State and Tribal abandoned mine land reclamation plans and revisions thereof submitted by a State or Tribe are based on a determination of whether the submittal meets the requirements of Title IV of SMCRA (30 U.S.C. 1231–1243) and the Federal regulations at 30 CFR Parts 884 and 888.

National Environmental Policy Act

No environmental impact statement is required for this rule since agency decisions on proposed State and Tribal abandoned mine land reclamation plans and revisions thereof are categorically excluded from compliance with the National Environmental Policy Act (42 U.S.C. 4332) by the Manual of the Department of the Interior [516 DM 6, appendix 8, paragraph 8.4B(29)].

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal which is the subject of this rule is based upon Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements established by SMCRA or previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions in the analyses for the corresponding Federal regulations.

Unfunded Mandates

This rule will not impose a cost of $100 million or more in any given year on any governmental entity or the private sector.

List of Subjects in 30 CFR Part 914

Intergovernmental relations, Surface mining, Underground mining.

Dated: March 10, 1997.

Ronald C. Recker,

Acting Regional Director, Appalachian Regional Coordinating Center.

[FR Doc. 97–6752 Filed 3–17–97; 8:45 am]

BILLING CODE 4310–05–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 70

[AD–FRL–5710–8]

Clean Air Act Interim Approval of Operating Permits Program; Commonwealth of Virginia

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed interim approval.

SUMMARY: EPA proposes interim approval of the Commonwealth of Virginia's Operating Permits Program, which Virginia submitted in response to Federal statutory and regulatory directives that States adopt programs providing for the issuance of operating permits to all major stationary sources and to certain other sources. EPA is proposing interim approval of Virginia's submittal because Virginia's program substantially meets the requirements for approval set forth at 40 Code of Federal Regulations (CFR) Part 70, but still requires some revisions to fully meet those requirements. The required revisions which Virginia will have to make before EPA could grant full approval are discussed in this notice.

DATES: Comments on this proposed action must be received in writing by April 17, 1997. Comments should be addressed to the contact indicated below.

ADDRESSES: Copies of the State's submittal and other supporting information used in developing the proposed interim approval are available for inspection during normal business hours at the following locations: (1) U.S. EPA Region III; Air, Radiation, & Toxics Division; 841 Chestnut Building; Philadelphia, PA 19107, and (2) Virginia Department of Environmental Quality; 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: Ray Chalmers, 3AT23; U.S. EPA Region III; Air, Radiation, & Toxics Division; 841 Chestnut Building; Philadelphia, PA 19107. (215) 566–2061.

SUPPLEMENTARY INFORMATION:

I. Introduction

A. Submittal and Review Requirements

As required under Title V of the 1990 Clean Air Act Amendments (sections 501–507 of the Clean Air Act (CAA)), EPA has promulgated rules which define the minimum elements of an approvable State operating permits program and the corresponding standards and procedures by which the EPA will approve, oversee, and withdraw approval of State operating permits programs (see 57 FR 32250 (July 21, 1992)). These rules are codified at 40 Code of Federal Regulations (CFR) Part 70. Title V directs States to develop, and submit to EPA, programs for issuing these operating permits to all major stationary sources and to certain other sources.

The CAA directs States to develop and submit these programs to EPA by November 15, 1993, and requires EPA to approve or disapprove each program within one year after receiving the submittal. The EPA's program review occurs pursuant to section 502 of the CAA and the part 70 regulations, which together outline criteria for approval or disapproval. Where a program substantially, but not fully, meets the requirements of section 502 of the CAA and Part 70, EPA may grant the program interim approval for a period of up to 2 years. If EPA has not fully approved a program by November 15, 1995, or by the end of an interim program, it must establish and implement a Federal program.

Due in part to pending litigation over several aspects of the Part 70 rule promulgated on July 21, 1992, Part 70 is in the process of being revised. When the final revisions to Part 70 are promulgated, the requirements of the revised Part 70 will redefine EPA's criteria for the minimum elements of an approvable State operating permits program and the corresponding standards and procedures by which EPA will review State operating permits program submittals. Until the date on which the revisions to Part 70 are promulgated, the currently effective July 21, 1992, version of Part 70 shall be used as the basis for EPA review.

B. Federal Oversight and Potential Sanctions

If EPA were to finalize this proposed interim approval, it would extend for two years following the effective date of the final interim approval. During the interim approval period, Virginia would be protected from sanctions, and EPA would not be obligated to promulgate, administer and enforce a Federal permits program for the Commonwealth. Permits issued under a program with interim approval have full standing with respect to part 70, and the one year time period for submittal of permit applications by subject sources begins upon the effective date of interim approval, as does the three year time period for processing the initial permit applications.

Following final interim approval, if Virginia failed to submit a complete

corrective program for full approval by the date six months before expiration of the interim approval, EPA would be required to start an 18 month clock for mandatory sanctions. If Virginia then failed to submit a corrective program that EPA found complete before the expiration of the 18 month period, EPA would be required to apply one of the sanctions in section 179(b) of the CAA, which would remain in effect until EPA determined that Virginia had remedied the deficiency by submitting a complete corrective program. Moreover, if the Administrator found a lack of good faith on the part of Virginia, both sanctions under section 179(b) would be required to apply after the expiration of the 18 month period until the Administrator determined that Virginia had come into compliance. In any case, if, six months after application of the first sanction, Virginia still had not submitted a corrective program that EPA found complete, a second sanction would be required.

If, following final interim approval, EPA were to disapprove Virginia's complete corrective program, EPA would be required to apply one of the section 179(b) sanctions on the date 18 months after the effective date of the disapproval, unless prior to that date Virginia had submitted a revised program and EPA had determined that it corrected the deficiencies that prompted the disapproval. Moreover, if the Administrator found a lack of good faith on the part of Virginia, both sanctions under section 179(b) would be required to apply after the expiration of the 18 month period until the Administrator determined that Virginia had come into compliance. In all cases, if, six months after EPA applied the first sanction, Virginia had not submitted a revised program that EPA had determined corrected the deficiencies that prompted disapproval, a second sanction would be required.

In addition, discretionary sanctions may be applied where warranted any time after the end of an interim approval period if Virginia has not timely submitted a complete corrective program or EPA has disapproved a submitted corrective program. Moreover, if EPA has not granted full approval to Virginia's program by the expiration of the interim approval, EPA must promulgate, administer and enforce a Federal permits program for Virginia after the interim approval expires.

II. Description of Virginia's Submittal

Virginia submitted an operating permits program to EPA on November 12, 1993, pursuant to the requirements of Title V. The submittal included regulations, an Attorney General's opinion, a program description, permitting program documentation, and other required elements. On January 14, 1994, Virginia submitted a supplemental letter pertaining to enhanced monitoring. EPA disapproved that submittal in a Federal Register notice published on December 5, 1994 (59 FR 62324).

