ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[Region 2 Docket No. NY70–279, FRL–7845–8]

Approval and Promulgation of Implementation Plans; New York State Implementation Plan Revision; 1-Hour Ozone Control Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a revision to the New York State Implementation Plan (SIP) for ozone concerning the control of volatile organic compounds. The SIP revision consists of amendments to title 6 of the New York Codes, Rules and Regulations, part 205, ''Architectural and Industrial Maintenance Coatings.'' This SIP revision consists of a control measure needed to meet the shortfall emissions reduction identified by EPA in New York's 1-hour ozone attainment demonstration SIP. The intended effect of this action is to approve a control strategy required by New York's SIP which will result in emission reductions that will help achieve attainment of the national ambient air quality standard for ozone.

EFFECTIVE DATE: This rule will be effective January 12, 2005.

ADDRESSES: A copy of the New York's submittal is available at the following addresses for inspection during normal business hours:

Environmental Protection Agency, Region 2 Office, Air Programs Branch, 290 Broadway, 25th Floor, New York, New York 10007–1866.

New York State Department of Environmental Conservation, Division of Air Resources, 625 Broadway, Albany, New York 12233.

FOR FURTHER INFORMATION CONTACT: Kirk J. Wieber, Air Programs Branch, Environmental Protection Agency, 290 Broadway, 25th Floor, New York, New York 10007–1866, (212) 637–3381 or *Wieber.Kirk@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. What Is Required by the Clean Air Act and How Does It Apply to New York?

Section 182 of the Clean Air Act (the Act) specifies the mandatory State Implementation Plan (SIP) submittal requirements for areas classified as nonattainment for the 1-hour ozone national ambient air quality standards (NAAQS) and when SIP submissions must be made to EPA by the states. The specific requirements vary depending upon the severity of the ozone problem. The New York–Northern New Jersey–Long Island area is classified as a severe 1-hour ozone nonattainment area. Under section 182, severe ozone nonattainment areas were required to submit demonstrations of how they would attain the 1-hour standard. On December 16, 1999 (64 FR 70364), EPA proposed approval of New York's 1-hour ozone attainment demonstration SIP for the New York–Northern New Jersey–Long Island nonattainment area. In that rulemaking, EPA identified an emission reduction shortfall associated with New York's 1-hour ozone attainment demonstration SIP, and required New York to address the shortfall. In a related matter, the Ozone Transport Commission (OTC) developed six model rules which identified control measures for a number of source categories and estimated emission reduction benefits from implementing these model rules. These model rules were designed for use by states in developing their own regulations to achieve additional emission reductions to close emission shortfalls.

On February 4, 2002 (67 FR 5170), EPA approved New York's 1-hour ozone attainment demonstration SIP. This approval included an enforceable commitment submitted by New York to adopt additional control measures to close the shortfall identified by EPA for attainment of the 1-hour ozone standard.

EPA is aware that concerns have been raised about the achievability of VOC content limits of some of the product categories. Although we are approving this rule today, the Agency is concerned that if the rule limits make it impossible for manufacturers to produce coatings that are desirable to consumers, there is a possibility that users may misuse the products by adding additional solvent, thereby circumventing the rule's intended VOC emission reductions. We intend to work with the states and manufacturers to explore ways to ensure that the rules achieve the intended VOC emission reductions, and we intend to address this issue in evaluating the amount of VOC emission reduction credit attributable to the rules.

II. What Was Included in New York's Submittal?

On November 4, 2003 Carl Johnson, Deputy Commissioner, New York State Department of Environmental Conservation (NYSDEC), submitted to EPA a revision to the SIP which included revisions to title 6 of the New York Codes, Rules and Regulations (NYCRR), part 205, ''Architectural and Industrial Maintenance (AIM) Coatings.'' It was supplemented on November 21, 2003. The revisions to part 205 (also referred to as the New York AIM coatings rule) will provide volatile organic compound (VOC) emission reductions to address, in part, the shortfall identified by EPA. New York used the OTC model rule as a guideline to develop part 205.

On January 13, 2004, EPA determined that the SIP revision submitted by New York containing revisions to part 205 was administratively complete pursuant to the criteria found in title 40, part 51, appendix V of the Code of Federal Regulations. On January 16, 2004 (69 FR 2557), EPA proposed approval of part 205. For a detailed discussion on the content and requirements of the revisions to New York's part 205, the reader is referred to EPA's proposed rulemaking action.

III. What Comments Did EPA Receive in Response to Its Proposal?

In response to EPA's January 16, 2004 proposed rulemaking action, EPA received comments from two interested parties; (1) Richard M. Cogen, Nixon Peabody LLP, on behalf of the Sherwin-Williams Company, and (2) James Sell, on behalf of the National Paint and Coating Association. A summary of the comments received and EPA's responses are as follows:

A. Comment: The New York AIM Coatings Rule Is Based on Flawed Data

A commenter asserts that the New York AIM coatings rule is based on flawed data and that the use of this data violates the Data Quality Objectives Act (''DQOA'') (section 515(a) of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Public Law 106–554; H.R. 5658)). The data at issue is contained in what the commenter has characterized as ''a study prepared by E.H. Pechan and Associates'' (''Pechan Study'') in 2001. The alleged flaws relate to emissions reductions calculated in the Pechan Study; certain of the underlying data and data analyses are allegedly ''unreproduceable.'' Further, the commenter asserts that if better data were used, the OTC model AIM coatings rule would achieve greater VOC emissions reductions, relative to the Federal AIM coatings rule, than was calculated in the Pechan Study (51 percent reduction versus 31 percent reduction), even if certain source categories were omitted from regulation under the OTC rule. For these reasons, the commenter states that EPA must not

approve the New York AIM coatings rule as a revision to the SIP.[1]

Response: EPA disagrees with this comment. The Pechan Study is not at issue in this rulemaking. The Pechan Study was not submitted to EPA by the State in support of its AIM coatings rule. Further, even if the Pechan Study had been submitted by the State, the validity of that data would not be at issue because, at this time, New York is not asking for approval of any quantified amount of VOC emission reduction from the enactment of its regulation. Rather, this regulation has been submitted by the State, and is being considered by EPA, on the basis that it strengthens the existing New York SIP. The commenter does not dispute that the New York AIM coatings rule will, in fact, reduce VOC emissions.

Section 110 of the Act provides the statutory framework for approval/disapproval of SIP revisions. Under the Act, EPA establishes NAAQS for certain pollutants. The Act establishes a joint Federal and state program to control air pollution and to protect public health. States are required to prepare SIPs, for each designated ''air quality control region'' within their borders. The SIP must specify emission limitations and other measures necessary for that area to meet and maintain the required NAAQS. Each SIP must be submitted to EPA for its review and approval. EPA will review and must approve the SIP revision if it is found to meet the minimum requirements of section 110 of the Act. See also *Union Electric Co.* v. *EPA,* 427 U.S. 246, 265, 96 S.Ct. 2518, 49 L.Ed.2d 474 (1976). The Act expressly provides that the states may adopt more stringent air pollution control measures than the Act requires with or without EPA approval. See section 116 of the Act. EPA only has the authority to disapprove specific SIP revisions that are less stringent than a standard or limitation provided by Federal law (Section 110(k) of the Act). See also *Duquesne Light* v. *EPA,* 166 F.3d 609 (3d Cir. 1999).

