

D. Audit Privilege and Immunity Law

Nothing in this action should be construed as making any determination or expressing any position regarding Ohio's audit privilege and immunity law (Sections 3745.70–3745.73 of the Ohio Revised Code). The USEPA will be reviewing the effect of the Ohio audit privilege and immunity law on various Ohio environmental programs, including those under the CAA. The USEPA will take appropriate action(s), if any, after thorough analysis and opportunity for Ohio to state and explain its views and positions on the issues raised by the law. The action taken herein does not express or imply any viewpoint on the question of whether there are legal deficiencies in this or any Ohio CAA program resulting from the effect of the audit privilege and immunity law. As a consequence of the review process, the regulations subject to the action taken herein may be disapproved, Federal approval for the CAA program under which they are implemented may be withdrawn, or other appropriate action may be taken, as necessary.

E. 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. USEPA 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 the publication of the rule in the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

F. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by May 22, 1998. 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, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: February 20, 1998.

Michelle D. Jordan,

Acting Regional Administrator, Region V.

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 KK—Ohio

2. Section 52.1870 is amended by adding paragraph (c)(117) to read as follows:

§ 52.1870 Identification of plan.

* * * * *

(c) * * *

(117) On August 1, 1997 the Ohio Environmental Protection Agency submitted a requested revision to the Ohio State Implementation Plan. This revision constituted amendments to the emissions statement reporting regulations approved on October 13, 1994 and codified in paragraph (c)(100) of this section. The revision is intended to limit the applicability of these rules to stationary sources located within the State's marginal and above ozone nonattainment areas.

(i) Incorporation by reference.

(A) Ohio Administrative Code Rule 3745–24–02 Applicability. Effective July 31, 1997.

[FR Doc. 98–7131 Filed 3–20–98; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 52**

[PA 041–4069; FRL–5977–4]

Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania Conditional Limited Approval of the Pennsylvania VOC and NO_x RACT Regulation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is granting conditional limited approval of a State

Implementation Plan (SIP) revision submitted by the Commonwealth of Pennsylvania. This revision establishes and requires the implementation of reasonably available control technology (RACT) on all major sources of volatile organic compounds (VOCs) and nitrogen oxides (NO_x). The intended effect of this action is to grant conditional limited approval to this Pennsylvania RACT regulation.

EFFECTIVE DATE: This final rule is effective on April 22, 1998.

ADDRESSES: Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, Pennsylvania 19107; the Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460; and Pennsylvania Department of Environmental Protection, Bureau of Air Quality, P.O. Box 8468, 400 Market Street, Harrisburg, Pennsylvania 17105.

FOR FURTHER INFORMATION CONTACT: Cynthia H. Stahl, (215) 566–2180, at the above EPA Region III address.

SUPPLEMENTARY INFORMATION:**Background**

On August 12, 1997 (62 FR 43134), EPA published a notice of proposed rulemaking (NPR) for the Commonwealth of Pennsylvania. The NPR proposed conditional limited approval of the Pennsylvania RACT regulation for NO_x and VOC sources. (Pennsylvania Chapters 129.91 through 129.95). The formal SIP revision was submitted by the Pennsylvania Department of Environmental Protection (PA DEP, then known as the Pennsylvania Department of Environmental Resources) on February 4, 1994. This submittal was amended with a revision on May 3, 1994 correcting and clarifying the presumptive NO_x RACT requirements under Chapter 129.93(b)(4). The submittal was again amended on September 18, 1995 by the withdrawal from EPA consideration of provisions 129.93(c)(6) and (7) pertaining to best available control technology (BACT) and lowest achievable emission rate (LAER). A description of Pennsylvania's SIP revision and EPA's rationale for granting it conditional limited approval were provided in the NPR and shall not be restated here.

Comments Received on EPA's Proposed Action

In response to the August 12, 1997 proposed action, EPA received comments from PADEP. The PADEP comments were the only ones received. The comments relevant to the rulemaking and EPA's responses follow below. A more detailed discussion can be found in the Technical Support Document (TSD) prepared on this rulemaking. A copy of the TSD may be obtained from the EPA Regional Office listed in the ADDRESSES section of this document.

Comment 1

Pennsylvania states that the Clean Air Act (the Act) RACT requirements do not specify that "upfront" emission limitations for each source or source category must be included in a RACT SIP. The Pennsylvania RACT regulation requires the submission of RACT plans, sets forth a requirement to perform a top-down RACT analysis and requires implementation of RACT by no later than May 31, 1995.