EPA disapproved the submittal because it did not provide citizens with adequate judicial standing to challenge permits, did not prevent the default issuance of permits, did not contain regulations which were still in effect, did not cover the proper universe of sources, did not ensure that permits would include all applicable requirements, and did not correctly delineate permit provisions enforceable only by Virginia. In addition, EPA identified numerous other deficiencies that Virginia would need to correct to meet the federal requirements for a fully approvable program, although these other deficiencies were not bases for the disapproval action. These other issues were what EPA calls ''interim approval issues''—deficiencies that would prevent granting full approval to the State's program, but that leave the program qualified for interim approval because they don't cause it to fail to ''substantially meet'' the requirements of the CAA.

On January 9, 1995, Virginia submitted revised regulations and a revised Attorney General's opinion as amendments to its original program, and asked that EPA approve the revised program. On January 17, 1995, Virginia submitted an additional copy of the revised regulations (the version published in the Virginia Register). Finally, on May 17, 1995, Virginia again amended its program by submitting revised statutory language and an amended Attorney General's opinion. The revisions addressed many of the disapproval bases and other deficiencies EPA had previously identified. However, Virginia did not submit revised judicial standing provisions. Virginia did not revise these provisions because it believed its judicial standing provisions were adequate and had sued EPA to contest EPA's conclusion that they were not.

EPA proposed disapproval of Virginia's revised submittal in a Federal Register notice published on September 19, 1995 (60 FR 48435). EPA proposed disapproval because Virginia still did not provide citizens with adequate judicial standing to challenge permits, because Virginia did not assure that all sources required by the CAA to obtain Title V permits would be required to obtain such permits, and because Virginia did not adequately provide for collection of Title V program fees. EPA also identified as interim approval issues the fact that Virginia had defined units as ''insignificant'' at far higher emissions levels than those which EPA considered ''sound,'' as well as certain other provisions pertaining to insignificant activities.

On November 8, 1995, Virginia submitted revised Title V operating permit regulations to EPA, which the Commonwealth asserted corrected the major regulatory problems which EPA had identified in Virginia's previous submittals, and again asked that EPA approve the State's program. However, these were emergency regulations in effect for only one year, and Virginia had taken no action to revise its judicial standing provisions to give all affected citizens the right to challenge in Virginia's courts operating permits issued by Virginia. Moreover, Virginia had not corrected provisions pertaining to insignificant activities which EPA had identified as raising interim approval issues. On September 10 and 12, 1996, Virginia again submitted to EPA revised Title V program regulations, this time regulations which had been permanently adopted, and once more asked that EPA approve the State's Title V program. However, Virginia had still not revised its judicial standing provisions and had still not corrected provisions pertaining to insignificant activities. Since Virginia's November, 1995 and September, 1996 submittals did not properly address previously identified deficiencies, EPA did not propose to take action on these submittals when EPA initially received them.

Virginia has since appropriately revised its judicial standing provisions. After the Fourth Circuit Court of Appeals affirmed EPA's disapproval of Virginia's program, 80 F.3d 869 (1996), Virginia appealed its case to the U.S. Supreme Court. On January 21, 1997, the Supreme Court decided not to hear Virginia's case. Virginia had prepared for the possibility that the Courts might not rule in the Commonwealth's favor by passing a revised judicial standing law, acceptable to EPA, which would go into effect should the Courts not find for Virginia.

On February 6, 1997, Virginia submitted to EPA an Attorney General's opinion affirming that Virginia's acceptable judicial standing law would be in effect as of February 15, 1997 as a result of the U.S. Supreme Court's January 21, 1997 denial of Virginia's petition. The Attorney General's

opinion also addressed several other remaining legal issues. In addition, on February 27, 1997, Virginia's Department of Environmental Quality (VADEQ) agreed to commit to recommending revisions to regulatory requirements and also agreed to make certain interpretations of existing regulatory requirements. These agreements are discussed below when relevant.

As a result of these recent revisions, EPA has determined that Virginia's Title V submittal now substantially meets the requirements for approval set forth at 40 CFR part 70, and EPA is therefore proposing interim approval of Virginia's submittal. The portions of the submittal for which EPA is proposing interim approval consist of the operating permit and operating permit fee regulations submitted on September 10, 1996, the acid rain operating permit regulations submitted on September 12, 1996, and other non-regulatory documentation. EPA cannot propose full approval because Virginia must still address certain ''interim approval issues,'' as discussed below. Concurrently with this proposed interim approval, EPA is withdrawing the proposal to disapprove Virginia's submittal which EPA published in the Federal Register on September 19, 1995.

III. Analysis of Virginia's Submittal

This section focuses on how Virginia has corrected the program deficiencies which EPA identified in Virginia's program in the proposed disapproval notice which EPA published at 60 FR 48435 on September 19, 1995, and on certain other important deficiencies which Virginia must still address before EPA can fully approve the Commonwealth's program. Virginia's full program submittal, EPA's Technical Support Document (TSD), which provides additional analysis of Virginia's submittal, and other relevant materials are available as part of the public docket.

Virginia's Title V operating permit program submittal substantially, but not fully, meets the requirements of the CAA and of the implementing regulations at 40 CFR Part 70. Virginia has substantially corrected the deficiencies which had earlier caused EPA to disapprove and to propose to disapprove Virginia's programs. The deficiencies which EPA identified as bases for disapproval when it published its September 19, 1995, Federal Register notice proposing disapproval of Virginia's program were that Virginia's Title V program submittal: (1) Did not provide all citizens with adequate judicial standing to challenge State permits; (2) did not assure that all sources required by the CAA to obtain Title V permits would be required to obtain such permits; and (3) did not contain an adequate provision for collection of Title V program fees. EPA discusses below the changes Virginia made in its Title V submittal to correct these deficiencies. EPA also identified other deficiencies during its previous review, which it identified as interim approval issues. Virginia has already corrected some of these deficiencies. Discussed below are changes which Virginia made which adequately address some of these previously identified deficiencies, as well as certain additional changes which Virginia must still make before EPA could grant full approval to Virginia's program.

A. Deficiencies Corrected

1. Virginia's Judicial Standing Provisions

A major reason for EPA's disapproval and its proposal to disapprove Virginia's earlier Title V operating permit program submittals was that Virginia's law did not provide interested parties with adequate standing to obtain judicial review in State court of final Title V permit decisions. Virginia's judicial standing law restricted the right to judicial review to those who had suffered an actual or imminent injury which was an invasion of ''an immediate, pecuniary and substantial interest which is concrete and particularized.'' EPA, and the U.S. Court of Appeals for the 4th Circuit, concluded that Virginia's requirement that a petitioner had to demonstrate a ''pecuniary'' interest was too restrictive to be approved under Title V. See 80 F.3rd 869 (4th Cir., 1996).

