

contingency measures associated with the 2005 ROP plan for Cecil County.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[VA001-1001a; FRL-7648-4]

Approval of Section 112(l) Authority for Hazardous Air Pollutants; Equivalency by Permit Provisions; National Emission Standards for Hazardous Air Pollutants From the Pulp and Paper Industry; Commonwealth of Virginia

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The EPA is approving a request from the Commonwealth of Virginia's Department of Environmental Quality (DEQ) for authority to implement and enforce state permit terms and conditions in place of those of the National Emission Standards for Hazardous Air Pollutants (NESHAP) for the Pulp and Paper Industry, with respect to the operations of International Paper Company's Franklin Mill, located in Franklin, Virginia. Thus, the EPA is hereby granting the Virginia DEQ the authority to implement and enforce alternative requirements in the form of Clean Air Act (CAA) Title V permit terms and conditions after EPA has approved the State's alternative requirements. The EPA is approving this request because it has found that the Virginia DEQ has satisfied the requirements for approval set forth at 40 CFR part 63, subpart E, entitled, "Approval of State Programs and Delegation of Federal Authorities."

DATES: This rule is effective on June 14, 2004 without further notice, unless EPA receives adverse written comment by May 6, 2004. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the *Federal Register* and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by VA001-1001, by one of the following methods:

A. Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the online instructions for submitting comments.

B. E-mail: Campbell.Dave@epa.gov.

C. Mail: David J. Campbell, Chief, Permits and Technical Assessment Branch, Mailcode 3AP11, U.S. Environmental Protection Agency,

Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. Hand Delivery: At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. VA001-1001. EPA's policy is that all comments received will be included in the public docket without change, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The federal regulations.gov Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Copies of all comments should also be sent to the Virginia Department of Environmental Quality. Copies of written comments should be sent to John M. Daniel, Jr., Director, Air Division, Virginia Department of Environmental Quality, P.O. Box 10009, Richmond, Virginia 23240. Copies of electronic comments should be sent to jmdaniel@deq.state.va.us. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; and the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: Ray Chalmers, (215) 814-2061, or by e-mail at chalmers.ray@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to section 112 of the Clean Air Act (CAA), the Environmental Protection Agency (EPA) promulgates NESHAP for various categories of air pollution sources. On April 15, 1998, EPA promulgated a NESHAP for the Pulp and Paper Industry, as codified at 40 CFR part 63, subpart S, §§ 63.440 through 63.459. (See, 63 FR 18504.) International Paper Company operates a pulp and paper mill called the Franklin Mill, located in Franklin, Virginia, which is subject to the requirements of this NESHAP.

Under section 112(l) of the CAA, EPA may approve State or local rules or programs to be implemented and enforced in place of certain otherwise applicable Federally promulgated CAA section 112 rules, emission standards, or requirements. EPA's approval of State and local rules or programs under section 112(l) is governed by regulations found at 40 CFR part 63, subpart E. (See, 65 FR 55810, dated September 14, 2000). Under the provisions of subpart E found at 40 CFR 63.94, a State or local air pollution control agency may seek approval, for affected sources permitted by the State or local agency under a CAA Title V permitting program developed pursuant to the EPA regulations found at 40 CFR part 70, of State or local CAA Title V permit terms and conditions to be implemented and enforced in lieu of specified existing and future Federal CAA section 112 rules, emissions standards, or requirements. This option is referred to as the equivalency by permit (EBP) option. To receive EPA approval using this option, the State or local agency must meet the requirements of 40 CFR 63.91 and 63.94.

Approval of alternative requirements under the EBP process comprises three steps. The first step is EPA granting "up-front approval" of a State's EBP program. (See, 40 CFR 63.94(a) and (b).) The second step is EPA review and approval of the State's proposed alternative CAA section 112 requirements in the form of pre-draft permit terms and conditions. (See, 40 CFR 63.94(c) and (d).) The third step is incorporation of the approved pre-draft permit terms and conditions into a specific CAA Title V permit and the CAA Title V permit issuance process itself. (See, 40 CFR 63.94(e).)