Response 1

The Act requires the State to submit RACT rules for major sources not covered by a control techniques guideline (CTG) by November, 15, 1992 and for sources to implement RACT by May 31, 1995. Implementation of RACT would require that specific requirements are set forth, including appropriate emission limitation requirements and monitoring and recordkeeping requirements. The Pennsylvania RACT regulation, while strengthening the SIP by establishing the requirement for sources to submit RACT plans, general procedures to determine RACT, and a schedule, does not provide the necessary specific requirements for each subject source so that RACT can be implemented by May 31, 1995. Nor does it provide the certainty in terms of emission reductions that will be achieved to enable the State to perform the analyses required for an attainment demonstration.

Without certainty as to the control requirements that would apply to sources, EPA cannot determine at this point in time whether all major non-CTG sources are subject to appropriate and enforceable RACT requirements. For that reason, EPA has long taken the position that RACT rules may not merely be procedural rules that require the source and the State to later agree to an appropriate level of control; rather the rules submitted to meet the RACT requirement of the Act must identify the

appropriate level of control for source categories or for individual sources. EPA does not believe that it can fully approve the Commonwealth's plan as providing for RACT in accordance with section 182(b) unless and until the Agency can review the State-adopted control requirements to determine whether such controls are "reasonably available." EPA was upheld on this interpretation of RACT in *State of Michigan v. Thomas*, 805 F.2d 176 (6th Cir. 1986) (interpreting the RACT requirement in section 172 of the pre-amended CAA). However, although EPA does not believe that this procedural rule, standing alone, meets the RACT requirements of section 182(b), EPA does believe that it will help the State achieve healthier air by requiring sources to identify and implement control requirements. Therefore, while EPA cannot fully approve this rule as meeting the section 182(b) RACT requirement, the Agency does believe that it can and should be approved into the SIP. Consequently, EPA is granting limited approval to the Pennsylvania RACT regulation on the basis that it strengthens the SIP.

Comment 2

Pennsylvania states that by accepting the Pennsylvania RACT regulation as complete, EPA has determined that the case-by-case process contained within that regulation meets the requirements of the Act. Pennsylvania further states that the completeness criteria include a requirement for numeric emission limitations so that if EPA believes that emission limitations were appropriate for any of the RACT source categories, it should have found the Pennsylvania RACT submittal incomplete. By not finding the Pennsylvania submittal incomplete, EPA has accepted the Pennsylvania regulation as not needing numeric emission limitations.

Response 2

The completeness review and the approvability determination are two separate processes as explicitly recognized in the Clean Air Act. The completeness criteria in 40 CFR Part 51, Appendix V (adopted pursuant to section 110(k)(1)(A)) provide the means to ensure that the administrative requirements of SIP submittals are met and that all the information necessary to judge approvability of the SIP submittal is included in the submittal. The Act provides that after EPA determines a submission is complete or it is deemed complete, then it provides for EPA to approve or disapprove the submission (section 110(k)(2) and (3)). Consequently, a determination of

completeness does not presume approvability. The criteria used to judge approvability of the Pennsylvania RACT regulation are not the same as the completeness criteria. EPA's determination of completeness regarding the Pennsylvania RACT regulation simply meant that EPA had the materials necessary to make a decision as to approvability of the regulation. In the August 12, 1997 proposed rulemaking notice EPA provided the rationale for its proposed decision regarding the approvability of the Pennsylvania RACT regulation.

Theoretically, EPA could have found the Pennsylvania RACT SIP submittal incomplete because the Part 51 Appendix V completeness criteria at 2.2(g) states that the submittal should contain evidence of emission limitations, among other elements. There are two compelling reasons why EPA did not make such a finding and why such a rigid interpretation of the completeness criteria is counterproductive. First, the completeness criteria in Appendix V must be applied to all SIP submittals where numeric emission limitations are not expected or required. Such SIP submittals include air quality plans (attainment demonstrations, rate of progress plans) and the maintenance plans that must accompany requests to redesignate areas. The rigid interpretation of the completeness criteria could warrant finding these types of SIP submittals incomplete. It is not the intent of the Appendix V completeness criteria to reject as incomplete all SIPs that do not contain numeric emission limitations. Second, it is possible that RACT for certain sources and source categories could consist of requirements that do not specifically include numeric emission limitations, but instead have other kinds of emission limitations. For instance, RACT can consist of operational requirements therefore, EPA did not apply the completeness criteria rigidly to exclude from consideration any RACT submittal that did not contain numeric emission limitations for every subject source. Furthermore, even if EPA was in error finding the Pennsylvania submission incomplete, EPA would not be precluded from finding a deficiency in the submittal package in the approval process.