The Pechan Study is not part of New York's submission in support of its AIM coatings rule. Because New York at this time is not claiming a specific amount of emissions reductions, the level of emissions reductions rightly or wrongly calculated by the Pechan Study, is irrelevant to whether EPA can approve this SIP revision.[2] The only relevant inquiry at this time is whether this SIP revision meets the minimum criteria for approval under the Act, including the requirement that the State AIM coatings rule be at least as stringent as the Federal AIM coatings rule set forth at 40 CFR 59.400.

As set forth above, EPA has concluded that the New York AIM coatings rule meets the criteria for approvability. It is worth noting that EPA agrees with the commenter's conclusion that the New York AIM coatings rule is more stringent than the Federal AIM coatings rule, though not for the reasons given by the commenter (*i.e.*, that its ''better'' data demonstrates that OTC model AIM coatings rule achieves a 51 percent, as opposed to the Pechan Study's 31 percent reduction in VOC emissions beyond that required by the Federal AIM coatings rule). Rather, the New York AIM coatings rule is, on its face, more stringent. The preamble of the New York AIM coatings rule states: ''The revisions set specific VOC limits (in grams per liter) for 52 coating categories and require compliance with those limits by January 1, 2005. These new limits are more stringent than the Federal AIM coatings rule for 40 categories and more stringent than the current State rule for 31 categories (page 4, New York State Register, Rule Making Activities, November 12, 2003).'' Examples of where New York's AIM coatings rule is facially more stringent than the Federal AIM coatings rule include, but are not limited to, the VOC content limit for non-flat high gloss coatings and antifouling coatings. The Federal AIM coatings rule VOC content limit for non-flat high gloss coatings is 380 grams/liter while the New York AIM coatings rule's limit is 250 grams/liter, and the Federal AIM coatings rule's VOC content limit for anti-fouling coatings is 450 grams/liter while the New York AIM coatings rule is 400 grams/liter. An example of where the New York AIM coatings rule is as stringent, but not more stringent, than the Federal AIM coatings rule is the VOC content limit for antenna coatings and low-solids coatings. In both the State and Federal rules, the VOC content limits for these categories is 530 grams/liter and 120 grams/liter, respectively. Thus, on a category by category basis, the New York AIM coatings rule is as stringent or more stringent than the Federal AIM coatings rule. Further, EPA has received no comments that the New York AIM coatings rule is less stringent than the Federal rule.

B. Comment: Approval of the New York AIM Coatings Rule as a SIP Revision Violates Sections 110(a)(2)(A) and 110(a)(2)(E) of the Clean Air Act

With respect to sections 110(a)(2)(A) and 110(a)(2)(E) of the Act, the commenter asserts that New York cannot give the assurances required by these provisions of the Act since each provision requires that a state be able to assure that a SIP revision meets applicable requirements of the Act, and that no ''Federal or State law'' prohibits the state from ''carrying out such implementation plan or portion thereof.'' Such assurance cannot be given, the commenter alleges, the New York AIM coatings rule violates the DQOA, sections 183(e)(9), and 184(c) of the Act, the New York State Environmental Quality Review Act, the New York State Administrative Procedures Act and the New York Environmental Conservation Law.

Response: For the reasons set forth in responses to comments A, C, D, E and F, EPA disagrees that the New York AIM coatings rule violates the DQOA, the Act, the New York State Environmental Quality Review Act, the New York State Administrative Procedures Act, and the New York Environmental Conservation Law. Therefore, nothing prevents New York from giving the assurances under sections 110(a)(2)(A) and (a)(2)(E) of the Act.

C. Comment: The New York AIM Coatings Rule Was Adopted in Violation of Section 183(e)(9) of the Clean Air Act

A commenter states that in 1998, after a seven-year rule development process, EPA promulgated its nationwide regulations for AIM coatings pursuant to section 183(e) of the Act. The commenter notes that New York's AIM coatings rule imposes numerous VOC emission limits that will be more stringent than the corresponding limits in EPA's regulation. The commenter asserts that section 183(e)(9) requires that any state which proposes regulations to establish emission standards other than the Federal standards for products regulated under Federal rules shall first consult with the EPA Administrator. The commenter believes that New York failed to engage in that required consultation, and therefore, (1) New York violated section 183(e)(9) in its adoption of the New York AIM coatings rule, and (2) EPA

[1] This commenter has submitted a ''Request for Correction of Information'' (RFC), dated June 2, 2004, to EPA's Information Quality Guidelines Office in Washington, DC. EPA is evaluating and will respond separately to the RFC, which raises substantively similar issues to those raised by this comment.

[2] After submission of a request for approval of a quantified amount of emissions reductions credit due to the AIM coatings rule, EPA will evaluate the credit attributable to the rule. Whatever methodology and data the State uses in such a request, the issue of proper credit will become ripe for public comment and any comments received will be responded to at that time.

approval of this rule would violate, and be prohibited by sections 110(a)(2)(A) and (a)(2)(E) of the Act.

Response: EPA disagrees with this comment. Contrary to the implication of the commenter, section 183(e)(9) does not require states to seek EPA's permission to regulate consumer products. By its explicit terms, the statute contemplates consultation with EPA only with respect to ''whether any other state or local subdivision has promulgated or is promulgating regulations on any products covered under [section 183(e)].'' The commenter erroneously construes this as a requirement for permission rather than informational consultation. Further, the final Federal architectural coatings regulations at 40 CFR 59.410, explicitly provides that states and their political subdivisions retain authority to adopt and enforce their own additional regulations affecting these products. *See also* 63 FR 48848, 48884. In addition, as stated in the preamble to the final rule for architectural coatings, Congress did not intend section 183(e) of the Act to preempt any existing or future state rules governing VOC emissions from consumer and commercial products. *See* 63 FR 48848, 48857. Accordingly, NYSDEC retains authority to impose more stringent limits for architectural coatings as part of its SIP, and its election to do so is not a basis for EPA to disapprove the SIP. *See, Union Electric Co.* v. *EPA,* 427 U.S. 246, 265–66 (1976). EPA favors national uniformity in consumer and commercial product regulation, but recognizes that some localities may need more stringent regulations to combat more serious and more intransigent ozone nonattainment problems.

Further, there was ample consultation with EPA prior to the State's adoption of its AIM coatings rule. On March 28, 2001, the OTC adopted a Memorandum of Understanding (MOU) on regional control measures, signed by all the member states of the OTC, including New York, which officially made available the OTC model rules, including the AIM model rule. See the discussion of this MOU in the Report of the Executive Director, OTC, dated July 24, 2001, a copy of which has been included in administrative record of this final rulemaking. It should also be noted that the March 28, 2001 MOU, was transmitted to Robert Brenner, Assistant Administrator for the Office of Air and Radiation of EPA, and to various EPA Regional offices, as was the July 24, 2001 Report of the Executive Director. That MOU includes the following text: ''WHEREAS after reviewing regulations already in place in OTC and other States, reviewing technical information, consulting with other states and Federal agencies, consulting with stakeholders, and presenting draft model rules in a special OTC meeting, OTC developed model rules for the following source categories * * * architectural and industrial maintenance coatings * * *'' (a copy of the signed March 28, 2001 MOU has been placed in the administrative record of this final rulemaking).