The first step, obtaining EPA's "up-front approval" of a State's EBP program, enables EPA to ensure that: (1) A State meets the criteria at 40 CFR 63.91(d) for up-front approval common to all approval options; (2) a legal

foundation exists for a State to replace the otherwise applicable Federal section 112 requirements with alternative, Federally enforceable requirements that will be reflected in final CAA Title V permit terms and conditions; and, (3) the specific source(s) and Federal emission standard(s) for which a State will be accepting delegation under the EBP program are clearly specified.

The second step, having EPA review and approve the State's alternative CAA section 112 requirements, provides EPA with an opportunity to ensure that the State's proposed pre-draft CAA Title V permit terms and conditions reflect all of the requirements of the otherwise applicable Federal requirements and are equivalent to those requirements. The approval criteria used by EPA are set forth at 40 CFR 63.94(d). If the EPA finds that the pre-draft CAA Title V permit terms and conditions submitted by the State meet the criteria of paragraph (d), EPA approves the State's alternative requirements (by approving the pre-draft permit terms and conditions) and notifies the State in writing of the approval.

The third step, requiring incorporation of the approved pre-draft permit terms and conditions into a specific CAA Title V permit and the CAA Title V permit issuance process itself, serves to make the requirements legally effective. EPA's final approval of the State's proposed alternative requirements that substitute for the Federal standard does not occur until the completion of step three.

On November 21, 2003 the Virginia DEQ requested delegation of authority to implement and enforce State CAA Title V permit terms and requirements for International Paper Company's Franklin Mill as an alternative to those of the NESHAP for the Pulp and Paper Industry found at 40 CFR part 63, subpart S. The Virginia DEQ states in its request that it intends for the submittal to fulfill only the requirements of step one of the EBP process, pertaining to obtaining "up-front approval" of its program. The Virginia DEQ explains that it will later fulfill steps two and three of the EBP process by submitting substitute CAA Title V operating permit terms and conditions for EPA review and approval, and then proceeding with the CAA Title V permit issuance process. The Virginia DEQ sought this authority pursuant to the provisions of 40 CFR 63.94 and 63.91, and the Virginia DEQ submitted information addressing the requirements of those sections.

II. Analysis of State's Submittal

EPA has reviewed the Virginia DEQ's submittal and has concluded that the Virginia DEQ meets the requirements for "up-front approval" of its EBP program which are specified at 40 CFR 63.94(b) and 63.91(d). The requirements a State or local agency must meet can be summarized as follows: (1) Identify the source(s) for which the State seeks authority to implement and enforce alternative requirements; (2) request delegation (or have delegation) for any remaining sources required to be permitted by the State under 40 CFR part 70 that are in the same category as the source(s) for which it wishes to establish alternative requirements; (3) identify all existing and future CAA section 112 emission standards for which the State is seeking authority to implement and enforce alternative requirements; (4) demonstrate that the State has an approved CAA Title V operating permits program that permits the affected sources; and, (5) demonstrate that the State meets the general approval criteria set forth at 40 CFR 63.91(d).

EPA lists each requirement below and after each requirement explains its reasons for concluding that the Virginia DEQ meets the requirement:

A. Identify the Source(s) for Which the State Is Seeking Authority To Implement and Enforce Alternative Requirements

The Virginia DEQ identified International Paper Company's Franklin Mill, a pulp and paper mill located in Franklin, Virginia, as the source for which it is seeking authority to implement and enforce alternative requirements. According to the Virginia DEQ, International Paper Company's Franklin Mill is one of four operating pulp and paper mills in Virginia subject to 40 CFR part 63, subpart S. The Virginia DEQ reports that none of the other companies operating pulp and paper mills in Virginia have contacted the State regarding an interest in the EBP process.

