

Dated: April 22, 1999.

L.M. Bynum,

*Alternate OSD Federal Register Liaison
Officer, Department of Defense.*

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**ENVIRONMENTAL PROTECTION
AGENCY****40 CFR Part 52**

[VA024-5042; FRL-6318-5]

**Approval and Promulgation of Air
Quality Implementation Plans; Virginia;
Reasonably Available Control
Technology for Major Sources of
Nitrogen Oxides**

AGENCY: Environmental Protection
Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the Commonwealth of Virginia. This revision establishes and requires the implementation of reasonably available control technology (RACT) on major sources of nitrogen oxides (NO_x) in the Virginia portion of the Metropolitan Washington D.C. serious ozone nonattainment area. The intended effect of this action is to grant conditional limited approval of Virginia's regulations to impose RACT on major sources of NO_x.

EFFECTIVE DATE: This final rule is effective on May 28, 1999.

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, 1650 Arch Street, Philadelphia, Pennsylvania 19103; the Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460; Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia, 23219.

FOR FURTHER INFORMATION CONTACT: Kristeen Gaffney, (215) 814-2092. Or by e-mail at gaffney.kristeen@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: On January 26, 1999 (64 FR 3891), EPA published a notice of proposed rulemaking (NPR) for the Commonwealth of Virginia. The NPR proposed conditional limited approval of Virginia's NO_x RACT regulations for the Virginia portion of the Metropolitan Washington D.C. serious ozone

nonattainment area. No comments were received on the proposal.

I. Background

The Clean Air Act requires states to submit rules to implement RACT on major sources of NO_x in ozone nonattainment areas designated as moderate or above and throughout the Ozone Transport Region. The definition of major source is determined by the classification of the nonattainment area and whether or not it is located in the Ozone Transport Region. A portion of Virginia is part of the Metropolitan Washington D.C. serious ozone nonattainment area and that same portion of Virginia is in the Ozone Transport Region. Therefore, sources in the Virginia portion of the Washington D.C. nonattainment area which emit or have the potential to emit 50 tons or more of NO_x per year are considered major and are subject to the NO_x RACT requirements of the Act.

On November 9, 1992, the Virginia Department of Environmental Quality (VADEQ) submitted a revision to its SIP consisting of adopted regulations to impose NO_x RACT on major sources in the nonattainment area, known in state regulations as the Northern Virginia Emissions Control Area. The VADEQ supplemented its November 1992 submittal on December 11, 1992. On August 11, 1998, the VADEQ made another submittal to EPA withdrawing certain provisions of the November 9, 1992 submittal, and forwarding revisions that corrected typographical errors and recodified and renumbered one of the relevant regulations, Appendix T (now 9 VAC 5-40-311).

The November 9, 1992 submittal consisted of revisions to Virginia Regulation 120-01, Part IV, Emission Standards for General Process Operations (Rule 4-4) and Appendix T, entitled "Reasonably Available Control Technology Guidelines for Stationary Sources of Nitrogen Oxides". Rule 4-4 was amended to insert a new section, 120-04-0408, entitled "Standard for nitrogen oxides". To accommodate the insertion of section 120-04-0408, the revision also renumbered the previously existing sections 120-04-0408 through 120-04-0418, inclusive, as sections 120-04-0409 through 120-04-0419, inclusive. On April 11, 1998, the VADEQ submitted a revised version of Appendix T to correct a technical error in the *Virginia Register* version of the final rule dated November 30, 1992. This error was corrected by Virginia in the *Virginia Register* on June 23, 1997. On April 11, 1998, the Commonwealth submitted the corrected version of Appendix T. In addition to the

typographical correction, the Commonwealth also recodified Appendix T and renumbered it as 9 VAC 5-40-311.