Comment 3

Pennsylvania states that section 182 of the Act requires provisions to provide for RACT, but not specifically for numeric emission limitations. Furthermore, section 110 provides for numeric emission limitations where

necessary, indicating that there are times when emission limitations are not necessary.

Response 3

Numeric emission limitations are not a requirement for every SIP submittal. For SIPs such as emission inventory SIPs or maintenance plans, emission limitations do not make sense and are not required. This, however, does not preclude finding that emission limitations are appropriate and necessary for certain SIPs such as those establishing RACT requirements for certain source categories.

Comment 4

EPA's definition and interpretation of RACT expressly authorizes case-by-case RACT determinations. If EPA has changed its position, it has an obligation to revoke all prior inconsistent SIP approvals, issue SIP deficiency notices and subject all other states to the same rules as being applied in Pennsylvania.

Response 4

EPA's RACT definition recognizes that RACT may be determined on a case-by-case basis. However, under the Act, EPA is required to issue CTGs, which establish presumptive RACT requirements for various source categories. States generally use the CTGs to adopt RACT regulations that apply based on source categories but may choose to develop source-specific RACT rules if compelling reasons exist. For source categories not covered by a CTG, States may develop a general RACT requirement or they can develop RACT on a source-by-source basis. EPA's acknowledgment of the appropriateness of case-by-case RACT determinations does not mean that process-oriented RACT regulations, such as Pennsylvania's, meet the section 182(b)(2) requirements of the Act. Rather, for the reasons provided in response 1, above, EPA believes that the case-by-case RACT submissions must be submitted and approved in order to determine that the State has met the RACT requirement.

Comment 5

EPA states in its proposal that the Section 129.93 presumptive requirements for large coal-fired combustion units constitutes RACT for this source category. Therefore, EPA has accepted a control technology requirement alone as RACT and Pennsylvania should receive full approval for submission of RACT for this source category.

Response 5

EPA has stated, and Pennsylvania acknowledged in its September 23, 1996 letter, that even those sources subject to the presumptive requirement in Pennsylvania's Chapter 129.93 must submit RACT proposals to EPA for SIP approval. Pennsylvania Chapter 129.93 contains a presumptive requirement of low-NO_x burners with separate overfired air for coal-fired boilers with rated heat inputs of equal to or greater than 100 mmBTU/hr, but does not provide any numeric emission limitations. The condition that Pennsylvania must meet in submitting all sources subject to the Chapter 129.93 low-NO_x burner and separate overfired air control technology requirement reflects EPA's consistent position that control technology alone for these kinds of sources is not RACT. The submittal of these source RACTs as case-by-case RACT determinations using the procedures contained in Pennsylvania's RACT regulation (Chapter 129.91 and 129.92), in conjunction with EPA approval of these RACT proposals, will satisfy the section 182 RACT requirements of the Act for this group of sources. EPA and the Pennsylvania regulations define RACT as "the lowest emission limit that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility" (December 9, 1976 memorandum from Roger Strelow, Assistant Administrator for Air and Waste Management, to EPA Regional Administrators and 25 Pa. Code, Subpart C Article III, Chapter 121). Installation of control technology alone does not ensure that the lowest emission limits are being achieved. Consequently, in the ideal case, RACT for all sources would include numeric emission limitations and a control technology requirement. The practical approach, however, warrants obtaining numeric emission limitations only where technically and economically feasible. Numeric emission limitations are necessary and appropriate for coal-fired boilers rated \geq 100 mmBTU/hr. As a source category, these coal-fired boilers, almost exclusively utility boilers, are some of the largest NO_x emitting sources in the Commonwealth and in the Northeast United States. Establishment of numeric emission limitations at emission sources where operating and maintenance conditions can significantly affect the amount of emissions is prudent. Large coal-fired combustion units \geq 100 mmBTU/hr, even with emission controls, can emit NO_x at significantly different emission rates if operation and