B. Request or Have Delegation for Any Remaining Sources Required To Be Issued CAA Title V Permits by the State and That Are in the Same Category as the Source(s) for Which It Seeks To Establish Alternative Requirements

The Virginia DEQ is currently delegated the authority to implement and enforce the Federal requirements of 40 CFR part 63, subpart S for all pulp and paper mills. Subpart S applies to "the owner or operator of processes that produce pulp, paper, or paperboard;

that are located at a plant site that is a major source. * * *" (See, 40 CFR 63.440.) On January 26, 1999, EPA announced in the **Federal Register** that it had delegated to the Virginia DEQ the authority to implement and enforce EPA's NESHAP standards for all affected sources of hazardous air pollutants (HAPs), as defined in 40 CFR part 63, for all source categories which are located at major sources. (See, 64 FR 3938.) EPA also delegated to the Virginia DEQ the authority to implement and enforce all future EPA NESHAP standards applicable to such sources, on the condition that the Virginia DEQ legally adopt such new standards with only approved wording changes and that the Virginia DEQ provide notice to EPA of such adoption. The Virginia DEQ subsequently adopted additional standards, and notified EPA that it had adopted these additional standards. The additional standards that the State adopted included 40 CFR part 63, subpart S.

C. Identify All Existing and Future Federal Section 112 Rules for Which the State Is Seeking Authority To Implement and Enforce Alternative Requirements

In its November 21, 2003 submittal, the Virginia DEQ requested only the authority to implement and enforce State permit requirements for International Paper Company's Franklin Mill as alternatives to the Federal requirements applicable to that Mill found at 40 CFR part 63, subpart S. The Virginia DEQ confirmed that there are no other existing and future Federal CAA section 112 rules for which the State is seeking authority to implement and enforce alternative requirements.

D. Demonstrate That the State Has an Approved CAA Title V Permits Program and That the Program Permits the Affected Source(s)

EPA granted final full approval to Virginia's CAA Title V operating permits program on December 4, 2001 (66 FR 62961), and under this approved program the Virginia DEQ has the authority to issue CAA Title V permits to all major stationary sources. In its November 21, 2003 submittal, the Virginia DEQ confirmed that International Paper Company's Franklin Mill is a CAA Title V source and that it is subject to the State's CAA Title V permits program. The Virginia DEQ noted the International Paper Company had submitted a CAA Title V permit application, and that the Virginia DEQ was reviewing this application.

E. Demonstrate That the State Meets the General Approval Criteria Found at 40 CFR Section 63.91(d)

The provisions of 40 CFR 63.91(d) specify that "Interim or final CAA Title V program approval will satisfy the criteria set forth in § 63.91(d), up-front approval criteria." As discussed in item D. above, EPA has fully approved Virginia's CAA Title V operating permits program.

F. Virginia's Voluntary Environmental Assessment Privilege Law

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) "privilege" for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed. Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1-1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information: (1) That are 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.

On January 12, 1997, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege law, Va. Code Sec. 10.1-1198, precludes granting a privilege to documents and information "required by law," including documents and information "required by Federal law to maintain program delegation, authorization or approval," since Virginia must "enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts * * *" The opinion concludes that "[r]egarding § 10.1-1198, therefore,

documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval."

Virginia's Immunity law, Va. Code Sec. 10.1-1199, provides that "[t]o the extent consistent with requirements imposed by Federal law," any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1997 opinion states that the quoted language renders this statute inapplicable to enforcement of any Federally authorized programs, since "no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity."

Therefore, EPA has determined that Virginia's Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its CAA Title V program consistent with the Federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the Clean Air Act, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the Clean Air Act is likewise unaffected by this, or any, state audit privilege or immunity law.