After EPA's position was upheld by the Fourth Circuit Court of Appeals, Virginia appealed the case to the U.S. Supreme Court. On January 21, 1997, the Supreme Court declined to hear Virginia's case. To be prepared should EPA's position that Virginia's judicial standing provisions were deficient be upheld by the Courts, Virginia had adopted revised and acceptable judicial standing provisions, at sections 10.1–1318, 10.1–1457, and 62.1–44.29 of the Code of Virginia, but specified that the revised provisions would become effective only if Virginia's suit against EPA was unsuccessful.

The Supreme Court's refusal to take Virginia's appeal has caused Virginia's revised judicial standing provisions to become effective, and Virginia's standing provisions are now fully acceptable. Virginia's revised standing law now provides judicial standing to any person who ''meets the standard for judicial review of a case or controversy pursuant to Article III of the United States Constitution.'' It further provides that ''a person shall be deemed to meet such standard if (i) such person has suffered an actual or imminent injury which is an invasion of a legally protected interest and which is concrete and particularized; (ii) such injury is fairly traceable to the decision of the Board and not the result of the independent action of some third party not before the court; and (iii) such injury will likely be redressed by a favorable decision by the court.'' This new standard is consistent with the standard for Article III standing articulated by the Supreme Court in *Lujan* v. *Defenders of Wildlife,* 112 S. Ct. 2130 (1992). Consequently, EPA has determined that Virginia's standing provisions meet the requirements of CAA section 502(b)(6) and 40 CFR 70.4(b)(3).

2. Applicability Under the Operating Permits Program

In the original disapproval of Virginia's program, EPA identified as a basis for disapproval Virginia's failure to require issuance of permits to the proper universe of sources required by part 70. See 59 FR 62325. In addition, in its September 19, 1995, Federal Register notice proposing disapproval of Virginia's previous operating permit program submittal, EPA again cited the fact that the submittal did not ensure the applicability of the Title V operating permit program to all sources required to be subject to the program under 40 CFR 70.3 as a reason for disapproving the submittal.

This was because in the applicability sections of the earlier version of its regulations (which were designated as sections 120–08–0501 and 120–08–0601) Virginia should have listed all of the CAA requirements which trigger Title V applicability, as they are set forth at 40 CFR 70.3. Instead of meeting this requirement by listing federal CAA section 111 and 112 requirements, Virginia inappropriately listed certain of its own air pollution control regulations, into which it had incorporated federal CAA section 111 and 112 requirements. In the revised regulations it submitted to EPA in September 1996, Virginia correctly cited federal CAA section 111 and 112 requirements in the applicability sections of its regulations (now designated as sections 9 VAC 5–80–50 and 9 VAC 5–80–310), thus correcting this deficiency. As discussed later in this notice, Virginia's regulations regarding applicability

continue to present a minor facial inconsistency with part 70, which EPA does not view as an impediment to future full approval of the Commonwealth's program.

3. Permit Fee Demonstration

In its September 19, 1995, Federal Register notice EPA cited the inadequacy of the permit fee provisions in Virginia's submittal as another reason for proposing disapproval of the submittal. The deficiency in the fee provision was that Virginia had not set a minimum fee amount of $25 per ton of emissions, to be adjusted for consumer price inflation (CPI) using a 1989 base year. Virginia revised its regulations to correct this deficiency.

In its prior notice EPA also identified as a concern a statutory limit on the amount of fees which the Commonwealth can collect. This statutory limit, which is found in the Virginia Air Pollution Control Law at § 10.1–1322 B, appears to create a cap of $25 per ton of emissions, to be adjusted for inflation using a 1990 base year. EPA stated that the statute should be revised to specify a base year of 1989. EPA believed that unless Virginia made this change the Commonwealth would not be able to collect the full fee amount specified by its regulations because of the statutory cap.

Virginia did not change this statutory provision. However, Virginia's Attorney General provided an assurance that this cap would not interfere with the State's ability to collect the full amount of required fees. Virginia's Attorney General stated that: ''Virginia Code § 10.1–1322(B) provides that the annual permit fees 'shall be adjusted annually by the Consumer Price Index as described in § 502 of the federal Clean Air Act.'" Since Code § 10.1–1322(B) references § 502 and § 502 provides that adjustment shall be made using 1989 as the base year, the CPI adjustment required by Code § 10.1–1322(B) also employs a 1989 base year. The reference in Code § 10.1–1322(B) to a 1990 base year does not pertain to the CPI adjustment, but refers instead to the year in which the initial $ 25 per ton charge applies. In keeping with the requirements of section 502 of the CAA as interpreted by EPA and for this purpose only, the year 1990 runs from September 1, 1989 through August 31, 1990.'' See Supplement to January 6, 1995 Attorney General's Opinion dated February 6, 1997. Because the fee cap as adjusted by the CPI under the Virginia fee statute is in fact the same as the amount as the fee assessed under the Virginia regulations (i.e., the calculation begins at $25 per ton and is adjusted by changes in the CPI since 1989), EPA is satisfied that Virginia will be able to assess fees which meet the presumptive minimum required under Title V.

4. Other Deficiencies Corrected

In its September 19, 1995, Federal Register notice EPA cited several other deficiencies in the insignificant activities provisions in Virginia's submittal which would prevent EPA from being able to grant full approval to the program. Virginia corrected some but not all of these deficiencies. In this section EPA discusses the deficiencies which Virginia corrected.

In its previous proposed disapproval notice, EPA expressed concern regarding the fact that Virginia had defined as insignificant all emissions units with uncontrolled emissions of less than 10 tons per year of nitrogen dioxide, sulfur dioxide, and total suspended particulates or particulate matter (PM10), less than seven tons per year of volatile organic compounds, and less than 100 tons per year of carbon monoxide (CO). EPA noted that it considered these levels too high. Virginia responded to EPA's concerns by changing its insignificant activity provisions to define units as insignificant which had uncontrolled emissions of less than 5 tons per year (TPY) of nitrogen dioxide, sulfur dioxide, total suspended particulates or particulate matter (PM10), and volatile organic compounds. EPA considers the exemption level of less than 5 TPY of uncontrolled emissions of these pollutants to be acceptable. Virginia did not change its specification that units with uncontrolled CO emissions of less than 100 TPY are insignificant. For the reasons discussed in the September 19, 1995 Federal Register notice, EPA continues to regard this as a deficiency which must be corrected before EPA could grant full approval to Virginia's program. This deficiency is discussed further below in the section entitled *Remaining Deficiencies.*

EPA was also concerned by the fact that under Virginia's previous rules a determination of whether or not a source is subject to the operating permit program could be made without taking into account emissions from units considered to be insignificant. If the total emissions from units subject to Title V requirements were just below the levels which would trigger Title V program applicability, failure to take into account additional emissions from units which are exempt could result in a source avoiding Title V requirements to which it should have been subject. Virginia corrected this deficiency by stating in Rule 8–5 at 9 VAC 5–80–90, and in Rule 8–7 at 9 VAC 5–80–440, that ''the emissions from any emissions unit shall be included in the permit application if the omission of those emissions units from the application would interfere with the determination of the applicability of this rule, the determination or imposition of any applicable requirement, or the calculation of permit fees,'' and by including a similar statement in Article 4 at 9 VAC 5–80–710. Thus, EPA has determined that Virginia has sufficiently corrected this prior deficiency, and the Commonwealth need take no further action with respect to it before EPA could grant full approval to Virginia's program.