Virginia's rule 120-04-0408 requires certain sources to comply with the applicable emission limits established in Appendix T (now known as 9 VAC 5-40-311); or to apply for an alternative emission limit through a source-specific RACT determination process. The emission limits of section C of 9 VAC 5-40-311 do not cover all categories of NO_x sources. Section C specifically enacts emission limits for boilers/steam generating units, process heaters and gas turbines. Other source categories, such as incinerators, reciprocating internal combustion engines, cement manufacturing and iron/steel manufacturing are not covered in 9 VAC 5-40-311. Therefore, not all potential major NO_x sources are subject to specific, presumptive "up-front" (i.e. immediately ascertainable) emission limits. Instead, the regulations establish a process for the Commonwealth to review and approve individual RACT emission limitations proposed by the sources, which are then to be submitted to EPA as SIP revisions. Additionally, subsection 120-04-0408(B) of Virginia's rule allows sources subject to the presumptive limits in Appendix T (now known as 9 VAC 5-40-311) to propose alternative RACT on a case-by-case basis provided they submit the proposal by January 1, 1994. The proposal must include technical and economic support documentation for the proposed RACT and include a schedule for compliance as expeditiously as practical but no later than May 31, 1995.

The Clean Air Act requires states to implement RACT on all major stationary sources. Process-oriented generic regulations, such as those submitted by Virginia, which do not include specific and ascertainable emission limits for all major sources, do not by themselves provide standards for EPA to approve or disapprove as satisfying the definition of RACT. Therefore, the Act's RACT requirements are satisfied only after the specific limits imposed by the Commonwealth on its major sources have been submitted to EPA as SIP revisions and approved by EPA as RACT for the subject sources.

In a November 7, 1996 policy memo from Sally Shaver, Director, Air Quality Strategies and Standards Division of the Office of Air Quality Planning and Standards, EPA issued guidance for approving state generic RACT regulations, like Virginia's, provided certain criteria are met. This guidance does not exempt any major source from RACT requirements but instead

provides for a *de minimis* deferral of RACT only for the purposes of approving the state's generic RACT regulation. The *de minimis* deferral level is determined by using the 1990 NO_x emissions, excluding the utility boiler NO_x emissions. The remaining 1990 non-utility boiler 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 that all utility boiler RACTs will be approved prior to application of this *de minimis* deferral policy and possible conversion of the generic RACT conditional approval to full approval. EPA does not expect to defer more than 5 percent of the emissions calculated in this manner in order to fully approve Virginia's generic NO_x RACT regulation. In accordance with the November 1996 policy, EPA is requiring that all utility boiler RACT determinations be approved by EPA and all but a *de minimis* level of non-utility boiler RACT determinations be approved into the SIP before the limited approval can be converted to full approval. Full approval of a generic RACT regulation under this policy does not change the Commonwealth's statutory obligation to implement RACT for all major sources. No major NO_x source is being exempted from RACT requirements through this policy or today's rulemaking.

Because EPA has not received SIP revisions from the Commonwealth for all source-specific RACT determinations, EPA can at best, according to the November 7, 1996 policy memorandum, grant conditional limited approval of Virginia's NO_x RACT generic rule. In a letter to EPA dated April 11, 1998, the VADEQ committed to submit, as SIP revisions, RACT determinations for all sources either not subject to the presumptive emission limits in Appendix T or electing alternative source-specific RACT requirements. The VADEQ committed to submit these RACT determinations within 12 months of EPA's final conditional limited approval of its generic rule.

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) "privilege" for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed. Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws

when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1-1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information (1) that are generated or developed before the commencement of a voluntary environmental assessment; (2) that are prepared independently of the assessment process; (3) that demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) that are required by law.

On January 12, 1997, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege Law, Va. Code Sec. 10.1-1198, precludes granting a privilege to documents and information "required by law," including documents and information "required by federal law to maintain program delegation, authorization or approval," since Virginia must "enforce federally authorized environmental programs in a manner that is no less stringent than their federal counterparts. . . ." The opinion concludes that "[r]egarding § 10.1-1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by federal law to maintain program delegation, authorization or approval."

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

Therefore, EPA has determined that Virginia's Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its 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.