maintenance of the units is not closely monitored. Since methods to accurately measure NO_x emissions from these large combustion units exist, compliance with numeric emission limitations is feasible. The operating circumstances, size and impact of these large boilers, together with the ability to accurately measure emissions, warrants the use of numeric emission limitations. Smaller combustion sources generally do not impact NO_x emissions to as large an extent as the large coal-fired combustion units. Numeric emission limitations on smaller units would be ideal, although requiring such numeric emission limitations on small combustion units is generally difficult because of the lack of accurate monitoring methods. Consequently, numeric emission limitations are appropriate to include in the RACT requirements for some sources, but are potentially infeasible as RACT for other types of sources. Pennsylvania's Chapter 129.93 (b) does not contain additional requirements that EPA has determined are appropriate for this source category, including numeric emission limitations. In the proposed rulemaking notice EPA clearly identified this deficiency in Section 129.93 (62 FR 43134). As EPA stated in the proposal, a technology requirement alone for this source category does not constitute RACT. EPA's conditional limited approval is based on the determination that Pennsylvania's process-oriented SIP does not fully satisfy the section 182(b)(2) RACT requirement of the Act.

Comment 6

Pennsylvania's large combustion units using continuous emission monitoring systems will be evaluated by the Department and will have their emission limitations submitted to EPA and implemented through the state operating permit program or through the Title V permit program, making these emission limitations federally enforceable. EPA and the public will have an opportunity to comment on those emission limitations at that time.

Response 6

EPA is required to determine through the SIP approval process whether the state has established emission limitations and other applicable requirements that meet RACT. The EPA review procedures, under the permitting process for the state operating permit program or the Title V program, provide for the federal enforceability of emission limitations. They are not a substitute for the kind of EPA approval required by Title I for establishing initial requirements for SIPs. Opportunity for

EPA to comment on a permit with a limited time period for veto are not sufficient for EPA to fulfill its statutory obligation to determine whether applicable requirements meet the RACT requirements of the Act. The Title V program is a means to incorporate all of the applicable requirements and not a mechanism to establish initial requirements. Process-oriented SIPs such as Pennsylvania's do not contain the necessary underlying RACT control requirements.

Comment 7

Pennsylvania states that it has submitted RACT proposals to EPA for all sources subject to the Pennsylvania regulation section 129.93(b)(1) requirement as of September 23, 1996. Pennsylvania further states that EPA agreed that if the sources are located in Allegheny or Philadelphia Counties, the respective local air regulatory agencies are responsible for these RACT proposals and that EPA would limit the applicability of Clean Air Act sanctions to those jurisdictions. Pennsylvania states that if EPA grants conditional as opposed to full approval of the RACT SIP, then this rulemaking action should reflect the agreements regarding Philadelphia and Allegheny County.

Response 7

As an initial matter, Pennsylvania is mistaken in its assertion that it had submitted RACT proposals for all sources subject to section 129.93(b)(1) by September 23, 1996. Section 129.93(b)(1) pertains to those coal-fired combustion units rated at greater than or equal to 100 million BTU/hr. Since September 23, 1996, PADEP has made SIP submittals to EPA for sources subject to section 129.93(b)(1). Further, EPA is aware that there remain sources in Pennsylvania subject to 129.93(b)(1) for which PADEP still has not submitted RACT proposals to EPA.

EPA's regulation for the automatic imposition of sanctions pursuant to section 179(a) of the Act provides that sanctions will be applied in the "affected area." 40 CFR 52.31; see 59 FR 39832, 39854 (Aug. 4, 1994). The affected area is defined as the geographic area subject to the relevant Act requirement. 40 CFR 52.31(b)(3). Under section 182(b), the relevant Act requirement at issue, Pennsylvania must submit RACT rules for each nonattainment area. Therefore, it is the nonattainment area as a whole that is the area subject to the relevant Act requirement. Consequently, if PA DEP fails to complete its SIP commitments for any portion of the Philadelphia or Pittsburgh nonattainment areas, EPA

must apply section 179 sanctions to the entire affected nonattainment area.

Comment 8

Pennsylvania disagrees with EPA's proposed de minimis methodology for purposes of determining when the Pennsylvania RACT regulation can be converted to a full approval action. Pennsylvania states that many sources have been added to the 1990 emission inventory since 1990 and that EPA should allow the Department to use either 1990 or a more recent inventory for this de minimis calculation.