In addition, EPA was concerned by the fact that in Appendix W of the Commonwealth's prior regulations (since redesignated as Article 4) Virginia had defined as insignificant all pollutant emission units with emissions less than the section 112(g) de minimis levels set forth at 40 CFR 63.44 or the accidental release threshold levels set forth at 40 CFR 68.130. See 9 VAC 5–80–720 B 6. EPA noted that these levels were appropriate in many cases, but were too high in others. Virginia adequately addressed this concern by adding the qualifier ''or 1000 pounds per year, whichever is less'' to the statement at 9 VAC 5–80–720 B 6.

Furthermore, while not a concern for purposes of program approval, EPA notes that the references to emission units with emissions at or below the section 112(g) de minimis levels established in 40 CFR 63.44 now have no meaning. See 9 VAC 5–80–720 B 5 and B 6. Virginia apparently assumed when it prepared its regulation that EPA would finalize the referenced list. However, EPA did not finalize this list and there are now no emissions levels ''in 40 CFR 63.44.'' As a result, emission units emitting hazardous air pollutants which are not 112(r) pollutants need to be fully described in application forms. This fact reduces the universe of units which can be considered insignificant under Virginia's regulations, but this is not a concern with respect to EPA's decision to approve or disapprove Virginia's program, because part 70 does not require States to define any particular units as insignificant.

Finally, EPA also expressed concern with the fact that in its prior program Virginia had inappropriately included ''comfort air conditioning'' and ''refrigeration systems,'' which are subject to stratospheric ozone protection requirements, in the listing of insignificant activities found in Article 4. Virginia removed these items from

the list. Thus, this previous deficiency has been fully corrected.

B. Remaining Deficiencies (Interim Approval Issues)

As noted above, in its December 5, 1994 and September 19, 1995, Federal Register notices EPA cited several other deficiencies in the insignificant activities provisions in Virginia's submittal as another impediment to granting full approval of the submittal. EPA stated that Virginia would have to correct these deficiencies before EPA could fully approve the Commonwealth's program. In this section EPA addresses one insignificant activity related deficiency which Virginia did not correct in its revised program, and several additional insignificant activity related deficiencies which EPA has identified in reviewing the Commonwealth's new program since publishing the September 1995 proposed disapproval notice.

1. Units Emitting Up To 100 TPY of CO Inappropriately Considered to be Insignificant

EPA remains concerned that Virginia continues to define any emission unit emitting less than 100 TPY of carbon monoxide (CO) as insignificant. As EPA stated in its September, 1995 proposed disapproval notice, and as discussed previously in this notice, EPA has determined that the 100 TPY emissions level is far too high. The Director of the VADEQ has recently informed EPA that VADEQ will seek to change this regulation to correct this problem. (See letter from VADEQ Director dated February 27, 1997.) Virginia must complete this correction before EPA can fully approve Virginia's program.

EPA does not consider this deficiency to be an impediment to interim approval. Virginia has identified a specific provision in its regulations that requires sources to provide emissions information in permit applications if the omission of that information ''would interfere with the determination of the applicability of the State's Title V program, the determination or imposition of any applicable requirement, or the calculation of fees.'' 9 VAC 5–80–90. See also 9 VAC 5–80–710 4. In addition, the majority of sources in Virginia which have units emitting CO are not subject to applicable requirements for CO. Sources that are subject to CO-related requirements are likely to be subject to federal standards, such as new source performance standards (NSPS), for those units, and should be aware of the specific CO-related requirements applicable to them. Thus, in the interim period before Virginia revises its regulations, EPA believes that the potential for confusion caused by Virginia's 100 TPY CO threshold should be minimized, provided the Commonwealth takes care to monitor source compliance with applicable requirements. EPA therefore does not believe it would be reasonable to disapprove Virginia's program due to this deficiency. EPA's treatment of Virginia's high CO threshold is consistent with how EPA has addressed similar problems in other States.

2. Applications Not Required to Include Sufficient Information To Identify All Applicable Requirements for Emission Units Deemed Insignificant

In connection with its review of Virginia's inappropriate designation of units emitting up to 100 TPY of CO as insignificant EPA carefully reviewed Virginia's ''gatekeeper'' provisions to determine whether or not they might substantially address the concerns this inappropriate designation had raised. ''Gatekeeper'' provisions are meant to assure that all applicable requirements for units designated as insignificant are included in both applications and permits, thereby enabling permitting authorities, reviewing members of the public, affected States, and EPA to adequately assess source compliance with all applicable requirements. During the course of its review EPA identified several deficiencies with these ''gatekeeper'' provisions.

Virginia's regulations at 9 VAC 5–80–90 D 1 now require emissions information to be included in permit applications, even for insignificant activities, ''if the omission of these emissions units from the application would interfere with the determination of the applicability of this rule, the determination or imposition of any applicable requirement, or the calculation of permit fees.'' However, with respect to including all applicable requirements in applications, EPA notes that Virginia has inappropriately included a provision in the applicability section of Rule 8–5, at 9 VAC 5–80–50 F, which states that ''[t]he provisions of 9 VAC 5–80–90 concerning application requirements shall not apply to insignificant activities designated in 9 VAC 5–80–720 with the exception of the requirements of 9 VAC 5–80–90 D 1 and 9 VAC 5–80–710,'' and that it has included a similar provision in the applicability section of Rule 8–7, at 9 VAC 5–80–360 E. As a result of these provisions, sources are required to provide only emissions information for insignificant activities, but not any additional information, such as that required by 9 VAC 5–80–90 D.2, E., or F. (which require all information necessary to determine applicable requirements), which might be required to identify applicable requirements when emissions information alone is not sufficient. Since many applicable requirements under the CAA, particularly those relating to 112(d) standards for hazardous air pollutants, could not be identified solely by emissions information, EPA does not believe that Virginia's existing ''gatekeeper'' provision fully meets the requirements of Title V. Specifically, 40 CFR 70.5(c) provides that applications ''may not omit information needed to determine the applicability of, or to impose, any applicable requirement, or to evaluate the fee amount required under the schedule approved pursuant to § 70.9 of this part.'' (emphasis added). Before EPA can fully approve Virginia's program Virginia must assure that the requirements of § 70.5(c) will be met by appropriately revising the provisions at 9 VAC 5–80–50 F and 9 VAC 5–80–360 E.

VADEQ agrees that permit applications must include all information required to identify applicable requirements, and has agreed to seek revisions to Virginia's regulations in the future to ensure that sources provide such information. In addition, VADEQ has stated that ''[u]nder the provisions of 9 VAC 5–80–90 E 1, the Board (Virginia's Air Pollution Control Board) will require that permit applications contain a citation and description of all applicable requirements including those covering activities deemed insignificant under 9 VAC 5 Chapter 80, Article 4.'' (See letter from VADEQ Director dated February 27, 1997.) In light of this, EPA has determined that Virginia's program substantially meets the requirements of Title V with respect to this issue and that it is appropriate to grant interim approval of Virginia's program. This is consistent with how EPA has treated similar deficiencies in other States.

