restore the land to approximate original contour.

(2) Amend CSR 38–2–4.12 to reinstate the following deleted language: ''and submitted for approval to the Director as a permit revision.''

(3) Amend the West Virginia program by clarifying that the requirements at CSR 38–2–5.4(c) also apply to slurry impoundments.

(4) Amend CSR 38–2–14.15(m), or otherwise amend the West Virginia program to require compliance with 30 CFR 816/817.81 (b), (d), and (e) regarding coal refuse disposal, foundation investigations and emergency procedures and to clarify that where the coal processing waste proposed to be placed in the backfill contains acid- or toxic-producing materials, such material must not be buried or stored in proximity to any drainage course such as springs and seeps, must be protected from groundwater by the appropriate use of rock drains under the backfill and along the highwall, and be protected from water infiltration into the backfill by the use of appropriate methods such as diversion drains for surface runoff or encapsulation with clay or other material of low permeability.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[VA032–5013, VA030–5014; FRL–5534–4]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Approval of Revised Confidentiality Provisions; Approval and Disapproval of Minor New Source Permit Provisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving in part and disapproving in part State Implementation Plan (SIP) revisions submitted by the Commonwealth of Virginia. This action proposes approval of changes submitted by Virginia in March 1993 to the provisions governing confidentiality of information. This action disapproves the public participation requirements associated with the permitting of minor new sources, and approves all other revisions to Virginia's revised new source permit provisions. The intended effect of this action is to approve those State provisions which meet the requirements of the Clean Air Act, and disapprove those State provisions which do not. This action is being taken under section 110 of the Clean Air Act.

EFFECTIVE DATE: This final rule is effective on August 23, 1996.

ADDRESSES: Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air, Radiation, and Toxics Division, U.S. Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, Pennsylvania 19107; the Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460; and the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia, 23219.

FOR FURTHER INFORMATION CONTACT: Harold A. Frankford, (215) 566–2108 or FRANKFORD.HAROLD@EPAMAIL.EPA.GOV.

SUPPLEMENTARY INFORMATION: On September 12, 1995 (60 FR 47320), EPA published a notice of proposed rulemaking (NPR) for the Commonwealth of Virginia. The NPR proposed approval of revised provisions of the Virginia Regulations for the Control and Abatement of Air Pollution, Sections 120–02–30 and 120–08–01 (except for Sections 120–08–01G.1 and –01G.4.b), as well as the definition of ''confidential information.'' EPA also proposed approval of the revised exemption levels of Appendix R, provided that Virginia supply additional documentation that the exemptions provided for wood manufacturing operations and wood sawmills are consistent with all applicable Agency criteria for minor new source permit programs. At the same time, EPA proposed to disapprove the public participation requirements set forth in Sections 120–08–01G.1 and –01G.4.b, and retain in its place the current Virginia SIP-approved public participation provisions of Section 120–08–01C.4.a. The formal SIP revisions were submitted by Virginia on March 18, 1993 and March 29, 1993.

Other specific requirements of Sections 120–01–02C, 120–02–30, 120–08–01, and Appendix R submitted March 18, 1993 and March 29, 1993, and the rationale for EPA's proposed action are explained in the NPR and will not be restated here. In addition, the following provisions of Section 120–08–01 govern sources that are not covered by the SIP, and have neither been reviewed nor evaluated as part of this SIP revision action:

Sections 120–08–01C.1.b, 120–08–01G.4.a, 120–08–01H.1, 120–08–01I.2, and 120–08–01J.2.

Summary of Public Comments and EPA Response

During the public comment period, which ended on October 12, 1995, EPA received two comments. One commenter supported EPA's proposed action to disapprove the revised public participation requirements set forth in Section 120–08–01G.1 and 01G.4. The other commenter raised two issues regarding (1) The scope of the public participation provisions that the SIP should require and (2) the issue of federal enforceability in the definitions of ''allowable emissions'' and ''potential to emit.''

The second commenter urged EPA to approve in its entirety the revised provisions to Section 120–08–01. With regard to the public participation issue, the commenter stated that the public participation provisions in 40 CFR section 51.161 should only apply to federally required new source review programs; they should not apply to the less environmentally significant sources subject to new source review. The commenter further stated its opinion that Virginia has provided reasonable public participation provisions in its proposed revised SIP, allowing public comment or hearing only for the most environmentally significant sources or modifications or sources which have the potential for public interest concerning air quality issues.

However, this commenter also raised the issue that the wording of the definitions ''allowable emissions'' and ''potential to emit'' found in Section 120–08–01B is inconsistent with a recent U. S. Court of Appeals decision on the issue of federal enforceability [*National Mining Association* v. *United States Environmental Protection Agency*, 59 F.3d 1351 (D.C. Cir. 1995)], and that EPA should address this issue. The SIP language requires that control requirements be both state and federally enforceable, while the Court decision holds that such control requirements are acceptable as long as they are either state enforceable or federally enforceable.