Moreover, NYSDEC provided EPA Region 2 the opportunity to review and comment on the New York AIM coatings rule in its draft and proposed versions. Given all of the above, there is no validity to the commenter's assertion that New York failed to consult with EPA in the adoption of its AIM coatings rule. EPA was fully cognizant of the requirements of the New York AIM coatings rule before its formal adoption by the State.[3] For all of the above mentioned reasons, EPA disagrees that New York violated section 183(e)(9) in its adoption of its AIM coatings rule, and disagrees that approval of the New York AIM coatings rule by EPA is in violation of or prohibited by sections 110(a)(2)(A) and (a)(2)(E) of the Act.

D. Comment: The New York AIM Coatings Rule Was Adopted in Violation of Section 184(c) of the Clean Air Act, and Approval of the SIP Revision Would, Itself, Violate That Section

The commenter believes the OTC violated section 184(c)(l) of the Act by failing to ''transmit'' its recommendations to the Administrator, and that the OTC's violation was compounded by the Administrator's failure to review the model rule through the notice, comment and approval process required by section 184(c)(2)–(4) of the Act. These alleged violations of the Act should have prevented New York from adopting its AIM coatings rule, and now prevent EPA from validly approving them as a revision to the New York SIP.

Response: EPA disagrees with this comment. Section 184(c)(1) of the Act states that ''the Commission (OTC) may, after notice and opportunity for public comment, develop recommendations for additional control measures to be applied within all or a part of such transport region if the commission determines such measures are necessary to bring any area in such region into attainment by the dates provided by this subpart.'' It is important to note that the OTC model AIM coatings rule was not developed pursuant to section 184(c)(1), which provision is only triggered ''Upon petition of any State within a transport region established for ozone * * *'' No such petition preceded the development of the model AIM coatings rule. Nor, for that matter, was development of a rule upon State petition under section 184(c)(1) meant to be the exclusive mechanism for development of model rules within the OTC. Nothing in section 184 prevents the voluntary development of model rules without the prerequisite of a state petition. This provision of the Act was not intended to prevent OTC's development of model rules which states may individually choose to adapt and adopt on their own, as New York did, basing its AIM coatings rule on the model developed within the context of the OTC. In developing its State rule from the OTC model, New York was free to adapt that rule as it saw fit (or to leave the OTC model rule essentially unchanged), so long as its rule remained at least as stringent as the Federal AIM coatings rule.

As stated above, on March 28, 2001, the OTC and member states, signed a MOU on regional control measures which officially made available to the public the model rules, including the AIM model rule. The OTC did not develop recommendations to the Administrator for additional control measures. The MOU stated that implementing these rules will help attain and maintain the 1-hour standard for ozone and were therefore made available to the states for use in developing its own regulations.

Even though the OTC did not develop the model AIM coatings rule pursuant to section 184(c)(1) of the Act, nevertheless it provided ample opportunity for OTC member and stakeholder comment by holding several public meetings concerning the model rules including the AIM coatings model rule. The sign-in sheets or agenda for four meetings held in 2000 and 2001 at which the OTC AIM coatings model was discussed (some of which reflect the attendance of a representative of the EPA and/or the commenter), have been placed in the administrative record for this final rulemaking.

E. Comment: The New York AIM Coatings Rule Was Adopted in Violation of Section 19–0303 of the New York Environmental Conservation Law (ECL)

The Commenter asserts that NYSDEC violated section 19–0303(3) of the ECL

[3] While EPA reviewed the AIM model rule and the draft New York version of that rule, EPA had no authority conferred under the Clean Air Act to dictate the exact language or requirements of the rule beyond the general requirement that the New York rule, in order to be approvable as a SIP revision, must be at least as stringent as its Federal counterpart.

because the New York AIM coatings rule applies statewide even though additional control measures are needed only for the New York City metropolitan area. The commenter contends that by failing to adequately consider comments which suggested that the rules could be tailored more closely to that metropolitan area, the State failed to observe the law's requirement to ''give due recognition to the fact that'' relevant differences in air quality or emission characteristics among geographical areas in the State may call for differential applicability of emission reduction requirements among differing geographical areas.

The commenter also asserts that NYSDEC violated section 19–0303(4) of the ECL because it failed to prepare a sufficient regulatory impact assessment. Specifically, the commenter contends that among other failings, New York relied upon grossly inadequate data as discussed above, failed to perform any State-specific cost or impact studies, and failed to analyze the cost-effectiveness of any reasonably available alternatives to the New York AIM coatings rule.

In addition, the commenter asserts that NYSDEC violated section 19–0303(5) of the ECL because it failed to provide notice in the State Environmental Notice Bulletin of the OTC's March 2001 recommendation with respect to the OTC model rule on which the New York AIM coatings rule is closely based, or to solicit public review of the model rule.

Response: EPA disagrees with this comment. The New York final AIM coatings rule was adopted by the State pursuant to the provisions of sections 1–0101, 3–0301, 19–0103, 19–0105, 19–0301, and 19–0305 of the ECL, which grants the NYSDEC the authority to adopt regulations for the prevention, control, reduction and abatement of air pollution. NYSDEC has found that this regulation is necessary for the State to attain ambient air quality standards (New York State Register, Rule Making Activities, March 19, 2003, page 8 and New York State Register, Rule Making Activities, November 12, 2003, page 7, both of which are part of NYSDEC's AIM coatings rule SIP revision submittal). With respect to the commenter's assertion that the AIM coatings rule was only needed for the New York City metropolitan area, it is the State's prerogative as to whether it adopts a rule applicable statewide or nonattainment area specific. New York adopted its AIM coatings rule to achieve VOC emission reductions necessary to attain the 1-hour ozone standard in the New York—Northern New Jersey—Long Island nonattainment area, but also, New York adopted its AIM coatings rule applicable statewide in order to make progress towards reducing 8-hour ozone levels in recently designated nonattainment areas located in New York State that are outside of the New York City metropolitan area. See New York State Register, Rule Making Activities, March 19, 2003, page 8.

In addition, though the State could have decided to limit the application of the rule to selected areas of the State, it elected to apply its AIM coatings rule statewide. Rather than opting for a county by county variation in regulatory limits affecting the sales and use of products, New York opted for a unitary system. Doing so may reduce the burden on manufacturers to have to track the point of sale and use of products and enhances the effectiveness and enforceability of the rule by helping to minimize the opportunity for use of noncomplying products within nonattainment areas. We do not consider the State's decision to opt for statewide applicability of the limits unreasonable. In any event, New York's decision to implement its AIM coatings rule with wider geographic scope than that of a specific nonattainment area is simply not a grounds for EPA to disapprove the regulation under section 110 of the Act. As explained elsewhere, states retain the ability under the Act to regulate such products so long as they at least meet the requirements of the Federal AIM rule.

