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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[R03-OAR-2005-VA-0003; FRL-7905-9]

#### Approval and Promulgation of Air Quality Implementation Plans; Virginia; Minor Revisions to the Fugitive Dust and Waiver Requirements

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule.

**SUMMARY:** EPA is taking direct final action to approve a revision to the Virginia State Implementation Plan (SIP). The revision removes oil application as an acceptable alternative fugitive dust emissions reduction method, due to an existing prohibition of oil application, on land, found in the Virginia statute. In addition, the revision changes a specific reference from "Executive Director" to "Director." EPA is approving these minor revisions to Virginia's regulations in accordance with the requirements of the Clean Air Act.

**DATES:** This rule is effective on June 28, 2005 without further notice, unless EPA receives adverse written comment by May 31, 2005. 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 Regional Material in EDocket (RME) ID Number R03-OAR-2005-VA-0003 by one of the following methods:

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

B. Agency Web site: <http://www.docket.epa.gov/rmepub/> RME, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.

C. E-mail: [morris.makeba@epa.gov](mailto:morris.makeba@epa.gov).

D. Mail: R03-OAR-2005-VA-0003, Makeba Morris, Chief, Air Quality Planning Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

E. 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 RME ID No. R03-OAR-2005-VA-0003. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at <http://www.docket.epa.gov/rmepub/>, 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 RME, [regulations.gov](http://www.regulations.gov) or e-mail. The EPA RME and the Federal [regulations.gov](http://www.regulations.gov) websites are 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 RME or [regulations.gov](http://www.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.

**Docket:** All documents in the electronic docket are listed in the RME index at <http://www.docket.epa.gov/rmepub/>. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in RME or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

**FOR FURTHER INFORMATION CONTACT:** Linda Miller, (215) 814-2068, or by e-mail at [miller.linda@epa.gov](mailto:miller.linda@epa.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On February 2, 2004, the Virginia Department of Environmental Quality submitted a formal revision to its State Implementation Plan (SIP). The SIP revision consists of minor modifications to Virginia's fugitive dust and waiver regulations. These minor revisions remove language that conflicts with the Virginia statute and clarifies who may grant a waiver.

##### II. Summary of SIP Revision

The SIP revision, submitted on February 2, 2004, includes regulatory modifications made to alleviate a conflict between statutory provisions and regulatory requirements. The Virginia statute (Code of Virginia, Section 62.1-44.34:18) prohibits the discharge of oil upon land. The previously SIP approved Virginia regulations concerning fugitive dust/emissions conflicted with the statutory prohibition. The revisions to 9 VAC 5-40-90 and 9 VAC 5-50-90 remove the reference to application of oil as a means to reduce fugitive dust emissions. The change does not affect the stringency of the SIP as there are several other alternatives to reduce fugitive emissions.

In addition, there are several other minor editorial corrections made to 9 VAC 5-40-120 and 9 VAC 5-50-120. The reference to "Executive Director" is changed to "Director," and the word "methods" is removed from several provisions in the regulation. These minor editorial changes do not alter the interpretation of the SIP approved regulations.

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, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege law, Va. Code Sec. 10.1-1198, precludes granting a privilege to documents and information "required by law," including documents and information "required by Federal law to maintain program delegation, authorization or approval," since Virginia must "enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts. \* \* \*" The opinion concludes that "[r]egarding § 10.1-1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval."

Virginia's Immunity law, Va. Code Sec. 10.1-1199, provides that "[t]o the extent consistent with requirements imposed by Federal law," any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any Federally authorized programs, since "no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity."

Therefore, EPA has determined that Virginia's Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its program consistent with the Federal requirements. In any event, because EPA has also determined that a state

audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the 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 approving a revision to the SIP to remove the reference to application of oil as a means to reduce fugitive dust emissions in 9VAC 5-40-90-2 and 9VAC 5-50-90-2. EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment to approve a minor change to regulations 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 the SIP revision if adverse comments are filed. This rule will be effective on June 28, 2005 without further notice unless EPA receives adverse comment by May 31, 2005. 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.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air 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 Clean Air 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.*).