Response 8

EPA formulated its policy for de minimis (as the term relates to the conversion of a generic RACT rule to full SIP approval) based on the 1990 emission inventory because this inventory is public, required to go through public notice and comment before changes are made to it, and represents the baseline of emissions used for air quality planning purposes. The Act specifies the use of the 1990 emission inventory for air quality planning purposes in order to provide for an established baseline from which emission reductions can be determined. If Pennsylvania has discovered additional sources or other inaccuracies in the 1990 emission inventory, it should correct those omissions and inaccuracies through the processes required to change the 1990 emission inventory. Using a later calendar year for the de minimis calculation raises issues related to the accessibility, verifiability, and consistency of the data. For purposes of determining whether a de minimis amount of emissions remain to be covered by specific SIP approved RACT requirements in converting the rulemaking action from conditional to limited approval and from limited approval to full approval, and in order to allow for consistent comparison, the baseline of emissions that is used must be public, verifiable, and consistent.

Comment 9

Pennsylvania states that EPA's failure to address comments submitted to the January 12, 1995 proposed rulemaking is inappropriate.

Response 9

The August 12, 1997 proposed rulemaking for the Pennsylvania generic VOC and NO_x RACT regulation withdraws the January 12, 1995 proposal and proposes conditional limited approval for the Pennsylvania RACT regulation. The August 1997 proposal completely replaces the

January 1995 proposal. In the August 1997 notice, EPA stated that comments made to the January 1995 proposal would not be addressed and invited all interested parties to submit comments on the August 1997 proposal. Only Pennsylvania submitted comments on the August 1997 proposal. In addition, the January 1995 proposed rulemaking actions were different from the August 1997 rulemaking action. EPA could not presume that comments made for one type of rulemaking action would be appropriate for another rulemaking action. If interested parties that commented on the January 1995 proposal believed that the same comments applied to the August 1997 proposal, the comments should have been resubmitted in response to the August 1997 proposal. There is no statutory obligation for EPA to respond to comments on a proposed rule where EPA has withdrawn the proposed rule and is not, therefore, taking final action on that proposal.

Comment 10

Pennsylvania believes that EPA should fully and unconditionally approve the Pennsylvania RACT regulation. In the alternative, EPA should grant conditional approval based on Pennsylvania meeting the conditions of its September 23, 1996 commitment letter to EPA.

Response 10

For the reasons provided in response to the previous comments, EPA believes it cannot fully approve Pennsylvania submission nor can it grant a conditional approval. Sections 182(b)(2) and 184(b)(4) of the Act require that Pennsylvania implement RACT for all major stationary sources. EPA believes, however, as stated in a November 7, 1996 policy memo, that it is possible to eventually fully approve the state generic RACT regulations like Pennsylvania's provided certain criteria are met. These criteria are described in detail in the August 12, 1997 proposed rulemaking notice (62 FR 43134) and summarized below in the Terms of Conditional Approval and Conversion of Limited Approval to Full Approval sections. This policy provides that such approval does not exempt any major source from RACT requirements but instead provides for a de minimis deferral of RACT. EPA fully expects every major VOC and NO_x source to implement RACT as required under sections 182 and 184 of the Act and for the state to submit those rules for approval into the SIP. Specifically, the November 7, 1996 EPA policy memorandum from Sally Shaver,