II. Terms of and Rationale for Conditional Limited Approval

EPA is conditionally approving Virginia's NO_x RACT regulations based upon VADEQ's April 11, 1998 commitment to submit, as SIP revisions, RACT determinations for all currently known major sources subject to source-specific NO_x RACT requirements. In accordance with section 110(k)(4) of the Act (and consistent with the VADEQ's commitment letter of April 11, 1998), these RACT determinations must be submitted by May 30, 2000.

EPA is also granting limited approval of Virginia's NO_x RACT regulations, rule 120-08-0408, and the provisions of 9 VAC 5-40-311 (formerly Appendix T) as submitted by the VADEQ. The current Virginia SIP does not contain a general requirement that all major sources of NO_x in the nonattainment area must implement RACT. While EPA does not believe that the Virginia NO_x RACT regulations fully satisfy the requirements of the Act because of the generic provisions allowing for source-specific determinations, EPA is limitedly approving portions of Virginia's NO_x RACT regulations on the basis that they strengthen the SIP. The purpose of the limited approval of the requirement to implement RACT and the presumptive emission limits on certain categories of sources is because they strengthen the Virginia SIP by adding RACT standards for sources of NO_x in the Virginia portion of the Metropolitan Washington D.C. ozone nonattainment area where none existed before.

Other specific requirements of Virginia's NO_x RACT regulations and the rationale for EPA's action are explained in the Notice of Proposed Rulemaking and will not be restated here. No public comments were

received on the Notice of Proposed Rulemaking.

III. Final Action

EPA is granting conditional limited approval of the Commonwealth's November 9, 1992 NO_x RACT SIP submittal, as modified on December 11, 1992 and April 11, 1998. EPA's conditional approval is based upon the April 11, 1998 commitment made by VADEQ to submit, within 12 months of EPA's final rulemaking of this NO_x RACT SIP, source-specific RACT determinations for all currently known major sources subject to source-specific NO_x RACT requirements. EPA is also granting limited approval because adding RACT standards for major sources of NO_x in the Northern Virginia Emissions Control Area where none existed before strengthens the SIP.

To fulfill the conditions of this approval, the Commonwealth must, by May 30, 2000: (1) Certify that it has submitted, as SIP revisions, RACT proposals for all sources subject to source-specific NO_x RACT requirements; or (2) demonstrate that the emissions from any remaining subject sources represent a *de minimis* level of emissions (as described above). Once EPA has determined that the Commonwealth has satisfied this condition, EPA shall remove the conditional nature of its approval and the Virginia NO_x RACT regulations will, at that time, retain limited approval status. Should the Commonwealth fail to meet the conditions specified above, the final conditional limited approval of the NO_x RACT regulations SIP revision shall convert to a disapproval.

IV. Administrative Requirements

A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from review under E.O. 12866, entitled "Regulatory Planning and Review."

B. Executive Order 12875

Under E.O. 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a state, local, or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments. If EPA complies by consulting, E.O. requires EPA to provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected state, local, and tribal governments, the nature of their concerns, copies of written

communications from the governments, and a statement supporting the need to issue the regulation. In addition, E.O. 12875 requires EPA to develop an effective process permitting elected officials and other representatives of state, local, and tribal governments "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates." Today's rule does not create a mandate on state, local or tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of E.O. 12875 do not apply to this rule.

C. Executive Order 13045

E.O. 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), applies to any rule that the EPA determines (1) is "economically significant," as defined under E.O. 12866, and (2) the environmental health or safety risk addressed by the rule has a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to E.O. 13045 because it is not an economically significant regulatory action as defined by E.O. 12866, and it does not address an environmental health or safety risk that would have a disproportionate effect on children.

D. Executive Order 13084

Under E.O. 13084, EPA may not issue a regulation that is not required by statute, that significantly affects or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of

Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities." Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. This action does not involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of section 3(b) of E.O. 13084 do not apply to this rule.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. This final rule will not have a significant impact on a substantial number of small entities because 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, I certify 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 Clean Air Act, 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), 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, I certify that this disapproval action does not have a significant impact on a substantial number of small entities because it does not remove existing requirements nor does it substitute a new federal requirement.