With respect to the commenter's assertion concerning the need for a regulatory impact statement, EPA disagrees. NYSDEC did prepare a regulatory impact statement which included a cost impact study. Since in most respects the New York AIM coatings rule is very similar to the California Air Research Board (CARB) ''Suggested Control Measure for Architectural Coatings,'' NYSDEC utilized the cost information that supported the CARB action. Though NYSDEC undertook no independent cost analysis, it reviewed and analyzed the information used by CARB and included this information in its regulatory impact statement. The CARB cost information reflects information supplied by manufacturers who market AIM coatings nationally. These manufacturers are representative of those affected by the New York AIM coatings rule. Therefore, EPA has determined that the analysis and conclusions provided for the CARB action are sufficient for the New York AIM coatings rule.

With respect to the comment concerning the OTC model rule, EPA does not agree that New York should have solicited public review of the OTC model rule. In development of the model rule, the OTC Stationary and Area Sources Committee met with numerous stakeholders on several occasions (*See* EPA's response to Comment D) to discuss and to solicit comments on specific aspects of the control measures being considered, including the AIM model rule. It is also important to note that the NYSDEC held public hearings on April 28, 2003, April 30, 2003, and May 2, 2003, for the proposed New York AIM coatings rule.

In addition, in its review of the SIP revision submission of the New York AIM coatings rule, EPA has found no reason to indicate that the review performed by NYSDEC's Counsel's Office, as to the legality of its AIM coatings rule under State law, is insufficient. Therefore, EPA has determined, pursuant to section 110(a)(2)(E) of the Act and 40 CFR part 51, appendix V, that New York has provided the necessary assurances that it has adequate authority to implement the SIP revision and that it has followed all the procedural requirements of the New York constitution and laws in adopting the SIP revision submitted to EPA.

F. Comment: The State Violated the State Administrative Procedure Act (SAPA) and State Environmental Quality Review Act (SEQRA) in Its Adoption of the New York AIM Coatings Rule

The commenter states that NYSDEC's adoption of the New York AIM coatings rule was subject to SAPA. Section 202(5)(b) of the SAPA requires that NYSDEC publish and make available to the public an assessment of public comment on the proposed rule, including a summary and analysis of the issues raised by the comments and significant alternatives suggested in the comments. Section 202(5)(b) of the SAPA also required that the assessment include a statement of the reasons why any significant alternatives were not incorporated into the rule. The commenter stated that NYSDEC violated section 202(5)(b) of the SAPA because its assessment of public comments (the ''Response to Comments'' document) failed completely to identify or respond to a number of comments and failed to provide a statement as to why several alternatives suggested by the commenter and others were not incorporated into the rule.

Section 202–a(1) of the SAPA requires that, in promulgating the New York AIM coatings rule, NYSDEC consider utilizing approaches designed to avoid

undue deleterious economic effects or overly burdensome impacts on affected persons. The commenter stated that NYSDEC violated section 202–a(1) of the SAPA by failing to give adequate consideration to approaches suggested by the commenters that would have avoided undue deleterious economic effect and other undue impacts on the regulated community.

SEQRA requires that agencies in New York review the environmental impact of actions that they propose to take ''as early as possible in the formulation of a proposal for actions.'' Section 8–0109(4) of the ECL. Such review must evaluate whether the proposed action ''may have a significant effect'' on the environment. To fulfill its obligations under SEQRA, State agencies in New York must take a ''hard look'' at the potential environmental impact of their proposals and make a reasoned elaboration of the basis for their impact determination.

The commenter stated that in promulgating the New York AIM coatings rule, NYSDEC violated these basic requirements of SEQRA. The commenter contends that NYSDEC failed to review the impact of the rule early enough in its rulemaking process. The commenter further asserted that NYSDEC should have performed, but failed to perform, an environmental impact analysis, and should have rendered a determination of significance at the point at which it endorsed a proposal for action in March 2001 (when it approved the OTC's MOU, committing to pursue adoption of the OTC model rule). The commenter went on to state that NYSDEC compounded this ''violation'' by failing to perform an adequate evaluation of the environmental impacts of the New York AIM coatings rule either at the time that it formally proposed them or at the time of adoption. It contends that NYSDEC's failings in that regard included, but were not limited to, its failure to obtain or consider any State-specific information, its failure to assess the impacts of requiring use of products that will not be suitable for their intended purpose, the reliance on data of insufficient quality, and its failure to reasonably consider available alternatives. It is the commenter's position that these violations of SAPA and SEQRA are grounds to invalidate the New York AIM coatings rule under State law and cause the State to be without sufficient authority to implement them.

Response: EPA disagrees with the commenter's assertion concerning SAPA. New York did in fact include an assessment of public comments in its November 4, 2003, SIP revision submittal which was also included in the November 12, 2003, New York State Register for the State's final approval of the New York AIM coatings rule. This assessment included responses to specific comments and to comments in general. Failure to quote comments provided to NYSDEC verbatim does not constitute failure to respond to such comments. After review of the comments and NYSDEC's responses, EPA has determined that the NYSDEC responses are sufficient. In addition, NYSDEC does not have to consider every conceivable alternative to the rulemaking proposal (McKinney's section 8–0109, subdivisions 2(d), 4 of the ECL; 6 NYCRR section 617.14(f)(5)), but can focus on those alternatives which can be implemented and which are consistent with the objectives of the rulemaking.

EPA also disagrees with the commenter's assertion concerning SEQRA. SEQRA requires that ''all agencies determine whether the actions they directly undertake, fund or approve may have a significant impact on the environment, and, if it is determined that the action may have a significant adverse impact, prepare or request an environmental impact statement.'' Adoption of the New York AIM coatings rule will result in a positive impact to the environment by achieving VOC emission reductions necessary to attain the 1-hour standard in the New York-Northern New Jersey-Long Island nonattainment area and will also make progress towards reducing 8-hour ozone levels statewide. Therefore, since the impact will not be adverse, an environmental impact statement was not necessary.

As stated earlier, in its review of the SIP revision submission of the New York AIM coatings rule, EPA has found no reason to indicate that the review performed by NYSDEC's Counsel's Office, as to the legality of its AIM coatings rule under State law, is insufficient. Therefore, EPA has determined, pursuant to section 110(a)(2)(E) of the Act and 40 CFR part 51, appendix V, that New York has provided the necessary assurances that it has adequate authority to implement the SIP revision and that it has followed all the procedural requirements of the New York constitution and laws in adopting the SIP revision submitted to EPA.

G. Comment: The New York AIM Coatings Rule Violates the Equal Protection Clause of the U.S. Constitution

A commenter claimed that the New York AIM coatings rule violates The Equal Protection Clause of the United States Constitution because the Equal Protection Clause entitles persons, including corporate entities, to equal protection under the law. The New York AIM coatings rule allows only ''small manufacturers'' (defined as those who manufacture less than 3,000,000 gallons per year) to seek a limited short-term exemption from the rules based on an inability to meet the VOC content limits due to economic and/or technical infeasibility. This exemption would provide small manufacturers with additional time to acquire the technology for producing compliant coatings. The commenter contends that this exemption, which is not available to large manufacturers (even if they could satisfy the economic and/or technical infeasibility requirement) is not rationally related to any legitimate legislative purpose. The commenter further states that it also is unconstitutionally protectionist and discriminates against both large manufacturers and out-of-state manufacturers. It is the commenter's position that large manufacturers, like small manufacturers, should not be required to comply with infeasible limits, and should be provided with equal protection under the law. The commenter suggested that EPA should disapprove the New York AIM coatings rule SIP revision because of this alleged abridgment of its Constitutional rights.