3. Permits Not Required To Include Applicable Requirements for Emission Units Deemed Insignificant

With respect to including all applicable requirements in permits, Virginia Rule 8–5 contains an inappropriate provision at 9 VAC 5–80–110 which states that ''For major sources subject to this rule, the board shall include in the permit all applicable requirements for all emission units in the major source except those deemed insignificant in Article 4 (9 VAC 5–80–710 *et. seq.*) of this part.'' Virginia's Rule 8–7 (the acid rain

regulation) essentially repeats this deficiency at 9 VAC 5–80–490.A.1. These provisions in Rules 8–5 and 8–7 are inadequate because they contain the qualification ''except those deemed insignificant in Article 4 * * *'' EPA cannot fully approve Virginia's program until Virginia removes these qualifications.

VADEQ agrees that the change EPA calls for above is required and has committed to seek this change. In addition, VADEQ has stated that ''In addition to the provisions of 9 VAC 110 A 1, the Board will also include in the permit those applicable requirements covering activities deemed insignificant under 9 VAC 5 Chapter 80, Article 4.'' (See letter from VADEQ Director dated February 27, 1997.) Finally, Virginia's regulations elsewhere suggest that the Commonwealth's program inadvertently contains the deficiencies identified at 9 VAC 5–80–110 A.1 and 5–80–490 A.1. This is suggested by the fact that 9 VAC 5–80–110 B.1, 5–80–150 A.4, 5–80–490 B.1 and 5–80–510 B 4 require that permits ''specify and reference applicable emission limitations and standards, including those [* * *] that assure compliance with all applicable requirements'' and that permits may be issued only if ''the conditions of the permit provide for compliance with all applicable requirements.'' In light of this, EPA has determined that Virginia's program substantially meets the requirements of Title V with respect to this issue and that it is appropriate to grant interim approval of Virginia's program. EPA's treatment of this issue is consistent with how it has been treated in other States.

4. Emergency or Standby Compressors, Pumps, and/or Generators Inappropriately Defined as Insignificant

EPA also notes that under 9 VAC 5–80–720 C 4 Virginia designates as insignificant emissions units ''Internal combustion powered compressors and pumps used for emergency replacement or standby service, operating at 500 hours per year or less, as follows'' and then goes on to cite emergency generators of various horsepower ratings, depending on whether or not the generators are gasoline, diesel, or natural gas powered. EPA believes that 9 VAC 5–80–720 C 4 is confusing in that Virginia first defines emergency or standby compressors or pumps as insignificant, and then further qualifies the units considered insignificant by discussing various sizes of emergency generators. VADEQ has agreed to seek to clarify this provision in the revised regulations Virginia will be submitting in the future. In the interim, VADEQ has explained to EPA that ''With regard to the provisions of 9 VAC 5–80–720 C 4 regarding the designation of certain internal combustion powered compressors and pumps as insignificant emissions units, the exemption levels (expressed in horsepower) for the emergency generators refer to the size of the engines that provide the power to the compressors and pumps.'' (See letter from VADEQ Director dated February 27, 1997.)

EPA notes that engines of the sizes designated will likely be large enough to trigger certain NSPS standards, e.g., 40 CFR part 60, Subpart Dc—Standards of Performance for Small Industrial-Commercial-Institutional Steam Generating Units, or GG—Standards of Performance for Stationary Gas Turbines, or be major sources in and of themselves. EPA believes that to avoid confusion any list of insignificant activities should not contain items which may clearly be subject to applicable requirements. Accordingly, before EPA can grant full approval to the Commonwealth's program, Virginia must not only clarify its insignificant activity provision for emergency pumps, compressors, or generators, but must also reduce the horsepower size designations sufficiently to exclude any unit which would likely trigger an applicable requirement or emit pollutants in major amounts. It is important to note that the major source thresholds for air pollutants will vary depending on nonattainment designations in the Commonwealth. For example, given that there is a serious ozone nonattainment area in northern Virginia, the State's insignificant activities will be judged relative to the major source thresholds of 50 tons/year for volatile organic compounds and nitrogen oxides.

EPA took a similar position in its notice giving final interim approval to Tennessee's program. See 61 FR 39335 (July 29, 1996). In that notice EPA stated that ''insignificant activities lists should avoid the potential for confusion created when an activity that is plainly subject to an applicable requirement is included.'' 61 FR 39337. EPA required, as an interim approval item, that Tennessee address EPA's concerns regarding the potential for confusion which arose because certain activities and emission units were listed as insignificant which could also be subject to applicable requirements. EPA took similar positions when it proposed approval of West Virginia's program at 60 FR 44799 (August 29, 1995), and then approved that program at 60 FR 57352 (November 15, 1995), and when it proposed approval of Florida's program at 60 FR 32292 (June 21, 1995), and then approved that program at 60 FR 49343 (September 25, 1995).

5. ''Off-Permit Changes'' Defined as Including Changes Subject to Requirements Under Title IV

In addition to the acid rain regulatory provisions cited above that track flaws in Virginia's main Title V rule, EPA is concerned with two other provisions in the Commonwealth's regulations relating to acid rain requirements. Currently, EPA's Part 70 rule allows sources to make certain so-called ''off-permit'' changes that are not addressed or prohibited by the permit without obtaining a permit revision. See 40 CFR 70.4(b)(14). However, this flexibility does not extend to changes that are modifications under Title I of the CAA or those that are subject to any of the acid rain requirements under Title IV of the CAA. 40 CFR 70.4(b)(15). Regarding acid rain requirements, EPA stated in its preamble to the final part 70 rule that ''the allowance trading system provided for in Title IV will not be feasible unless there is an accurate accounting of each source's obligations thereunder in the Title V permit.'' 57 FR 32250, 32270 (July 21, 1992). Virginia's regulations allowing ''off permit'' changes at 9 VAC 5–80–280.C and 5–80–680.C fail to exclude from eligibility changes that are subject to requirements under Title IV. For the reasons discussed in the preamble to the final part 70 rule, EPA has determined that it cannot grant full approval to Virginia's program until Virginia revises its regulations to correctly exclude Title IV changes from off-permit eligibility. In the meantime, EPA does not view this deficiency as preventing Virginia's program from substantially meeting the requirements of Title V. Thus, the Commonwealth's program is still eligible for interim approval.