EPA provides the following response:

(1) With regard to the commenter's statement regarding EPA's disapproval action, EPA has determined that the thresholds which constitute environmentally significant modifications are specified in the definition of ''significant'' found in both 40 CFR section 51.165(a)(1)(x) and Section 120–08–03C of Virginia's air pollution control regulations. The term

''significant'' is found in the definition of ''major modification,'' which is spelled out in Section 120–08–03C and cross-referenced in Section 120–08–01B. EPA had approved these definitions as a revision to the Virginia SIP on May 4, 1982 (47 FR 19134), and codified them into the SIP at § 52.2420(c)(69). The effective date of this action was June 3, 1982. The exemptions specified in the revised wording of revised Sections 120–08–01G.1 and .01G.4.b exceed both EPA and Virginia's stated thresholds of ''significant''. In this same action, EPA had approved the current public participation provisions found in SIP Section 120–08–01C.4. Since these SIP-approved public participation provisions apply to the public participation requirements for all major modifications, while the wording of revised Sections 120–08–01G.1 and .01G.4.b do not, EPA's decision to disapprove the exemptions specified in Section 120–08–01G and retain the provisions of SIP Section 120–08–01C.4 is not inconsistent with the commenter's recommendations.

The wording of the definitions ''allowable emissions'' and ''potential to emit'' found in revised Section 120–08–01 is consistent with the wording that has been part of the Virginia SIP since it was codified into the Virginia SIP at § 52.2420(c)(69) [see above]. Accordingly, the court decision referred to by the commenter does not require EPA to revise these provisions in this action, since they represent both current State law and currently Federally-enforceable SIP wording.

Additional Information Provided by Virginia

Virginia has also supplied the additional documentation requested by EPA pertaining to the impact of the exemptions provided for wood manufacturing operations and wood sawmills on the applicable Agency criteria for minor new source permit programs. In a March 18, 1996 letter, Virginia stated that the sawmills and wood manufacturing operations being exempted from the permitting requirements will not significantly contribute to ambient levels of PM_{10} standards. Virginia reached this conclusion on the basis that (1) Most sawmill operations are located in highly rural areas, and (2) such operations would emit particulate matter whose size would exceed 10 microns, and therefore would not contribute to ambient PM_{10} levels. Currently, there are no PM_{10} nonattainment areas in Virginia.

EPA has reviewed the emissions inventory available from the Aerometric Information Retrieval System (AIRS) database, and agrees with these conclusions. The inventory reveals the presence of 68 sources that fall under SIC code 2491 [Sawmills and Planing Mills-General]. However, fewer than 15 sources in the entire Commonwealth are classified solely as wood sawmills. All of these sources are classified as ''B'' or minor sources. Therefore, EPA is satisfied with Virginia's explanation that the exemptions found in Appendix R will not affect applicable ambient air quality levels or PSD increments.

Final Action

EPA is approving the revisions to Virginia Regulations 120–08–02C (definition of ''confidential information'') and 120–02–30 submitted by Virginia on March 18, 1993, as well as the revisions to Section 120–08–01 (except as noted below) and Appendix R submitted by Virginia on March 29, 1993 as revisions to the Virginia SIP. At the same time, EPA is disapproving the revisions to Section 120–08–01G.1 and G.4.b submitted by Virginia on March 29, 1993 as revisions of the Virginia SIP.

Accordingly, EPA is revising 40 CFR 52.2420 (Identification of plan) to reflect EPA's approval action. At the same time, EPA is revising 40 CFR 52.2423 (Approval status) to (1) Make the public aware that in addition to Virginia's criteria, EPA has its own criteria (40 CFR part 2) for determining what information submitted by a State in support of a Federal action (such as a SIP revision request) can be kept confidential; and (2) announce EPA's disapproval of revised provisions to Section 120–08–01G.1 and .01G.4.b as revisions of the Virginia SIP.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any state implementation plan. Each request for revision to the state implementation plan shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

Under Section 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval action promulgated does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal approval action approves pre-existing requirements under State or local law, and imposes no new Federal requirements. This Federal disapproval action maintains pre-existing Federal requirements that have been in effect since June 3, 1982. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

Under the Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

SIP approvals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not impose any new requirements, the Administrator certifies that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the Federal-State relationship under the CAA, preparation of a flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.* v. *U.S. EPA*, 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

Similarly, EPA's disapproval of portions of the State request under Section 110 and subchapter I, part D of the CAA does not affect any existing requirements applicable to small entities. Any pre-existing federal requirements remain in place after this disapproval. Federal disapproval of the state submittal does not affect its state-enforceability. Moreover, EPA's disapproval of the submittal does not impose any new Federal requirements. Therefore, EPA certifies that this

disapproval action does not have a significant impact on a substantial number of small entities because it does not remove existing requirements and impose any new Federal requirements.

Under section 801(a)(1)(A) of the Administrative Procedures Act (APA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today's Federal Register. This rule is not a ''major rule'' as defined by section 804(2) of the APA as amended.