Response: EPA disagrees with the commenter's allegations that the New York AIM coatings rule violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The mere fact that the State has elected to treat ''small'' and ''large'' manufacturers of coatings differently does not, in and of itself, constitute a violation of the Constitution.

The Equal Protection Clause provides, inter alia, that ''[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws.'' U.S. Const. amend XIV section 1. This clause is generally understood to mean that similar persons will be dealt with in a similar fashion under a state law. This does not mean, however, that a government may never classify persons and treat them differently. The ability of a state to differentiate between persons depends upon the nature of the classification scheme and the nature of

the rights at issue. The New York AIM coatings rule does not affect fundamental rights and it does not adversely affect suspect classes. In the case of state statute that relates solely to matters of economics or general social welfare, the statute need only rationally relate to a legitimate governmental purpose.

It is primarily the role of the courts to decide when a state action is rationally related to a legitimate governmental purpose. Nevertheless, based upon the administrative record for the New York AIM coatings rule, EPA believes that the State would pass that test. First, the State had a legitimate interest in drawing a distinction between large and small manufacturers. Its stated purpose for treating small manufacturers differently was to provide them with assistance to comply with the rule. See, ''Assessment of Public Comments on Proposed Revisions to 6 NYCRR part 205, Architectural and Industrial Maintenance (AIM) Coatings,'' Response #48.

The State explained that it is obligated, by State law, to: ''consider implementation approaches that will minimize adverse impacts * * * on small businesses * * * including establishing different compliance or reporting requirements or timetables that take into account the resources available to small businesses * * * and exempt such entities from compliance with the rule so long as the public health, safety, or general welfare is not endangered.'' Id., (explaining requirements of section 202–b of the New York Administrative Procedures Act). Following this statutory requirement, the State indicated that it had identified the small manufacturers in the State, evaluated their product lines, and targeted the regulatory exemption in such a way that it would provide necessary relief to small businesses, yet not undermine the overall VOC emission reduction objectives of the New York AIM coatings rule.

The State noted that it elected to create the exemption in order: ''To ensure that those businesses which have limited product lines and little if any research and development resources do not face crippling financial impacts from the adoption of the rule and have an opportunity and sufficient time to come into compliance.'' In addition, the State also explained why it decided not to extend the exemption to all manufacturers, regardless of size and economic resources: ''[t]he effect of adopting such a broad based exemption would be to swallow the whole rule. The [state] could not rely on any VOC reductions from the adoption of the proposed rule if every manufacturer could apply for an exemption that would never expire.'' Id. The State thus has a number of legitimate interests in creation of the small business exemption, including: (i) Compliance with State law; (ii) assuring that small manufacturers are not unnecessarily put out of business with the attendant economic and social costs; and (iii) assuring the overall effectiveness of the rule to achieve the intended VOC emission reduction goals for protection of public health.

To achieve these legitimate goals, EPA believes that the State has chosen an approach that is rationally related to the intended effect. The State targeted the exemption to what it decided were companies that would have more limited research and development resources. It made the exemption temporary so that these small companies would eventually manufacture coatings that would meet the VOC limits. One might disagree with the approach that the State has taken, but EPA concludes that the approach is rationally related to the intended goals. Courts have required that a such law need only have such a rational basis to pass muster under the Equal Protection Clause, not that it be perfect. *See, NPCA* v. *City of Chicago,* 45 F.3d 1124, 1127–28 (7th Cir. 1994), cert. denied, 515 U.S. 1143 (1995) (local restriction on sales of paints used by graffiti artists may not be the most effective means, but also not irrational to meet the objective).

In addition, EPA believes the commenter has not shown that there is no rational basis for this distinction. The commenter simply asserts that larger manufacturers should be treated in the same way as smaller manufacturers and that the provision is not related to any legitimate legislative purpose. EPA notes, however, that Congress and EPA have drawn distinctions in control requirements applicable under the Act based on the size of the entities subject to the requirements and either exempted smaller entities or subjected them to less stringent requirements. See, *e.g.*, section 182(b)(3) of the Act which provides exempting smaller service stations from certain requirements; 40 CFR 86.708–94(a)(1)(i)(B)(1)(iv) which provides for exemptions for small volume motor vehicle manufacturers from certain requirements. EPA also notes that the Regulatory Flexibility Act requires Federal agencies to examine the impacts of regulations on small entities, including small businesses, and determine whether small businesses should be subject to different and less burdensome regulatory requirements than larger entities. Consequently, there is a rational basis for a distinction between larger and smaller entities.

Finally, EPA notes that the commenter asserts without any justification that this provision of the New York AIM coatings rule discriminates against out-of-state manufacturers. EPA does not believe that this provision does so. The New York AIM coatings rule's limited short-term exemption provision applies to small manufacturers, as defined by the rule, regardless of whether they are located within or outside of New York State.

Given the legitimate interest of the State, and the rational relationship between the goals and the State's approach, EPA concludes that it should not disapprove the New York AIM coatings rule based upon the Equal Protection Clause.

H. Comment: The New York AIM Coatings Rule Violates the Commerce Clause of the U.S. Constitution

The commenter claimed that the New York AIM coatings rule violates the Commerce Clause of Article I, section 8, of the U.S. Constitution, because it imposes an unreasonable burden on interstate commerce. The commenter asserted that because the New York AIM coatings rule contains VOC limits and other provisions that differ from the Federal AIM coatings rule in 40 CFR 59.400, the rule causes an unreasonable restriction on coatings in interstate commerce. The commenter further asserted that the burdens of the New York AIM coatings rule are excessive and outweigh the benefits of the rule. The commenter suggested that EPA should disapprove the SIP revision on this basis.

Response: EPA agrees that AIM coatings are products in interstate commerce and that state regulations on coatings therefore have the potential to violate the Commerce Clause. EPA understands the commenter's practical concerns caused by differing state regulations, but disagrees with the commenter's view that the New York AIM coatings rule impermissibly impinges on interstate commerce.

A state law may violate the Commerce Clause in two ways: (i) by explicitly discriminating between interstate and intrastate commerce; or (ii) even in the absence of overt discrimination, by imposing an incidental burden on interstate commerce that is markedly greater than that on intrastate commerce. The New York AIM coatings rule does not explicitly discriminate against interstate commerce, because it

applies evenhandedly to all coatings manufactured or sold for use within the state. The New York AIM coatings rule's limited short-term exemption provision applies to small manufacturers, as defined by the rule, regardless of whether they are located within or outside of New York State. In the case of incidental impacts, the Supreme Court has applied a balancing test to evaluate the relative impacts of a state law on interstate and intrastate commerce. See, *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137 (1970). Courts have struck down even nondiscriminatory state statutes, when the burden on interstate commerce is ''clearly excessive in relation to the putative local benefits.'' Id. at 142.