Director, Air Quality Strategies and Standards Division, to all Regional Air Division Directors, sets forth the methods for determining whether all but a de minimis amount of emissions are covered by a RACT rule. For VOC sources subject to the generic RACT regulation under consideration (i.e., non-CTG VOC sources), the state would need to submit, and then EPA must approve, the RACT requirements for all but a de minimis amount of VOC source emissions. The method used to determine whether a state has met the VOC de minimis deferral level is to compare the baseline of 1990 non-CTG VOC emissions with those non-CTG VOC emissions that have yet to have RACT approved into the SIP. Generally, EPA does not expect to defer more than 5% of the emissions calculated in the above manner in order to fully approve a state generic VOC RACT regulation. For NO_x sources, the de minimis deferral level is determined by using the 1990 NO_x emissions, excluding the utility¹ NO_x emissions. The remaining 1990 non-utility emissions are then compared with the amount of non-utility NO_x emissions that have yet to have RACT approved into the SIP. Generally, EPA expects all utility RACTs to be approved prior to application of this de minimis deferral policy and possible conversion of the generic RACT conditional approval to full approval. As with VOC source RACT, EPA does not expect to defer more than 5% of the emissions calculated in this manner in order to fully approve a state generic NO_x RACT regulation. States that have used a de minimis argument to exempt certain NO_x sources or groups of NO_x sources from RACT requirements, or from making a demonstration that what is being required is RACT, cannot again apply the use of a de minimis rationale with respect to conversion of their generic RACT rules to full approval. For these states, conversion of the generic RACT rule to full approval requires submittal and approval of all the remaining RACT subject sources. EPA continues to believe that the November 1996 policy is appropriate for addressing rulemaking options for process-oriented SIPs. Consequently, through this rule EPA is requiring that to receive full approval of its generic NO_x RACT regulation Pennsylvania will need to have had all utility RACT determinations approved by EPA and all but a de minimis level of non-utility RACT determinations approved into the

SIP. Full approval of Pennsylvania's generic RACT regulation in accordance with this policy does not change Pennsylvania's statutory obligation to implement RACT for all major sources. No major VOC or NO_x source is being exempted from RACT requirements through today's rulemaking.

Terms of the Conditional Approval

The Commonwealth's September 23, 1996 commitment letter includes the following conditions: Case-by-case RACT proposals for all major VOC and NO_x sources must be submitted as case-by-case SIP revisions including those sources covered by 25 Pa. Code § 129.93(b)(1) by no later than [INSERT date 12 months after the effective date of EPA final conditional approval]. Furthermore, by no later than [INSERT date 12 months after the effective date of EPA final conditional approval], Pennsylvania will: (1) certify that it has submitted case-by-case RACT proposals for all sources subject to the RACT requirements currently known to PADEP; or (2) demonstrate that the emissions from any remaining subject sources represent a de minimis level of emissions, as defined in this rulemaking document.

Once EPA has determined that the Commonwealth has satisfied this condition, EPA shall remove the conditional nature of this approval and the Pennsylvania VOC and NO_x regulations SIP revision will, at that time, retain limited approval status. Should the Commonwealth fail to meet the condition specified above, the final conditional limited approval of the Pennsylvania VOC and NO_x RACT regulation SIP revision shall convert to a disapproval.

Conversion From Limited Approval to Full Approval

Conversion of the Pennsylvania VOC and NO_x RACT regulation to full approval will occur when EPA has approved all of the case-by-case RACT proposals as SIP revisions.

As indicated previously, other specific requirements of and the rationale for EPA's proposed action are explained in the NPR and will not be restated here. Further details are contained in the TSD which may be obtained from the EPA Region III office listed in the ADDRESSES section above.

Final Action

EPA is granting conditional limited approval to the Pennsylvania VOC and NO_x RACT regulation as a revision to the Pennsylvania SIP.

Nothing in this action should be construed as permitting or allowing or

establishing a precedent for any future request for revision to any state implementation plan. Each request for revision to the state implementation plan shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

Administrative Requirements

A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from E.O. 12866.

B. Regulatory Flexibility Act

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

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

If the conditional approval is converted to a disapproval under section 110(k)(3), based on the State's failure to meet the commitment, it will not affect any existing state requirements applicable to small entities. Federal disapproval of the state submittal does not affect its state-enforceability. Moreover, EPA's disapproval of the submittal does not impose a new Federal requirement. Therefore, EPA certifies that a conversion of this action to a disapproval action does not have a significant impact on a substantial number of small entities because it does not remove existing requirements nor

¹ "Utility" is defined as in 40 C.F.R. Part 72.2 (Acid Rain Program General Provisions—Definitions).

does it substitute a new federal requirement.

C. Unfunded Mandates

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

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

D. Submission to Congress and the General Accounting Office

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 a "major rule" as defined by 5 U.S.C. 804(2).

E. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action, pertaining to the conditional limited approval of the Pennsylvania VOC and NO_x RACT regulation, must be filed in the United States Court of Appeals for the appropriate circuit by May 22, 1998. 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 pertaining to the conditional limited approval of the Pennsylvania generic VOC and NO_x RACT regulation 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, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

Dated: March 4, 1998.