6. Affirmative Defense Provisions Deficient

Part 70 provides that a source may qualify for an affirmative defense for noncompliance with a technology based emission limitation in ''emergency'' situations if certain conditions are met. Section 70.6(g)(1) defines what kind of situations may qualify as ''emergencies,'' and § 70.6(g)(3) provides, in part, that the affirmative defense of emergency shall be demonstrated through properly signed, contemporaneous operating logs, or other relevant evidence that, ''(iv) the permittee submitted notice of the emergency to the permitting authority within 2 working days of the time when emission limitations were exceeded due

to the emergency.'' Section 70.6(g)(3) further provides that this notice would satisfy the requirement for ''prompt'' reporting of deviations required by § 70.6(a)(3)(iii)(B).

In its program Virginia uses the term ''malfunction'' instead of emergency. Virginia's definition of this term is consistent with how EPA defines ''emergency.'' However, Virginia's operating permit regulations at 9 VAC 5–80–250.B.4 and 5–80–650 provide in part that ''*[f]or malfunctions that occurred for one hour or more,* the permittee submitted to the board by the deadlines established in B.4.a and B.4.b. a notice and a written statement containing a description of the malfunction, any steps taken to mitigate emissions, and corrective actions taken. The notice fulfills the requirement of 9 VAC 5–80–110 F.2.b. to report promptly deviations from permit requirements.'' (emphasis added)

Virginia allows sources to claim the affirmative defense for malfunctions which last less than one hour even when the source does not notify the Commonwealth of the malfunction. Thus, Virginia's affirmative defense provision is less stringent than that required under § 70.6(g), and sources may be able to shield themselves from liability beyond what is allowed under part 70. EPA cannot grant full approval to Virginia's program until Virginia revises its regulations to correct this deficiency. However, EPA does not view this deficiency as preventing Virginia's program from substantially meeting the requirements of Title V, since it is of limited scope and Virginia's regulations otherwise comport with § 70.6(g). Thus, the Commonwealth's program is still eligible for interim approval.

C. Other EPA Comments

1. Acid Rain Provisions

Virginia submitted Rule 8–7 to require operating permits for sources subject to acid rain emission reduction requirements or limitations. Except for the deficiencies discussed elsewhere in today's notice, EPA has determined that Virginia's Rule 8–7 for acid rain sources is acceptable.

2. Authority and Commitments for Section 112 Implementation

Section 112 of the CAA requires EPA to control hazardous air pollutant emissions from various categories of sources by establishing maximum achievable control technology (MACT) standards. Upon request, EPA delegates the authority to implement and enforce section 112 requirements to State and local agencies. Virginia requested that EPA grant Virginia ''delegation of authority upon approval of the operating permit program for all Section 112 programs except Section 112(r), prevention of accidental releases.'' (See the VADEQ Director's 11/12/93 letter submitting Virginia's initial request for approval of its Title V program.) Virginia demonstrated that it has in Va. Code § 10.1–1322.A. and Rule 8–5 the broad legal authority to incorporate into permits and to enforce applicable CAA section 112 requirements. Virginia supplemented its broad legal authority with a commitment to ''develop the state regulatory provisions as necessary to carry out these programs and the responsibilities under the delegation after approval of the operating permit program and EPA has issued the prerequisite guidance for development of these Title III programs.'' (See the VADEQ Director's 11/12/93 letter submitting Virginia's initial request for approval of its Title V program.) (Note: States must meet their responsibilities under the CAA and part 70 without respect to whether or not EPA has issued ''guidance.'' Nevertheless, EPA's view is that it has issued sufficient guidance to enable States to develop all necessary regulatory provisions pertaining to section 112 requirements (formerly referred to as Title III requirements). With respect to CAA section 112(r), Virginia has the authority under section 9 VAC 5–80–90 1C to require that an applicant state that the source has complied with CAA section section 112(r) or state in the compliance plan that the source intends to comply and has set a schedule to do so.

When EPA has not promulgated an applicable Federal MACT emission limitation, section 112(g) of the Clean Air Act requires the Title V permitting authority (generally a State or local agency responsible for the program) to determine a MACT emission limitation on a case by case basis. On December 27, 1996, EPA promulgated regulations at 40 CFR part 63 (61 FR 68384, December 27, 1996) (the 112(g) MACT rule) implementing certain provisions in section 112(g). The 112(g) MACT rule assures that owners or operators of a newly constructed, reconstructed, or modified major sources of hazardous air pollutants (HAP)(unless they are specifically exempted) will be required to install effective pollution controls during the period before EPA can establish a national MACT standard for a particular industry, provided they are located in a State with an approved Title V permit program. The rule does not require new source MACT for modifications to existing sources.

The 112(g) MACT rule establishes requirements and procedures for owners or operators to follow to comply with section 112(g), and contains guidance for permitting authorities in implementing 112(g). Section 112(g) will be in effect in a State or local jurisdiction on the date that the permitting authority, under Title V, places its implementing program for section 112(g) into effect. Permitting authorities have up to 18 months from the December 27, 1996, date of publication of the 112(g) rule to initiate implementing programs. After the 18 month transition period, if a State or local permitting authority is unable to initiate a section 112(g) program, there are two options for obtaining a MACT approval: Either (1) the EPA will issue 112(g) determinations for up to one year; or (2) the permitting authority will make 112(g) determinations according to procedures specified at 40 CFR 63.43, and will issue a notice of MACT approval that will become final and legally enforceable after the EPA concurs in writing with the permitting authority's determination. Requirements for permitting authorities are found at 40 CFR 63.42.

To place its 112(g) implementing program into effect, the chief executive officer of the State or local jurisdiction must certify to EPA that its program meets all the requirements set forth in the 112(g) rule, and publish a notice stating that the program has been adopted and specifying its effective date. The program need not be officially reviewed or approved by EPA.

3. Deferral of Area Sources

Virginia's regulations continue to present a minor facial inconsistency with part 70's applicability requirements with respect to permitting of area sources which EPA wishes to clarify in advance. In Virginia Rule 8–5, 9 VAC 5–80–50 D.1 provides that area sources subject to requirements promulgated under section 111 or 112 of the CAA are deferred from the obligation to obtain permits, and that the ''decision to require a permit for these sources shall be made at the time that a new standard is promulgated and shall be incorporated into [Virginia's regulations] along with the listing of the new standard.''

EPA's regulations at 40 CFR 70.3(b)(2) provide that the decision to exempt area sources that become subject to section 111 or 112 standards adopted after July 21, 1992, will be made when such standards are promulgated. EPA interprets this language to mean that unless the new standard explicitly exempts area sources from Title V

applicability, these area sources remain subject to the permitting requirement of CAA section 502(a) and are required to obtain permits.