#### 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. 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**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

*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 28, 2005. Filing a petition for reconsideration by

the Administrator of this final rule to approve minor changes to the visible emissions and fugitive dust regulations does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action to approve minor revisions to the Virginia fugitive dust and waiver provisions, 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, Particulate matter.

Dated: April 20, 2005.

**Donald S. Welsh,**  
*Regional Administrator, Region III.*

■ 40 CFR part 52 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 VV—Virginia**

■ 2. In § 52.2420, the table in paragraph (c) is amended by revising the entries under Chapter 40, Part II, sections 5–40–90 and 5–40–120; and Chapter 50, Part II, sections 5–50–90 and 5–50–120 to read as follows:

**§ 52.2420 Identification of plan.**

\* \* \* \* \*

(c) \* \* \*

**EPA-APPROVED REGULATIONS AND STATUTES IN THE VIRGINIA SIP**

State citation (9 VAC 5)	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
* * *	* * *	* * *	* * *	* * *
<b>Chapter 40 Existing Stationary Sources [Part IV]</b>				
* * *	* * *	* * *	* * *	* * *
<b>Part II Emission Standards</b>				
<i>Article 1 Visible Emissions and Fugitive Dust/Emissions (Rule 4–1)</i>				
5–40–90	Standard for fugitive dust/emissions	2/1/03	4/29/05	Insert page number where the document begins]
5–40–120	Waiver	2/1/03	4/29/05	[Insert page number where the document begins]
* * *	* * *	* * *	* * *	* * *
<b>Chapter 50 New and Modified Stationary Sources [Part V]</b>				
* * *	* * *	* * *	* * *	* * *
<b>Part II Emission Standards</b>				
<i>Article 1 Standards of Performance for Visible Emissions and Fugitive Dust/Emissions (Rule 5–1)</i>				
5–50–90	Standard for fugitive dust/emissions	2/1/03	4/29/05	[Insert page number where the document begins]
5–50–120	Waiver	2/1/03	4/29/05	[Insert page number where the document begins]
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## EPA-APPROVED REGULATIONS AND STATUTES IN THE VIRGINIA SIP—Continued