W. Michael McCabe,
Regional Administrator, Region III.

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

PART 52—[AMENDED]

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

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

Subpart NN—Pennsylvania

2. Section 52.2020 is amended by adding paragraph (c)(129) to read as follows:

§ 52.2020 Identification of plan.

* * * * *

(c) * * *

(129) Limited approval of revisions to the Pennsylvania Regulations, Chapter 129.91 through 129.95, pertaining to VOC and NO_x RACT submitted on February 4, 1994 by the Pennsylvania Department of Environmental Resources (now known as the Pennsylvania Department of Environmental Protection):

(i) Incorporation by reference.

(A) Letter of February 4, 1994 from the Pennsylvania Department of Environmental Resources transmitting Pennsylvania VOC and NO_x RACT regulations, Chapter 129.91 through 129.95.

(B) Pennsylvania Reasonably Available Control Technology Requirements for Major Stationary Sources of Volatile Organic Compounds and Oxides of Nitrogen regulation, Chapter 129.91 through 129.95, effective on January 15, 1994, except for Chapter 129.93(b)(4).

(C) Letter of May 3, 1994 from the Pennsylvania Department of Environmental Resources amending the

Pennsylvania regulation, Chapter 129.93(b)(4).

(D) Pennsylvania Reasonably Available Control Technology Requirements for Major Stationary Sources of Volatile Organic Compounds and Oxides of Nitrogen regulation, Chapter 129.93(b)(4), effective April 23, 1994.

(E) Letter for September 18, 1995 from the Pennsylvania Department of Environmental Protection amending Pennsylvania's February 4, 1994 submittal to EPA by withdrawing Chapter 129.93(c)(6) and (7) from EPA consideration.

(ii) Additional material.

(A) Remainder of February 4, 1994 State submittal.

(B) Letter of September 23, 1996 from Pennsylvania Department of Environmental Protection agreeing to meet certain conditions by no later than 12 months after the publication of the final conditional rulemaking. These conditions are:

(1) Pennsylvania certify that it has submitted case-by-case RACT proposals for all sources subject to the RACT requirements (including those subject to 25 Pa. Code section 129.93(b)(1)) currently known to PADEP; or

(2) Demonstrate that the emissions from any remaining subject sources represent a de minimis level of emissions, as defined in the final rulemaking.

3. Section 52.2023 is amended by adding paragraph (k) to read as follows:

§ 52.2023 Approval status.

* * * * *

(k) Conditional limited approval of revisions to the Pennsylvania Regulations, Chapter 129.91 through 129.95, pertaining to VOC and NO_x RACT submitted on February 4, 1994 and amended on May 3, 1994 by the Pennsylvania Department of Environmental Resources (now known as the Pennsylvania Department of Environmental Protection).

4. Section 52.2026 is amended by adding paragraph (e) to read as follows:

§ 52.2026 Conditional approval.

* * * * *

(e) Revisions to the Pennsylvania Regulations, Chapter 129.91 through 129.95, pertaining to VOC and NO_x RACT submitted on February 4, 1994 and amended on May 3, 1994 by the Pennsylvania Department of Environmental Resources (now known as the Pennsylvania Department of Environmental Protection) is conditionally approved. Pennsylvania must meet the following conditions by no later than 12 months after the

publication of the final conditional rulemaking. These conditions are:

(1) Pennsylvania certify that it has submitted case-by-case RACT proposals for all sources subject to the RACT requirements (including those subject to 25 Pa. Code section 129.93(b)(1)) currently known to PADEP; or

(2) Demonstrate that the emissions from any remaining subject sources represent a de minimis level of emissions, as defined in the final rulemaking.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[VA025-5033; FRL-5977-9]

Approval and Promulgation of Air Quality Implementation Plans; Commonwealth of Virginia—Prevention of Significant Deterioration Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a revision to the Commonwealth of Virginia's State Implementation Plan (SIP) under which the Commonwealth will be implementing the Prevention of Significant Deterioration of Air Quality program (PSD program) pursuant to its own SIP regulations. The Commonwealth had been implementing the PSD program under the terms of an EPA delegation to the Commonwealth of the authority to implement the Federal PSD regulations. Under the PSD program those constructing new major sources of a criteria air pollutant in areas that are attainment for the National Ambient Air Quality Standards (NAAQS) set for that pollutant, or constructing major modifications to such sources in such areas, must demonstrate that emissions from those sources will not cause violations of the NAAQS, or significantly deteriorate air quality beyond specified ambient increments, and that the emissions will be controlled by Best Available Control Technology (BACT). Additional provisions relevant to Class I areas may also apply.