This action has been classified as a Table 3 action for signature by the Regional Administrator under the procedures published in the Federal Register on January 19, 1989 (54 FR 2214–2225), as revised by a July 10, 1995 memorandum from Mary Nichols, Assistant Administrator for Air and Radiation. The Office of Management and Budget (OMB) has exempted this regulatory action from E.O. 12866 review.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 23, 1996. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule 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 to approve Virginia's air quality provisions governing confidentiality of information requirements, as well as to partially approve and partially disapprove Virginia's air quality provisions governing minor new source permitting, 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, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur Oxides.

Dated: June 21, 1996.

Stanely L. Laskowski,

Acting Regional Administrator, Region III.

Chapter I, title 40, of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

Subpart VV—Virginia

2. Section 52.2420 is amended by adding paragraphs (c)(108) and (c)(109) to read as follows:

§ 52.2420 Identification of plan.

* * * * *

(c) * * *

(108) Revisions to the Virginia Regulations for the Control and Abatement of Air Pollution submitted on March 18, 1993 by the Virginia Department of Air Pollution Control:

(i) Incorporation by reference.

(A) Letter of March 18, 1993 from the Virginia Department of Air Pollution Control transmitting revisions governing confidentiality of information.

(B) Revisions to Virginia regulations sections 120–01–02C. (definition of ''confidential information'') and 120–02–30 (revisions to paragraphs 30A. and 30B.; addition of paragraphs 120–02–30C. through 30E.), adopted October 30, 1992 and effective February 1, 1993.

(ii) Additional material.

(A) Remainder of the March 18, 1993 State submittal pertaining to both the definition of ''confidential information'' and the revised provisions to Section 120–02–30.

(109) Revisions to the Virginia Regulations for the Control and Abatement of Air Pollution submitted on March 29, 1993 by the Virginia Department of Air Pollution Control:

(i) Incorporation by reference.

(A) Letter of March 29, 1993 from the Virginia Department of Air Pollution Control transmitting revisions governing confidentiality of information.

(B) The following provisions of the Virginia regulations, adopted October 30, 1992 and effective January 1, 1993.

(*1*) Revisions to Sections 120–08–01A.; 120–08–01C.4; 120–08–01D.; 120–08–01F. [former SIP Section 120–08–01G.]; 120–08–01G. (except for paragraphs .01G.1, .01G.4.a, and .01G.4.b); 120–08–01H. (except for paragraph .01H.1) [former SIP Section 120–08–01F, except for paragraph .01F.2]; 120–08–01I. (except for paragraph .01I.2) [former SIP Section 120–08–01L., except for paragraph .01L.2]; 120–08–01J. [former SIP Section 120–08–01H.]; 120–08–01K.; 120–08–01L. [former SIP Section 120–08–01J.]; 120–08–01M. [former SIP Section 120–08–01K.]; 120–08–01P. [former SIP Section 120–08–01M.]; Addition of Sections 120–08–01N and 120–08–01O.

(*2*) Revisions to to following definitions in Section 120–08–01B.: ''allowable emissions,'' ''commence,'' ''federally enforceable,'' ''modification,'' ''potential to emit,'' ''secondary emissions'' and ''stationary source.''

(*3*) Revisions to Appendix R, Sections I (title only), II.A, II.P, II.Q (added), II.R (added), III.A, III.C, III.E, III.G, III.I, III.L, III.T, III.U, IV., V., and VIII.

(ii) Additional material.

(A) Remainder of the March 29, 1993 State submittal pertaining to the revisions to Section 120–08–01 (except for paragraphs .01G.1, .01G.4.a, .01G.4.b, .01H.1, .01I.2, and .01J.2) and Appendix R listed in paragraphs (c)(109)(i)(B) (*1*) through (*3*) of this section.

(B) Letter of March 18, 1996 from the Virginia Department of Environmental Quality, Air Division, clarifying the effect of the exemption of wood sawmills from the provisions of Section 120–08–01 (Appendix R, Section II.R).

* * * * *

3. Section 52.2423 is amended by adding paragraphs (o) and (p) to read as follows:

§ 52.2423 Approval status.

* * * * *

(o) EPA approves the revised confidentiality of information provisions of Sections 120–02–30, submitted by the Virginia Department of Air Pollution Control on March 18, 1993, as revisions to the Virginia SIP. However, should Virginia submit a SIP revision request on behalf of a source, which contains information that has been judged confidential under the provisions of Section 120–02–30, Virginia must request EPA to consider confidentiality according to the provisions of 40 CFR part 2. EPA is obligated to keep such information confidential only if the criteria of 40 CFR part 2 are met.

(p) EPA disapproves the revised public participation provisions of Sections 120–08–01G.1 and 120–08–01G.4.b, submitted by the Virginia Department of Air Pollution Control on March 29, 1993, as revisions to the Virginia SIP. These revised provisions do not meet the requirements of 40 CFR 51.160 and 51.161. In its place, EPA retains the SIP provisions of Section 120–08–01C.1.a and 01C.4.b through d. as originally approved at §§ 52.2420(c)(69) [SIP section 2.33(a)(5)(ii)] and subsequently revised, due to format changes, at §§ 52.2420(c)(89)(i)(B)(*7*) [SIP section 120–08–01C.4.b].

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