State citation (9 VAC 5)	Title/subject	State effective date	EPA approval date	Explain- ation [former SIP citation]
[FR Doc. 05–8606 Filed 4–28–05; 8:45 am] BILLING CODE 6560–50-P	format for the <b>SUPPLEMENTARY INFORMATION</b> section: 1. Background 2. Adverse Public Comment and EPA Response			5, 2005, stating that EPA’s approval of Maine’s 111(d) plan revision gives “corporate polluters more time to pollute” and that this compliance extension should not be approved. The commenter asserts that it is “illegal to kill your fellow citizens when you have a choice” to spend money to protect the health of American citizens, and that “anything less equates to terrorism and war on [A]mericans.”
<b>ENVIRONMENTAL PROTECTION AGENCY</b>	<b>1. Background</b>			<i>Response:</i> The commenter makes blanket allegations about injury to the public with no support. EPA does not anticipate that Maine’s 111(d) plan revision will endanger the public health and, therefore, disagrees with the commenter.
<b>40 CFR Part 62</b>	On March 1, 2005, EPA published a Direct Final Rule (“DFR”) approving a revision to the State of Maine’s 111(d) plan for the control of TRS from existing kraft pulp mills at Chapter 124. 70 FR 9872. A detailed explanation of EPA’s rationale for approving the 111(d) plan revision was provided in the March 1, 2005 DFR. In accordance with direct final rulemaking procedures, on March 1, 2005, EPA also published a companion notice of proposed rulemaking of this revision. 70 FR 9901. On March 5, 2005, EPA received one adverse comment on its proposed approval, which is summarized and addressed in section 2 below. <sup>1</sup> EPA therefore published a withdrawal of the DFR on March 15, 2005. 70 FR 12591.			The term “total reduced sulfur” refers to a combination of compounds consisting primarily of hydrogen sulfide, methyl mercaptan, dimethyl sulfide, and dimethyl disulfide. These compounds are emitted when sulfur-based chemicals are used to dissolve wood chips as part of the paper making process. 70 FR 9872, 9874 (Mar. 1, 2005). These sulfides are extremely odorous. 41 FR 42012 (September 24, 1976) (proposed new source performance standards (NSPS) for kraft pulp mills).
[R01–OAR–2004–ME–0002; A–1–FRL–7903–9]	<b>2. Adverse Public Comment and EPA Response</b>			As EPA explained in both the Agency’s 1979 Emission Guideline for kraft pulp mills (EPA Guidelines Series, “Kraft Pulping: Control of TRS Emissions from Existing Mills” (March 1979) (“TRS Emission Guideline”)) and EPA’s 1978 new source performance standards for kraft pulp mills (43 FR 7568 (February 23, 1978)), studies analyzing the effects of TRS emissions from kraft pulp mills have focused on the odor associated with those emissions. <i>See</i> TRS Emission Guideline at 2–8. Based on those studies, and given the low concentrations of TRS compounds found near existing kraft pulp mills, EPA determined that TRS emissions from the brownstock washer systems at these facilities were not likely to endanger the public health. <i>Id.</i> at 2–12. The commenter has submitted no information to the contrary.
<b>Approval and Promulgation of Plan for the Control of Designated Pollutants; Maine; Total Reduced Sulfur From Existing Kraft Pulp Mills</b>	The Agency received one adverse comment on EPA’s proposed approval of Maine’s 111(d) plan revision. A summary of that comment and EPA’s response is provided below. <i>Comment:</i> The commenter submitted a comment by electronic mail on March			The Administrator has determined that TRS emissions from kraft pulp mills may cause or contribute to endangerment of the public welfare but
<b>AGENCY:</b> Environmental Protection Agency (EPA).				
<b>ACTION:</b> Final rule.				
<b>SUMMARY:</b> The EPA is approving a revision to Maine’s plan for controlling air pollution under section 111(d) of the Clean Air Act (“111(d) plan”). This revision to Maine’s regulations at Chapter 124, “Total Reduced Sulfur Control From Kraft Pulp Mills” (“Chapter 124”), extends the compliance date for existing brownstock washers to April 17, 2007. This action is being taken in accordance with section 111(d) of the Clean Air Act (“CAA”).				
<b>EFFECTIVE DATE:</b> This rule is effective on May 31, 2005.				
<b>ADDRESSES:</b> Copies of the documents relevant to this action are available for public inspection during normal business hours, by appointment at the Office of Ecosystem Protection, U.S. Environmental Protection Agency, EPA New England Regional Office, One Congress Street, 11th floor, Boston, MA 02114–2023; Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, Room B–108, 1301 Constitution Avenue, NW., Washington DC; and the Bureau of Air Quality Control, Department of Environmental Protection, First Floor of the Tyson Building, Augusta Mental Health Institute Complex, Augusta, ME 04333–0017.				
<b>FOR FURTHER INFORMATION CONTACT:</b> Ian D. Cohen, (617) 918–1655.				
<b>SUPPLEMENTARY INFORMATION:</b> The following table of contents describes the				

<sup>1</sup> EPA also received a written comment from the Edison Electric Institute (“EEI”), objecting to EPA’s description of CAA section 111(d) in the March 1, 2005 DFR. EEI’s comment had nothing to do with the substance of the DFR, as EEI itself notes in its comment letter, but rather concerned one sentence included in the statutory background section of the DFR. EEI noted in its comments that the one sentence description of CAA section 111(d) was incorrect because it did not account for amendments to section 111(d) enacted in 1990, and that the description of section 111(d) was inconsistent with EPA’s proposed Utility Rule, which specifically addressed the 1990 amendments to section 111(d). *See* 69 FR 4652 (Jan. 30, 2004) (proposed rule). EPA agreed with this comment and, for that reason, issued a “correcting amendment” to the statutory background section of the DFR on March 15, 2005. *See* 70 FR 12591 (Mar. 1, 2005); *see also* 70 FR 15994, 16029–32 (Mar. 29, 2005) (final rule containing EPA’s interpretation of CAA section 111(d)). As explained in the March 15, 2005 notice, EEI’s comment, and EPA’s response to that comment, have no bearing on the substance of EPA’s approval of Maine’s 111(d) plan revision and, therefore, are not addressed further in this final rule.