EFFECTIVE DATE: This final rule is effective on April 22, 1998.

ADDRESSES: Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection

Division, U.S. Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, Pennsylvania 19107; the Air and Radiation Docket and Information Center, U.S.

Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460; and the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia, 23219.

FOR FURTHER INFORMATION CONTACT: Ray Chalmers, U.S. EPA Region III, Air Protection Division, Permits & Technology Assessment Section (3AP11), 841 Chestnut Building, Philadelphia, PA. Phone: (215) 566-2061. Internet:

“Chalmers.Ray@epamail.epa.gov”.

SUPPLEMENTARY INFORMATION:

I. Background

In a series of submittals, the Virginia Department of Air Pollution Control (DAPC), now known as the Department of Environmental Quality (VDEQ), submitted the elements for a revision to its State Implementation Plan (SIP) that would establish a program for the prevention of significant deterioration of air quality (PSD) for the review and permitting of new major sources and major modifications (the PSD program). On January 24, 1996, EPA proposed to disapprove or, in the alternative, to conditionally approve Virginia's PSD SIP revision. (61 FR 1880). EPA proposed disapproval because, in the agency's view, the Commonwealth's limitation of access to state judicial appeal (also known as standing) of permitting actions was inconsistent with the agency's interpretation that existing law and regulations require an opportunity for state judicial review under approved PSD SIPs by permit applicants and affected members of the public. In EPA's proposed rule, comment was solicited on the agency's view that a limited judicial review did not meet the minimum requirements for standing required for PSD SIP programs under the Clean Air Act (CAA) and EPA's implementing regulations.

Alternatively, if the agency determined after reviewing public comment that provisions for judicial standing were unnecessary, EPA proposed to conditionally approve Virginia's PSD SIP. EPA determined that Virginia was still required to amend the Commonwealth's PSD regulations that existed at the time of the proposed rule to include revised increments for particulate matter (PM) as promulgated by EPA on June 3, 1993, and EPA's revised “Guidelines for Air Quality Models”, promulgated on July 20, 1993. More detailed information on EPA's

proposed rulemaking actions and an analysis of Virginia's PSD regulations can be found in the proposed rule published on January 24, 1996 (61 FR 1880) and the Technical Support Document for the proposed rule.

II. Analysis

Subsequent to the publication of EPA's proposed rule on Virginia's PSD program, the deficiencies noted above were corrected. Regarding judicial standing in Virginia, EPA published a December 5, 1994, final rule in which EPA disapproved Virginia's Title V operating permits program for, among other things, the failure to provide adequate judicial standing. (59 FR 62324). Virginia appealed this decision before the Fourth Circuit Court of Appeals, which affirmed EPA's disapproval, 80 F.3d 869 (1996), and Virginia subsequently appealed its case to the U.S. Supreme Court. On January 21, 1997, the Supreme Court decided not to hear Virginia's case. In preparation for this eventuality, Virginia had previously adopted revised and acceptable judicial standing provisions, at sections 10.1-1318, 10.1-1457, and 62.1-44.29 of the Code of Virginia, but specified that the revised provisions would become effective only if Virginia's suit against EPA was unsuccessful. The Supreme Court's refusal to take Virginia's appeal has caused Virginia's revised judicial standing provisions to become effective, and Virginia's standing provisions are now fully acceptable. Virginia's revised standing law now provides judicial standing to any person who “meets the standard for judicial review of a case or controversy pursuant to Article III of the United States Constitution.” It further provides that “a person shall be deemed to meet such standard if: (i) Such person has suffered an actual or imminent injury which is an invasion of a legally protected interest and which is concrete and particularized; (ii) such injury is fairly traceable to the decision of the Board and not the result of the independent action of some third party not before the court; and (iii) such injury will likely be redressed by a favorable decision by the court.” This new standard is consistent with the standard for Article III standing articulated by the Supreme Court in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992). Consequently, EPA has determined that Virginia's standing provisions meet the requirements of the CAA and 40 CFR 51.166.

On February 6, 1997 Virginia submitted to EPA an Attorney General's Opinion affirming that the revised standing law would go into effect on