III. Final Action

EPA is granting the Virginia DEQ "up-front" approval of an EBP program under which the Virginia DEQ may establish and enforce alternative State requirements for International Paper Company's Franklin Mill in lieu of those of the NESHAP for the Pulp and Paper Industry found at 40 CFR part 63, subpart S. The Virginia DEQ may only establish alternative requirements for the Franklin Mill which are equivalent to and at least as stringent as the otherwise applicable Federal requirements. (See, 40 CFR 63.94(d).) The VA DEQ must, in order to establish alternative requirements for the Franklin Mill under its EPA approved EBP program: (1) Submit to EPA for

review pre-draft CAA Title V permit terms specifying alternative requirements which are at least as stringent as the otherwise applicable Federal requirements, (2) obtain EPA's written approval of the alternative pre-draft CAA Title V permit requirements, and (3) issue a CAA Title V permit for the Franklin Mill which contains the approved alternative requirements. (See, 40 CFR 63.94(c) and (e).) Until EPA has approved the alternative permit terms and conditions and the Virginia DEQ has issued a final CAA Title V permit incorporating them, International Paper Company's Franklin Mill will remain subject to the Federal NESHAP requirements found at 40 CFR part 63, subpart S.

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comment. However, in the "Proposed Rules" section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve if adverse comments are filed. This rule will be effective on June 14, 2004 without further notice unless EPA receives adverse comment by May 6, 2004. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

IV. Statutory and Executive Order Reviews

A. General Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies 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.*). Because this rule approves pre-existing requirements under state law and does not impose

any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4). This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

EPA's role in reviewing this submittal is to approve a State request for authority to establish State permit terms and conditions to be implemented and enforced in lieu of specified existing and future Federal rules, emissions standards or requirements promulgated under CAA section 112, for those affected sources permitted by the State under a program meeting the requirements of CAA part 70, provided that the request meets the criteria of the CAA. In this context, in the absence of a prior existing requirement for a State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a State's submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, in reviewing this submission, to use VCS in place of a State submission that otherwise satisfies the provisions of the CAA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 804 exempts from section 801 the following types of rules: (1) Rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). EPA is not required to submit a rule report regarding today's action under section 801 because this is a rule of particular applicability establishing source-specific requirements for International Paper Company's Franklin Mill located in Franklin, Virginia.

C. Petitions for Judicial 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 June 14, 2004. 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 granting the Virginia DEQ "up-front" approval of an EBP program under which the Virginia DEQ may establish and enforce alternative State requirements for International Paper Company's Franklin Mill in lieu of those of the NESHAP for the Pulp and Paper Industry found at 40 CFR part 63, subpart S may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 63

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: April 6, 2004.

Thomas Voltaggio,

Acting Regional Administrator, Region III.

■ 40 CFR part 63 is amended as follows:

PART 63—[AMENDED]

■ 1. The authority citation for part 63 continues to read as follows:

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

Subpart E—Approval of State Programs and Delegation of Federal Authorities

■ 2. Section 63.99 is amended by adding paragraph (a)(46)(iii) to read as follows:

§ 63.99 Delegated Federal authorities.

(a) * * *

(46) Virginia

* * * * *

(iii) EPA has granted the Virginia Department of Environmental Quality (DEQ) "up-front" approval to implement an Equivalency by Permit (EBP) program under which the Virginia DEQ may establish and enforce alternative State requirements for International Paper Company's Franklin Mill in lieu of those of the National Emissions Standard for Hazardous Air Pollutants (NESHAP) for the Pulp and Paper Industry found at 40 CFR part 63, subpart S. The Virginia DEQ may only establish alternative requirements for the Franklin Mill which are equivalent to and at least as stringent as the otherwise applicable Federal requirements. The VA DEQ must, in order to establish alternative requirements for the Franklin Mill under its EPA approved EBP program: (1) Submit to EPA for review pre-draft Clean Air Act (CAA) Title V permit terms specifying alternative requirements which are at least as stringent as the otherwise applicable Federal requirements, (2) obtain EPA's written approval of the alternative pre-draft CAA Title V permit requirements, and (3) issue a CAA Title V permit for the Franklin Mill which contains the approved alternative requirements. Until EPA has approved the alternative permit terms and conditions and the Virginia DEQ has issued a final CAA Title V permit incorporating them, International Paper Company's Franklin Mill will remain subject to the Federal NESHAP requirements found at 40 CFR part 63, subpart S.

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