EPA was initially concerned that owners and operators of these area sources might, based on Virginia's regulations, mistakenly believe they are not required to obtain permits either because: (1) EPA may have not made an explicit decision whether to exempt them in setting the relevant standard, thus resulting in no ''decision'' to require them to obtain a permit being incorporated into Virginia's regulations at the time the standard is incorporated; or (2) Virginia may have not yet incorporated into its regulations the relevant standard, and its associated implicit or explicit decision whether to exempt area sources. Regarding the first possible reason, EPA believes that Virginia's regulations can be reasonably interpreted to properly require such sources to obtain permits, if Virginia's incorporation of relevant sections 111 and 112 standards is treated as having incorporated both any explicit decisions to exempt sources from permitting and any explicit or implicit decisions by EPA to subject them to the permitting requirement. The VADEQ has committed to EPA that ''In cases where EPA has promulgated a standard under section 111 or section 112 after July 21, 1992 and failed to declare whether or not the facility or source category covered by the standard is subject to the Title V program or not, the Board in making decisions under 9 VAC 5–80–90 D shall presume that the facility or source category is subject to the Title V program.'' (See letter from the Director of the VADEQ dated February 27, 1997.) Regarding the second possible area of confusion, Virginia's provision does not require area sources to obtain permits, even if EPA has explicitly stated in the substantive section 111 or section 112 rulemaking that they must, unless and until Virginia incorporates the underlying standard into its regulations. Thus, if Virginia does not incorporate the substantive federal rules into its regulations, the requirement for these sources to obtain a permit is not triggered under Virginia's program. The Commonwealth has incorporated all relevant sections 111 and 112 standards to date, including any that extend the permitting requirement to area sources. Thus, the potential for confusion exists only with respect to section 111 or section 112 standards EPA promulgates in the future. EPA notes that Virginia has procedures for prompt incorporation of new federal standards. Since EPA has no reason to believe that the Commonwealth will not continue to timely incorporate these standards as they become promulgated, Virginia's regulations do not in the Agency's view present an impediment to full approval regarding this issue. EPA will, of course, in conducting its oversight of Virginia's implementation of the program, watch for any indication that delayed incorporation of substantive standards results in area sources not getting permitted in a timely manner.

4. Audit Immunity and Privilege Law

Among other minimum elements required for approval of a State operating permits program, the CAA includes the requirement that the permitting authority has adequate authority to assure that sources comply with all applicable CAA requirements as well as authority to enforce permits through recovery of certain civil penalties and appropriate criminal penalties. Sections 502(b)(5) (A) and (E) of the CAA. In addition, Part 70 explicitly requires States to have certain enforcement authorities, including authority to seek injunctive relief to enjoin a violation, to bring suit to restrain violations imposing an imminent and substantial endangerment to public health or welfare, and to recover appropriate criminal and civil penalties. 40 CFR 70.11. Moreover, section 113(e) of the CAA sets forth penalty factors for EPA or a court to consider for assessing penalties for civil and criminal violations of Title V permits. EPA is concerned about the potential impact of some State privilege and immunity laws on the ability of such States to enforce federal requirements, including those under Title V of the CAA.

Virginia has adopted legislation that would provide, 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, Code § 10.1–1198, provides a privilege that protects from disclosure documents [1] and information about the content of those documents that are the product of a voluntary environmental assessment. The privilege does not extend to documents or information that are: (1) Generated or developed before the commencement of a voluntary environmental assessment; (2) that are prepared independently of the assessment process; (3) that demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) that are required by law. Particularly since documents required by Title V of the Act and by part 70 are documents ''required by law,'' EPA interprets the Commonwealth's privilege as not extending to Title V required documents. Virginia's Office of the Attorney General has submitted a legal opinion which supports EPA's understanding that the Commonwealth's Title V program requirements for compliance monitoring, reporting of violations, record keeping, and compliance certification, together render the privilege inapplicable to compliance evaluations, at a Title V source, of the Commonwealth's Title V requirements.

Virginia's immunity law, Va. Code § 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 Office of the Attorney General's legal opinion states that the phrase ''to the extent consistent with requirements imposed by federal law'' renders this statute inapplicable to Title V enforcement. No person can claim or be accorded immunity from any enforcement action that involves the Commonwealth's Title V program because to do so would be inconsistent with the requirements of Title V of the federal Clean Air Act. Thus, the statute by its terms cannot apply to sources operating under a Title V permit.'' Thus, EPA is not listing any conditions on Virginia's Title V program approval for this issue because the legislation will not preclude the Commonwealth from enforcing its Title V permit program consistent with the CAA's requirements.

[1] Document is defined to include ''field notes, records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, videotape, computer-generated or electronically recorded information, maps, charts, graphs and surveys.'' Va. Code § 10.1–1198.A.

5. Variance Provision

While not an issue for purposes of program approval, it should be noted that Virginia has the authority to issue a variance from requirements imposed by Virginia law. The variance provision at Va. Code § 10.1–1307.C. empowers the Air Pollution Control Board, after a public hearing, to grant a local variance from any regulation adopted by the board. EPA regards this provision as wholly external to the program submitted for approval under Part 70, and consequently is proposing to take no action on this provision of Virginia law. EPA has no authority to approve provisions of State law, such as the variance provision referred to, which are inconsistent with the CAA. EPA does not recognize the ability of a permitting authority to grant relief from the duty to comply with a federally enforceable permit, except where such relief is consistent with the applicable requirements of the CAA and is granted through procedures allowed by Part 70. EPA reserves the right to enforce the terms of the permit where the permitting authority purports to grant relief from the duty to comply with a permit in a manner inconsistent with the CAA and Part 70 procedures.

6. Permit Fee Changes

EPA notes that Virginia Rule 8–6 includes a provision, at 9 VAC 5–80–40 D. and E., which allows Virginia to assess a fee of less than $25 per ton (1989 dollars) adjusted for inflation, if Virginia determines that it would collect more money than required to fund its Title V program if it assessed the full $25 per ton fee (1989 dollars), adjusted for inflation. If Virginia chooses in the future to collect a fee of less than $25 (1989 dollars), adjusted for inflation, its fee assessment would no longer meet the requirement for presumed adequacy under 40 CFR 70.9. Accordingly, Virginia would trigger the requirements under 40 CFR 70.9(b)(5) that it provide EPA with a detailed accounting that its fee schedule meets the requirements of 40 CFR 70.9(b)(1).

Before the Commonwealth assesses a fee lower than the presumptive minimum of $25 per ton (1989 dollars), adjusted for inflation, it must obtain EPA approval of such a fee. EPA would approve such a fee if Virginia submitted a detailed accounting showing that the fee would result in the collection of sufficient funds to run a fully adequate Title V program. This requirement for EPA approval of any fee lower than the presumptive minimum is consistent with the requirements of 40 CFR 70.9, and is implied by 9 VAC 5–80–40 D., which states that ''Any adjustments made to the annual permit program fee shall be made within the constraints of 40 CFR 70.9.''

7. Title I Modifications

The EPA proposed to define ''Title I modification'' in the August 31, 1995 Operating Permits Program and Federal Operating Permits Program proposed rule. The EPA proposed to define Title I modification to mean any modification under part C and D of Title I or sections 111(a)(4), 112(a)(5), or 112(g) of the Act and regulations promulgated pursuant to § 61.07 of part 61. If the definition of ''Title I modification'' is finalized as proposed in the August 31, 1995, proposed rule, the State's definition would be consistent with part 70. If the definition of ''Title I modification'' is changed from that proposed in the August 31, 1995, proposed rule to include minor new source review changes, the Commonwealth will need to revise its permit regulation to be consistent with part 70.