At the outset, EPA notes that it is unquestionable that the State has a substantial and legitimate interest in obtaining VOC emissions reductions for the purpose of attaining the Ozone NAAQS. The adverse health consequences of exposure to ozone are well known and well established and need not be repeated here. See, *e.g.*, National Ambient Air Quality Standards for Ozone: Final Response to Remand, 68 FR 614620–61425 (January 6, 2003). Thus, the New York AIM coatings rule is protective of the public health of the citizens of New York State. The courts have recognized a presumption of validity where the state statute affects matters of public health and safety. *See, e.g., Kassel* v. *Consolidated Freightways Corp. of Delaware,* 450 U.S. 662, 671 (1980). Moreover, even where the state statute in question is intended to achieve more general environmental goals, courts have upheld such statutes notwithstanding incidental impacts on out of state manufacturers of a product. *See, e.g*, *Minnesota* v. *Clover Leaf Creamery, et al.*, 449 U.S. 456 (1981) (upholding state law that banned sales of milk in plastic containers to conserve energy and ease solid waste problems).

The commenter asserts, without reference to any facts, that the New York AIM coatings rule imposes burdens and has impacts on consumers that are ''clearly excessive in relation to the purported benefits * * *'' By contrast, EPA believes that the burdens of the New York AIM coatings rule are not so overwhelming as to trump the State's interest in the protection of public health. First, the New York AIM coatings rule does not restrict the transportation of coatings in commerce itself, only the sale of nonconforming coatings within the State's own boundaries. The State's rule excludes coatings sold or manufactured for use outside the State or for shipment to others. New York AIM Coatings, subpart 205.1(b). The New York AIM coatings rule cannot be construed to interfere with the transportation of coatings through the State en route to other states. As such, EPA believes that the cases concerning impacts on the interstate modes of transportation themselves are inapposite. *See, e.g.*, *Bibb* v. *Navajo Freight Lines,* 359 U.S. 520 (1938).

Second, the New York AIM coatings rule is not constructed in such a way that it has the practical effect of requiring extraterritorial compliance with the state's VOC limits. The New York AIM coatings rule only governs coatings manufactured or sold for use within the State's boundaries. The manufacturers of coatings in interstate commerce are not compelled to take any particular action, and they retain a wide range of options to comply with the rule, including but not limited to: (i) Ceasing sales of nonconforming products in New York; (ii) reformulating nonconforming products for sale in New York and passing the extra costs on to consumers in that state; (iii) reformulating nonconforming products for sale more broadly; (iv) developing new lines of conforming products; or (v) entering into production, sales or marketing agreements with companies that do manufacture conforming products. Because manufacturers or retailers of coatings in other states are not forced to meet New York's regulatory requirements elsewhere, the rule does not impose the type of obligatory extraterritorial compliance that the courts have considered unreasonable. *See, e.g.*, *NEMA* v. *Sorrell,* 272 F.3d 104 (2nd Cir. 2000) (state label requirement for light bulbs containing mercury sold in that state is not an impermissible restriction). The New York AIM coatings rule may have the effect of reducing the availability of coatings or increasing the cost of coatings within the State, but courts typically view it as the prerogative of the state to make regulatory decisions with regard to such impacts upon its own citizens. *See NPCA* v. *City of Chicago,* 45 F.3d 1124 (7th Cir. 1994), cert. denied, 515 U.S. 1143 (1995) (while local restriction on sales of paints used by graffiti artists may not be the most effective means to meet objective, it is up to the local government to decide).

Third, the burdens of the New York AIM coatings rule do not appear to fall more heavily on interstate commerce than upon intrastate commerce. The effect on manufacturers and retailers will fall on manufacturers and retailers, regardless of location, if they intend their products for sale within New York, and does not appear to have the effect of unfairly benefitting instate manufacturers or retailers. The mere fact that there is a burden on some companies in other states does not alone establish impermissible interference with interstate commerce. *See Exxon Corp.* v. *Maryland,* 437 U.S. 117, 126 (1978).

In addition, EPA notes that courts have not found violations of the Commerce Clause in situations where states have enacted state laws with the authorization of Congress. *See, e.g.*, *Oxygenated Fuels Assoc., Inc.* v. *Davis,* 63 F. Supp. 1182 (E.D. Cal. 2001) (state ban on MTBE authorized by Congress); *NEMA* v. *Sorell,* 272 F.3d 104 (2nd Cir. 2000) (RCRA's authorization of more stringent state regulations confers a ''sturdy buffer'' against Commerce Clause challenges). Section 183(e) of the Act governs the Federal regulation of VOCs from consumer and commercial products, such as coatings covered by the New York AIM coatings rule. EPA has issued a Federal regulation that provides national standards, including VOC content limits, for such coatings. *See* 40 CFR 59.400 *et seq*. Congress did not, however, intend section 183(e) to pre-empt additional state regulation of coatings, as is evident in section 183(e)(9) which indicates explicitly that states may regulate such products. EPA's regulations promulgated pursuant to the Act recognized that states might issue their own regulations, so long as they meet or exceed the requirements of the Federal regulations. *See*, *e.g.*, the National Volatile Organic Compound Emission Standards for Architectural Coatings, 40 CFR 59.410, and **Federal Register** which published the standards, 63 FR 48848, 48857 (September 11, 1998). Thus, EPA believes that Congress has clearly provided that a state may regulate coatings more stringently than other states.

In section 116 of the Act, Congress has also explicitly reserved to states and their political subdivisions the right to adopt local rules and regulations to impose emissions limits or otherwise abate air pollution, unless there is a specific Federal preemption of that authority. When Congress intends to create such Federal preemption, it does so through explicit provisions. *See*, *e.g.*, section 209(a) of the Act which pertains to state or local emissions standards for motor vehicles; section 211 of the Act which pertains to fuel standards. Moreover, the very structure of the Act is based upon ''cooperative federalism,'' which contemplates that each state will develop its own state implementation plan, and that states retain a large degree of flexibility in choosing which

sources to control and to what degree in order to attain the NAAQS by the applicable attainment date. *See Union Electric Co.* v. *EPA,* 427 U.S. 246 (1976). Given the structure of the Act, the mere fact that one state might choose to regulate sources differently than another state is not, in and of itself, contrary to the Commerce Clause.

Finally, EPA understands that there may be a practical concern that a plethora of state regulations could create a checkerboard of differing requirements that might not be the simplest approach to regulating VOCs from AIM coatings or other consumer products. Greater uniformity of standards does have beneficial effects in terms of more cost effective and efficient regulations. As EPA noted in its own AIM coatings rule, national uniformity in regulations is also an important goal because it will facilitate more effective regulation and enforcement, and minimize the opportunities for undermining the intended VOC emission reductions. 63 FR 48856–48857. However, EPA also recognizes that New York and other states with longstanding ozone nonattainment problems have local needs for VOC reductions that may necessitate more stringent coatings regulations. Under section 116 of the Act, states clearly have the authority to do so. New York may have additional burdens to insure compliance with its rule, but for purposes of this action EPA presumes that the State will take appropriate actions to enforce it as necessary. Because the New York AIM coatings rule meets the requirements of section 110(a)(2) of the Act, EPA has an obligation to approve the rule. EPA has no grounds for disapproval of the New York AIM coatings rule based upon the commenters commerce clause comment.

I. Comment: The Emission Limits and Compliance Schedule in the New York AIM Coatings Rule Are Neither Necessary Nor Appropriate to Meet Applicable Requirements of the Clean Air Act

The commenter claims that the New York AIM coatings rule is not ''necessary or appropriate'' for inclusion in the New York SIP, because EPA did not direct New York to achieve VOC reductions through the AIM coatings rule, but left it to the State to decide how such reduction can be achieved. The commenter further asserts that the New York AIM coatings rule is also not necessary or appropriate for inclusion in the New York SIP because of the numerous procedural and substantive failings on the part of NYSDEC in promulgating the rule.

