EPA's rulemaking action is unsupported, because EPA "ignored the fact that at least a dozen other large power plants including those of the coal-dependent Appalachian states of Virginia, West Virginia, and Kentucky, have similar nuclear waste storage capacity." The commenter also argues that EPA needs to evaluate "the cost of other utilities and other power generating utilities when forcing costly controls on plants such as this" as well as "the increased cost of ratepayers when forcing states to evaluate expensive controls on publicly owned utilities like in Virginia."

EPA Response: The commenter does not explain how power plants with nuclear storage capacity are related to this rulemaking action, nor identify any facilities of concern to allow EPA to further assess this claim. As indicated earlier, the SIP revisions addressed in this rulemaking evaluate air pollution controls for NO_x and VOC at three facilities in Northern Virginia, none of which are nuclear power plants. In particular, Possum Point Power Station is a thermal power plant in which electricity is produced by converting heat energy to electrical power through the combustion of natural gas in turbines and boilers. In addition to the topic of nuclear power being irrelevant, EPA also notes that the commenter does not provide in its comment which costs EPA should have evaluated as part of this rulemaking action and for which "utilities" this was needed.

EPA disagrees with the assertions that Virginia's RACT determination for Possum Point lacks adequate information and that EPA's proposed rulemaking action to approve this determination is unsupported. The commenter provided no new or additional data for EPA to evaluate in support of its allegations and does not explain how "increased cost to the rate payer" should be

evaluated as a factor beyond the statutory and regulatory factors EPA cited in the TSD for establishing RACT. EPA continues to rely upon the data cited in the NPRM and in the statutory and regulatory factors established for evaluating RACT. See, e.g., International Fabricare Institute v. E.P.A., 972 F.2d 384 (D.C. Cir. 1992). (The Administrative Procedures Act does not require that EPA change its decision based on “comments consisting of little more than assertions that in the opinions of the commenters the agency got it wrong,” when submitted with no accompanying data.) As set forth in the NPRM, EPA has determined that the February 1, 2019 SIP revision includes adequate information to support Virginia’s RACT determination for this facility. As part of the February 1, 2019 SIP revision, the Commonwealth of Virginia evaluated the technical and economic feasibility of installing and operating additional air pollution control devices of NO_x and/or VOC for each emissions unit at Possum Point. EPA believes that the Commonwealth provided sufficient assurances as part of the February 1, 2019 SIP revision to support its source-specific RACT determination for Possum Point.

EPA’s evaluation of Virginia’s February 1, 2019 SIP revision and the rationale for taking rulemaking action on this submission was discussed in detail in the NPRM and accompanying TSD. EPA’s decision to approve the RACT determination for Possum Point based on that information is not changed by these unsupported comments.

IV. Final Action

EPA finds that Virginia’s SIP revisions submitted on February 1, 14, and 15, 2019 addressing source-specific RACT for Possum Point Power Station, Covanta Fairfax, and Covanta Alexandria/Arlington, are adequate to meet RACT requirements set forth under the CAA for the 2008 ozone NAAQS. EPA is approving the February 1, 14, and 15, 2019 submittals as revisions

to the Commonwealth of Virginia SIP to satisfy sections 172(c)(1), 182(b)(2)(C), 182(f), and 184(b)(1)(B) for implementation of the 2008 ozone NAAQS.

V. 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 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.

VI. Incorporation by Reference

In this document, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of three federally enforceable permits, each addressing NO_x and/or VOC RACT under the 2008 ozone NAAQS for a major NO_x and/or VOC source as discussed in section II of this preamble. EPA has made, and will continue to make, these materials generally available through www.regulations.gov and at the EPA Region III Office (please contact the person identified in the FOR FURTHER INFORMATION CONTACT section of this preamble for more information). 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 in the next update to the SIP compilation.²

VII. 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 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

² 62 FR 27968 (May 22, 1997).

3821, January 21, 2011);

- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866.
- 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. Section 804, however, exempts from section 801 the following types of rules: rules of particular applicability; rules relating to agency management or personnel; and rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). Because this is a rule of particular applicability, EPA is not required to submit a rule report regarding this action under section 801.

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. This action addressing

source-specific RACT under the 2008 ozone NAAQS for three facilities in Northern Virginia, 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, Incorporation by reference, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: November 20, 2019.

Cosmo Servidio,
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 (d) is amended by adding entries for “Virginia Electric and Power Company (VEPCO) - Possum Point Power Station”, “Covanta Alexandria/Arlington, Inc.”, and “Covanta Fairfax, Inc.” at the end of the table to read as follows:

§ 52.2420 Identification of plan.

* * * * *

(d) * * *

EPA—APPROVED SOURCE SPECIFIC REQUIREMENTS

Source name	Permit/order or registration number	State effective date	EPA approval date	40 CFR part 52 citation
* * * * *				
Virginia Electric and Power Company (VEPCO) - Possum Point Power Station	Registration No. 70225	01/31/19	<u>[Insert date of publication in the Federal Register].</u> <u>[Insert Federal Register citation]</u>	§52.2420(d); RACT for 2008 ozone NAAQS
Covanta Alexandria/Arlington, Inc.	Registration No. 71920	02/14/19	<u>[Insert date of publication in the Federal Register].</u> <u>[Insert</u>	§52.2420(d); RACT for 2008 ozone NAAQS

Source name	Permit/order or registration number	State effective date	EPA approval date	40 CFR part 52 citation
			<u>Federal Register citation]</u>	
Covanta Fairfax, Inc.	Registration No. 71895	02/08/19	<u>[Insert date of publication in the Federal Register], [Insert Federal Register citation]</u>	§52.2420(d); RACT for 2008 ozone NAAQS

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[FR Doc. 2019-26403 Filed: 12/6/2019 8:45 am; Publication Date: 12/9/2019]