F. 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 annual 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 promulgated does not include a Federal mandate that may result in estimated annual 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.

G. 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).

H. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action to conditionally limitedly approve Virginia's NO_x RACT regulations must be filed in the United States Court of Appeals for the appropriate circuit by June 28, 1999. 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, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

Dated: March 24, 1999.

W. Michael McCabe,
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. Section 52.2420 is amended by adding paragraphs (c)(131) and (c)(132) to read as follows:

§ 52.2420 Identification of plan.

* * * * *

(c) * * *

(131) Limited approval of revisions to the Virginia State Implementation Plan submitted on November 9, 1992 by the Virginia Department of Environmental Quality:

(i) Incorporation by reference.

(A) Letters of November 9, 1992 and December 11, 1992 from the Virginia Department of Environmental Quality transmitting Virginia rule 120-04-0408 to implement major source NO_x RACT requirements in the Northern Virginia Emissions Control Area.

(B) Virginia regulation 120-04-0408, "Standard for Nitrogen Oxides", pertaining to major source NO_x RACT requirements, effective on January 1, 1993.

(C) Renumbering of previously SIP approved sections in rule 120-04: -0408 and -0409 to 120-04-0409 and -0410, respectively and previously SIP approved sections -0412 through -0418 to -0413 through -0419, respectively, effective January 1, 1993.

(ii) Additional Material—Remainder of November 9, 1992 submittal and supplemental information submitted by the Virginia Department of Environmental Quality on December 11, 1992 and August 11, 1998 pertaining to 120-04-0408.

(132) Limited approval of revisions to the Virginia State Implementation Plan submitted on November 9, 1992 and August 11, 1998 by the Virginia Department of Environmental Quality:

(i) Incorporation by reference.

(A) Letters of November 9, 1992, December 11, 1992 and August 11, 1998

from the Virginia Department of Environmental Quality transmitting Virginia regulation 9 VAC 5-40-311 (formerly Appendix T) establishing RACT requirements on major sources in the Northern Virginia Emissions Control Area.

(B) Addition of Virginia regulation 9 VAC 5-40-311, sections A, B, C.1, C.2, C.3.b, and C.3.d-g and Errata pages, establishing RACT requirements for major sources of NO_x in the Northern Virginia Emissions Control Area, effective on July 1, 1997.

(ii) Additional Material—Remainder of November 9, 1992 submittal and supplemental information submitted by the Virginia Department of Environmental Quality on December 11, 1992 and August 11, 1998 pertaining to VAC 5-40-311.

3. Section 52.2450 is amended by adding paragraph (f) to read as follows:

§ 52.2450 Conditional approval.

* * * * *

(f) Revisions to the Virginia State Implementation Plan, pertaining to NO_x RACT requirements on major sources in the Northern Virginia Emissions Control Area, Virginia regulations 120-04-0408 and 9 VAC 5-40-311, submitted on November 9, 1992, December 11, 1992, and August 11, 1998 by the Virginia Department of Environmental Quality are conditionally approved. Virginia must meet the following conditions by no later than May 30, 2000, in accordance with criteria defined in the EPA Memorandum dated November 7, 1996 from the Director of the Air Quality Strategies and Standards Division of the Office of Air Quality Planning and Standards, entitled "Approval Options for Generic RACT Rules Submitted to Meet the Non-CTG VOC RACT Requirement and Certain NO_x RACT Requirements." This memorandum is available at the office of the U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, PA 19103. These conditions are:

(1) The VADEQ must certify, in writing, that it has submitted, as SIP revisions, RACT determinations for all sources subject to source-specific NO_x RACT requirements; or

(2) The VADEQ must demonstrate that the emissions from any remaining subject sources represent a de minimis level of emissions.

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