Response: EPA disagrees with this comment. If fulfillment of the ''necessary or appropriate'' condition of section 110(a)(2)(A) required EPA to determine that a measure was necessary or appropriate and require a state to adopt that measure, this condition would present a ''catch 22'' situation. EPA does not generally have the authority to require the state to enact and include in its SIP any particular control measure, even a ''necessary'' one.[4] However, under section 110(a)(2)(A) a control measure must be either ''necessary *or* appropriate,'' (emphasis added); the use of the disjunctive ''or'' does not provide that a state must find that *only* a certain control measure and *no other measure* will achieve the required reduction. Rather, a state may adopt and propose for inclusion in its SIP any measure that meets the other requirements for approvability so long as that measure is at least an appropriate (and not necessarily exclusive), means of achieving emissions reduction. See also, *Union Electric Co.* v. *EPA*, 427 U.S. 246, 264–266 (1976) in which the Court held that ''necessary'' measures are those that meet the ''minimum conditions'' of the Act, and that a state ''may select whatever mix of control devices it desires,'' even ones more stringent than Federal standard, to achieve compliance with a NAAQS, and that ''the Administrator must approve such plans if they meet the minimum requirements of section 110(a)(2).'' Clearly, in light of the Act and the caselaw, EPA's failure to specify state adoption of a specific control measure cannot dictate whether a control measure is necessary or appropriate.

In this particular instance, EPA identified an emission reduction shortfall associated with New York's 1-hour ozone attainment demonstration SIP, and required New York to address the shortfall. See, 64 FR 70364 and 67 FR 5170. It is the State's prerogative to develop whatever rule or set of rules it deems necessary or appropriate such that the rule or rules will collectively achieve the additional emission reductions for attainment of the 1-hour ozone standard as identified by EPA.

As stated previously, the State's November 4, 2003, SIP revision submittal provides evidence that it has the legal authority to adopt the New York AIM coatings rule and that it has followed all of the requirements in the State's law and constitution that are related to adoption of the New York AIM coatings rule.

J. Comment: Comments Submitted to the NYSDEC on New York's Proposal of Its AIM Coatings Rule Are Incorporated by Reference in Sherwin-Williams' Letter to EPA Submitted as Comment to EPA's January 16, 2004 Proposed Approval of the New York AIM Coatings Rule

In its February 17, 2004, letter submitted to EPA as comment to EPA's proposed approval of the New York AIM Coatings Rule, the commenter incorporated by reference a ''Statement on behalf of the Sherwin-Williams Company on proposed 6 NYCRR Part 205'' presented to the NYSDEC at the Legislative Public Hearing, dated May 2, 2003 and ''Comments of the Sherwin-Williams Company'' to the NYSDEC, dated May 12, 2003. The following summarizes the comments that were presented to the NYSDEC and thereby incorporated by reference by the commenter:

(1) The commenter has significant concerns with the proposed standards for interior wood clear and semi-transparent stains, interior wood varnishes, interior wood sanding sealers, exterior wood primers, and floor coatings. The commenter asserts that New York's proposed AIM coatings rule is based upon the inaccurate assumption that compliant coatings are available or can be developed which will satisfy customer requirements and meet all of the performance requirements of these categories. The commenter contends that such coatings are not effectively within the limits of current technology and that this ''inaccurate assumption'' will result in increased and earlier repainting which can damage floors in New York due to seasonal variations in temperature and humidity.

(2) The commenter contends that NYSDEC has not considered the increase in emissions resulting from the performance issues and repainting.

(3) The commenter has suggested changes to the VOC standards for only a few of the 52 product categories proposed by New York in its AIM coatings rule, and claims that the version of the AIM coatings rule it counter-proposes will achieve significant reductions beyond the National AIM coatings rule.

(4) The commenter states that New York's proposed AIM coatings rule will

[4] As noted in *Virginia* v. *EPA*, EPA does have the authority within the mechanism created by section 184 of the Act to order states to adopt control measures recommended by the OTC, if EPA agrees with and approves that recommendation. 108 F.3d, n.3 at 1402. As previously stated, the OTC AIM model rule was not developed pursuant to the section 184 mechanism; EPA therefore has no authority to order that New York or any other state adopt this measure in order to reduce VOC emissions.

have a significant adverse impact on the commenter and the NYSDEC can issue another regulation that achieves substantial VOC reductions beyond the Federal AIM coatings rule without causing serious adverse impact on potential sales of certain products.

(5) The commenter contends that the reporting requirements and related compliance provisions of New York's proposed AIM coatings rule are unreasonable.

(6) The commenter states that New York's proposed AIM coatings rule is arbitrary and capricious because it does not include reasonable alternatives and because the small business limited short-term exemption provision should be available to all manufacturers.

(7) The commenter asserts that the economic analysis of New York's proposed AIM coatings rule is inaccurate because it uses a cost figure of $6400 per ton of emissions reduced based upon an economic analysis done for California. It contends that the cost figure is inappropriate given the differences in the stringency of the current requirements for AIM coatings in New York versus California, and therefore, New York needs to make an independent determination of the cost of VOC reductions from its proposed AIM coatings regulation.

(8) The commenter has indicated that both the Consumer Products regulation and AIM coatings rule proposed by New York are based on rulemakings in California. However, New York's proposal includes the California averaging provision for consumer products but does not do so for AIM. The commenter asserts that failure to include the California averaging provisions in the New York AIM coatings rule is arbitrary and capricious, and places an unequal burden on the architectural coating industry.

(9) The commenter also submitted comments to NYSDEC regarding it proposed AIM coatings rule challenging that the NYSDEC does not have authority under the State ECL to adopt the proposed AIM coatings rule.

Response: As previously stated in this document, EPA disagrees with the commenter's assertion that the adoption of the AIM coatings regulation by the NYSDEC is in violation of the ECL. Please see EPA's response to Comment E. With regard to the other comments submitted by the commenter to the NYSDEC on its proposed AIM coatings rule that it has incorporated by reference in its comments to EPA on EPA's February 16, 2004, proposed approval, EPA's response is that , it is important to understand EPA's role and responsibilities with regard to the review and approval, or disapproval, of rules submitted as SIP revisions. Prior to approving a state submitted SIP revision, pursuant to section 110(a) of the Act, EPA reviews the submission to ensure that the state provided the opportunity for comment and held a hearing(s) on the state regulation that is at issue in the proposed SIP revision. In this case, New York's November 4, 2003, SIP submittal and its November 21, 2003, supplemental SIP submittal to EPA, of its AIM coatings rule include the necessary documentation to demonstrate that it met these requirements. New York's SIP revision submissions are included in the docket of this rulemaking.

A complete SIP revision submission from a state includes copies of timely comments properly submitted to the state on the proposed SIP revision and the state's responses to those comments. New York's November 4, 2003, submission of its AIM coatings rule as a SIP revision to EPA properly includes both the comments submitted on its proposed AIM coatings rule and the States responses to those comments. See both the documents entitled, Assessment of Public Comments on Proposed Revisions to 6 NYCRR part 205, Architectural and Industrial Maintenance (AIM) Coatings and New York State Register, Rule Making Activities, Notice of Adoption, pg. 2, November 12, 2003.