IV. Proposed Aaction

EPA is proposing to grant interim approval to the operating permits program submitted by Virginia, and is soliciting public comment on whether or not such approval is appropriate. The portions of the submittal for which EPA is proposing interim approval consist of the operating permit and operating permit fee regulations submitted on September 10, 1996, the acid rain operating permit regulations submitted on September 12, 1996, and other non-regulatory documentation. If EPA does grant such approval, Virginia will be required to correct all of the remaining deficiencies in its program which are discussed earlier in this notice before EPA could grant full approval to Virginia's program. The interim approval, which would not be renewable, would extend for a period of two years. During the interim approval period Virginia would be protected from sanctions for failure to have a program, and EPA would not be obligated to promulgate a Federal permits program in the Commonwealth. Permits issued under a program with interim approval have full standing with respect to Part 70, and the one year time period for submittal of permit applications by subject sources begins upon interim approval, as does the three year time period for processing the initial permit applications.

Requirements for approval, specified in 40 CFR 70.4(b), encompass section 112(l)(5) requirements for approval of a program for delegation of section 112 standards as promulgated by EPA as they apply to Part 70 sources. Section 112(l)(5) requires that the State's program contain adequate authorities, adequate resources for implementation, and an expeditious compliance schedule, which are also requirements under Part 70. Therefore, EPA is also proposing to grant approval under section 112(l)(5) and 40 CFR 63.91 of the State's program for receiving delegation of section 112 standards that are unchanged from Federal standards as promulgated. This program for delegations only applies to sources covered by the Part 70 program.

V. Sanctions Stayed

Pursuant to section 502(d)(2)(A) of the CAA, EPA may, at its discretion, apply any of the sanctions in section 179(b) at any time following the effective date of a final disapproval. The available sanctions include a prohibition on the approval by the Secretary of Transportation of certain highway projects or the awarding of certain federal highway funding, and a requirement that new or modified stationary sources or emissions units for which a permit is required under Part D of Title I of the CAA achieve an emissions reductions-to-increases ratio of at least 2-to-1. In addition, EPA is required by section 502(d)(2)(B) of the CAA to apply one of the sanctions in section 179(b), as selected by the Administrator, on the date 18 months after the effective date of a final disapproval, unless prior to that date the State had submitted a revised operating permits program and EPA had determined that it corrected the deficiencies that prompted the final disapproval. Moreover, if the Administrator finds a lack of good faith on the part of the State, both sanctions are to apply after the expiration of the 18-month period until the Administrator determines that the State has come into compliance. In all cases, if, six months after EPA applies the first sanction, the State has not submitted a revised program that EPA has determined corrects the disapproved program's deficiencies, a second sanction is required. Finally, if EPA has not granted full approval to the State's program by November 15, 1995, and the State's program at that point does not have interim approval status, EPA must promulgate, administer and enforce a Federal permits program for the State on that date.

EPA first disapproved Virginia's operating permits program in a Federal Register notice published on December 5, 1994, which became effective on January 5, 1995. As a result, EPA's authority to apply discretionary

sanctions to Virginia arose on January 5, 1995, and the 18-month period before which EPA is required to apply sanctions also began on that date. EPA was required to apply the first sanction on July 5, 1996 and the second sanction on January 5, 1997, unless by those dates EPA had determined that Virginia had corrected each of the deficiencies that prompted EPA's original disapproval. EPA interprets the CAA to require the Administrator to select by rulemaking which sanction to apply first, before mandatory sanctions may actually be imposed. These sanctions have not been applied in Virginia because EPA has not yet published such a rule covering deficiencies under Title V.

EPA's sanctions policy for applying sanctions for State Title V Operating Permits Program largely follows the approach under Title I of the Act (see 40 CFR 52.31, 59 FR 39832 (August 4, 1994). Update to Sanctions Policy for State Title V Operating Permits Programs, John S. Seitz, Director Office of Air Quality Planning and Standards, (March 28, 1995).

Based on this proposed approval of the Virginia Title V operating permits program, EPA is making an interim final determination by this action that the Commonwealth has corrected the deficiencies prompting the original disapproval of the Virginia Title V operating permits program. EPA has determined that it is more likely than not that the Commonwealth has corrected the deficiencies that prompted the original disapproval of the Virginia operating permits program. This interim final determination will stay the implementation of sanctions unless and until either this proposed approval is finalized or is withdrawn.

Although this action regarding sanctions is effective upon publication, EPA will take comment on this interim final determination as well as on EPA's proposed interim approval of the Commonwealth's submittal. EPA will publish a final notice taking into consideration any comments received on EPA's proposed action and this interim final action. EPA has determined that it is appropriate to give immediate effect to this interim final determination that Virginia has corrected its prior disapproval deficiencies because it would not be in the public interest to leave Virginia vulnerable to sanctions pending finalization of the proposed approval. See, e.g., 59 FR 39832, 39838 and 39849–50 (August 4, 1994).

Today EPA is also providing the public with an opportunity to comment on this interim final determination. If, based on any comments on this action and any comments on EPA's proposed interim approval of Virginia's Title V submittal, EPA determines that the Virginia's Title V submittal is not approvable and this final action was inappropriate, EPA will take further action to disapprove the Title V submittal. If EPA's proposed approval of the Virginia Title V submittal is reversed, then Virginia would remain vulnerable to sanctions under section 502(d)(2)(A) of the CAA.

VI. Administrative Requirements

A. Request for Public Comments

The EPA is requesting comments on this proposed interim approval. Copies of the State's submittal and other information relied upon for the proposed interim approval are contained in a docket maintained at the EPA Regional Office. The docket is an organized and complete file of all the information submitted to, or otherwise considered by, EPA in the development of this proposed interim approval. The principal purposes of the docket are: (1) To allow interested parties a means to identify and locate documents so that they can effectively participate in the approval process; and (2) to serve as the record in case of judicial review. The EPA will consider any comments received by April 17, 1997.

B. Executive Order 12866

The Office of Management and Budget has exempted this action from Executive Order 12866 review.

C. Regulatory Flexibility Act

The EPA's actions under section 502 of the CAA do not create any new requirements, but simply address operating permits programs submitted to satisfy the requirements of 40 CFR Part 70. Because this action does not impose any new requirements, it does not significantly impact a substantial number of small entities.

D. Federal Mandates

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 action 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 consider 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. This Federal action proposes to approve Virginia's pre-existing Title V program, and imposes no new Federal requirements. Accordingly, this action would not impose a federal mandate which would result in additional costs for State, local, or tribal governments, or for the private sector.

List of Subjects in 40 CFR Part 70

Environmental Protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Operating permits, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401–7671q.

Dated: March 7, 1997.

W. Michael McCabe,

Regional Administrator,

Region III.

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