The New York SIP revision submission of its AIM coatings rule does not request that EPA approve a specific amount of VOC emission reduction credit. As such, the comments regarding the State's emission reduction calculations are not germane to EPA's current rulemaking to approve New York's November 4, 2003, and the supplemental November 21, 2003, SIP revision. The State's responses to the comments made by the commenter in its May 12, 2003, letter submitted to the NYSDEC as part of its timely comments on the proposed New York AIM coatings rule are included in the States' submission to EPA for approval of the SIP revision. (Comments were to be submitted to the NYSDEC on its proposed SIP revision by May 12, 2003).

The cost per ton figure determined by New York in its regulatory impact statement, its decision to rely upon information from California, its decision on whether to include reasonable alternatives, its choice not to include averaging provisions in its AIM coatings rule, its choice of reporting requirements and its choice to include a small business limited short-term exemption are all decisions which fall within the State's purview, and issues regarding those decisions are rightfully raised by interested parties to the State during its regulatory adoption process. Therefore, it was appropriate that the commenter comment to the State on these matters during the adoption of its AIM coatings rule. EPA has reviewed the SIP revision submitted and has determined that the commenter's comments on those issues it has incorporated by reference in this rulemaking, along with the NYSDEC's responses to those issues, are included therein. In the context of a SIP approval, EPA's review of state decisions is limited to whether the rule meets the minimum criteria of the Act. Provided that the rule adopted by the state satisfies this criteria, EPA must approve such plans. See, *Union Electric Co.* v. *EPA*.

With regard to the commenter's comments concerning the availability of complying coatings and the ability to develop complying coatings that can meet customer requirements and performance requirements, EPA notes that NYSDEC addressed these comments in its Assessment of Public Comments document. NYSDEC researched various AIM coatings surveys and performance studies which ''demonstrate the technical feasibility of the proposed limits and that coatings reformulated to meet these limits perform as expected.'' NYSDEC determined that quality AIM coatings are available in all categories which comply with the VOC content limits specified in the proposed New York AIM coatings rule, and therefore, New York adopted the proposed limits into its final AIM coatings rule. It is the State's prerogative to impose more stringent limits for architectural coatings as part of its SIP, and its election to do so is not a basis for EPA to disapprove the SIP. EPA has determined that New York's SIP revision was complete in that it included the commenter's comments and NYSDEC sufficiently responded to them. EPA has also determined that this SIP revision meets the minimum criteria for approval under the Act, including the requirement that the revision be at least as stringent as the Federal AIM coatings rule set forth at 40 CFR 59.400.

IV. What Is EPA's Conclusion?

EPA has determined that the comments, received in response to the January 16, 2004 proposed rulemaking action, do not alter its proposed determination that the SIP revision submitted by New York is fully approvable. EPA has evaluated New York's submittal for consistency with the Act, EPA regulations, and EPA

policy. EPA has determined that the revisions made to title 6 of the New York Codes, Rules and Regulations, part 205, entitled, ''Architectural and Industrial Maintenance Coatings'', effective November 22, 2003, meet the SIP revision requirements of the Act and, therefore, EPA has made the final determination that New York's AIM coatings rule is approvable.

V. Statutory and Executive Order Reviews

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 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.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) 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.*).

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

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 11, 2005. 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 may not be challenged later in proceedings to enforce its requirements. See section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: November 23, 2004.

Kathleen Callahan,

Acting Regional Administrator, Region 2.

■ Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart HH—New York

■ 2. Section 52.1670 is amended by adding new paragraph (c)(105) to read as follows:

§ 52.1670 Identification of plans.

* * * * *

(c) * * *

(105) Revisions to the State Implementation Plan submitted on November 4, 2003 and supplemented on November 21, 2003, by the New York State Department of Environmental Conservation, which consists of a control strategy that will achieve volatile organic compound emission reductions that will help achieve attainment of the national ambient air quality standard for ozone.

(i) Incorporation by reference:

(A) Regulation Part 205, ''Architectural and Industrial Maintenance Coatings.'' of title 6 of the New York Code of Rules and Regulations, filed on October 23, 2003, and effective on November 22, 2003.

■ 3. In § 52.1679, the table is amended by revising the entry under title 6 for part 205 to read as follows.

§ 52.1679 EPA-approved New York State regulations.

New York State regulation	State effective date	Latest EPA approval date	Comments
Title 6:			
* * * * * * *			
Part 205, Architectural and Industrial Maintenance Coatings.	11/22/2004	12/13/2004 and FR page citation.	

New York State regulation	State effective date	Latest EPA approval date	Comments
* * *	*	*	* * *

[FR Doc. 04–27261 Filed 12–10–04; 8:45 am]
BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 65

[Docket No. FEMA–P–7640]

Changes in Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Interim rule.

SUMMARY: This interim rule lists communities where modification of the Base (1% annual-chance) Flood Elevations (BFEs) is appropriate because of new scientific or technical data. New flood insurance premium rates will be calculated from the modified BFEs for new buildings and their contents.

DATES: These modified BFEs are currently in effect on the dates listed in the table below and revise the Flood Insurance Rate Map(s) in effect prior to this determination for the listed communities.

From the date of the second publication of these changes in a newspaper of local circulation, any person has ninety (90) days in which to request through the community that the Mitigation Division Director of the Emergency Preparedness and Response Directorate reconsider the changes. The modified BFEs may be changed during the 90-day period.

ADDRESSES: The modified BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: Doug Bellomo, P.E., Hazard Identification Section, Emergency Preparedness and Response Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2903.

SUPPLEMENTARY INFORMATION: The modified BFEs are not listed for each community in this interim rule. However, the address of the Chief Executive Officer of the community where the modified BFE determinations are available for inspection is provided.

Any request for reconsideration must be based on knowledge of changed conditions or new scientific or technical data.

The modifications are made pursuant to Section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The modified BFEs are the basis for the floodplain management measures that the community is required to either adopt or to show evidence of being already in effect in order to qualify or to remain qualified for participation in the National Flood Insurance Program (NFIP).

These modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, State, or regional entities.

The changes in BFEs are in accordance with 44 CFR 65.4.

National Environmental Policy Act

This rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. No environmental impact assessment has been prepared.

Regulatory Flexibility Act

The Mitigation Division Director of the Emergency Preparedness and Response Directorate certifies that this rule is exempt from the requirements of the Regulatory Flexibility Act because modified base flood elevations are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are required to maintain community eligibility in the NFIP. No regulatory flexibility analysis has been prepared.

Regulatory Classification

This interim rule is not a significant regulatory action under the criteria of Section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 12612, Federalism

This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

Executive Order 12778, Civil Justice Reform

This rule meets the applicable standards of Section 2(b)(2) of Executive Order 12778.

List of Subjects in 44 CFR Part 65

Flood insurance, Floodplains, Reporting and record keeping requirements.

■ Accordingly, 44 CFR part 65 is amended to read as follows:

PART 65—[AMENDED]

■ 1. The authority citation for part 65 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 65.4 [Amended]

■ 2. The tables published under the authority of § 65.4 are amended as follows: