ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 70

[VA–T5–2001–01a; FRL–7112–5]

Clean Air Act Full Approval of Operating Permit Program; Virginia

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; final full approval.

SUMMARY: EPA is taking final action to grant full approval of the Commonwealth of Virginia's operating permit program. The Commonwealth's operating permit program was submitted in response to the Clean Air Act (CAA) Amendments of 1990 that required each States to develop, and submit to EPA, a programs for issuing operating permits to all major stationary sources and to certain other sources within the State's jurisdiction. The EPA granted final interim approval of Virginia's operating permit program on June 10, 1997, as corrected on March 19, 1998. The Commonwealth of Virginia amended its operating permit program to address the deficiencies identified in the interim approval, and this final rulemaking action approves those amendments. The EPA proposed full approval of Virginia's operating permit program in the **Federal Register** on October 10, 2001. This final rulemaking summarizes the adverse comments EPA received on the October 19, 2001 proposal, provides EPA's responses, and promulgates final full approval of the Commonwealth of Virginia's operating permit program.

DATES: This rule is effective on November 30, 2001.

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 and Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: David Campbell, Permits and Technical Assessment Branch at (215) 814–2196 or by e-mail at *campbell.dave@.epa.gov.*

SUPPLEMENTARY INFORMATION: On November 20, 2000, the Commonwealth of Virginia submitted amendments to its State operating permit program. These amendments are the subject of this document, and this section provides additional information on the amendments by addressing the following questions:

What is the State operating permit program?
Why is EPA taking this action?
What were the concerns raised by the commenters?
What action is being taken by EPA?
What is the effective date of EPA's full approval of the Virginia operating permit program?
What is the scope of EPA's full approval?

What is the State Operating Permit Program?

The Clean Air Act (CAA) Amendments of 1990 required all States to develop operating permit programs that meet certain federal criteria. When implementing the operating permit programs, the States require certain sources of air pollution to obtain permits that contain all of their applicable requirements under the CAA. The focus of the operating permit program is to improve enforcement by issuing each source a permit that consolidates all of its applicable CAA requirements into a federally enforceable document. By consolidating all of the applicable requirements for a given air pollution source into an operating permit, the source, the public, and the State environmental agency can more easily understand what CAA requirements apply and how compliance with those requirements is determined.

Sources required to obtain an operating permit under this program include ''major'' sources of air pollution and certain other sources specified in the CAA or in the EPA's implementing regulations. For example, all sources regulated under the acid rain program, regardless of size, must obtain operating permits. Examples of ''major'' sources include those that have the potential to emit 100 tons per year or more of volatile organic compounds, carbon monoxide, lead, sulfur dioxide, nitrogen oxides, or particulate matter (PM10); those that emit 10 tons per year of any single hazardous air pollutant (HAP) specifically listed under the CAA; or those that emit or have the potential to emit 25 tons per year or more of a combination of HAPs. In areas that are not meeting the national ambient air quality standards (NAAQS) for ozone, carbon monoxide, or particulate matter, major sources are defined by the gravity of the nonattainment classification. For example, in the counties and cities in northern Virginia that are part of the Metropolitan Washington, DC serious ozone nonattainment area, major sources include those with the potential of emitting 50 tons per year or more of volatile organic compounds or nitrogen oxides.

Why Is EPA Taking This Action?

Where a title V operating permit program substantially, but not fully, met the criteria outlined in the implementing regulations codified at 40 CFR part 70, EPA granted interim approval contingent upon the State revising its program to correct the deficiencies. Because the Virginia operating permit program substantially, but not fully, met the requirements of part 70, EPA granted interim approval of Virginia's program in a rulemaking published on June 10, 1997, as corrected on March 19, 1998 (62 FR 31516 and 63 FR 13346, respectively). The interim approval notice described the conditions that had to be met in order for the Virginia operating permit program to receive full approval. Interim approval of Virginia's operating permit program expires on December 1, 2001.

EPA tentatively concluded that the Commonwealth of Virginia fulfilled the conditions of the interim approval. Consequently, EPA published a direct final rule on October 10, 2001 (66 FR 51581) granting full approval of Virginia's operating permit program. However, adverse comments were received in response to the companion proposal notice that was also published on October 10, 2001 (66 FR 51620). The direct final rule was withdrawn on November 21, 2001 (66 FR 58400). In today's notice, EPA is responding to comments and taking final action on the companion proposal.

On May 22, 2000, EPA promulgated a rulemaking that extended the interim approval period of 86 operating permits programs until December 1, 2001 (65 FR 32035). The action was subsequently challenged by the Sierra Club and the New York Public Interest Research Group (NYPIRG). In settling the litigation, EPA agreed to publish a notice in the **Federal Register** that would alert the public that they may identify and bring to EPA's attention alleged programmatic and/or implementation deficiencies in title V programs and that EPA would respond to their allegations within specified time periods if the comments were made within 90 days of publication of the **Federal Register** notice. That notice was published on December 11, 2000 (65 FR 77376).

In response to the December 11, 2000 notice, several citizens commented on what they believe to be deficiencies with respect to the Virginia title V program. As stated in the **Federal Register** notice published on October 10, 2001 (66 FR 51620) proposing to fully approve Virginia's operating

permit program, EPA takes no action on those comments in this final rulemaking action. Rather, EPA expects to respond by December 14, 2001 to timely public comments on programs that have obtained interim approval. We will publish a notice of deficiency (NOD) when we determine that a deficiency exists, or we will notify the commenter, in writing, to explain our reasons for not making a finding of deficiency. In addition, we will publish a notice of availability in the **Federal Register** notifying the public that we have responded, in writing, to these comments and how the public may obtain a copy of our response. A NOD will not necessarily be limited to deficiencies identified by citizens, and may include any deficiencies that we have identified through our program oversight. Furthermore, in the future, EPA may issue an additional NOD if EPA or a citizen identifies other deficiencies. The process for issuance of NODs is discussed in greater detail below.

What Were the Concerns Raised by the Commenters?

EPA received two comment letters during the public comment period. The Virginia Manufacturers Association provided a letter dated November 9, 2001 stating its support of EPA's action to grant full approval of Virginia's operating permit program. Since this letter did not raise any concerns with the proposed action, no response is necessary. EarthJustice provided comments on behalf of the Virginia Chapter of the Sierra Club dated November 9, 2001. In its November 9, 2001 letter, EarthJustice incorporated, by reference, its prior comments submitted to EPA pursuant to other actions taken by the Agency regarding Virginia's operating permit program. Those comments were submitted in letters as follows: (a) Letter of March 12, 2001 commenting in response to EPA's December 11, 2000 **Federal Register** notice (65 FR 77376) which announced a 90-day comment period for the public to identify deficiencies in State and Local agency operating permits programs; and (b) Letter of November 2, 2001 regarding EPA's October 3, 2001 notice of proposed rulemaking approving revisions to the Virginia title V program (66 FR 50375).

Copies of each of these letters are included in the docket file maintained at the EPA Region III office. The following is a discussion of the issues raised in EarthJustice's November 9, 2001 letter and EPA's responses.

Comment: The commenter indicates that EPA cannot grant full approval of the Virginia title V operating permit program without first addressing all alleged deficiencies identified by EarthJustice in its prior comment letters.

Response: EPA is aware that comments have been made regarding alleged deficiencies other than those listed in Virginia's June 10, 1997 interim approval. EPA agrees that these allegations must be addressed through appropriate actions by EPA and/or the Commonwealth of Virginia. For the reasons discussed below, however, we disagree that newly alleged or formally identified deficiencies prohibit EPA from granting full approval of Virginia's operating permit program at this time.

In 1990, Congress amended the Clean Air Act, 42 U.S.C. 7401 to 7671q, by adding title V, 42 U.S.C. subsections 7661 to 7661f, which requires certain air pollutant emitting facilities, including ''major source[s]'' and ''affected source[s],'' to obtain and comply with operating permits. *See* 42 U.S.C. subsection 7661a(a). Title V is intended to be administered by local, state or interstate air pollution control agencies, through permitting programs that have been approved by EPA. *See* 42 U.S.C. subsection 7661a(a). EPA is charged with overseeing the State's efforts to implement an approved program, including reviewing proposed permits and objecting to improper permits. *See* 42 U.S.C. subsections 7661a(i) and 7661d(b). Accordingly, title V of the CAA provides a framework for the development, submission and approval of State operating permit programs. Following the development and submission of a State program, the Act provides two different approval options that EPA may utilize in acting on State submittals. See 42 U.S.C. subsection 7661a(d) and (g). Pursuant to section 502(d), EPA ''may approve a program to the extent that the program meets the requirements of the Act * * *'' EPA may act on such program submittals by approving or disapproving, in whole or in part, the State program. An alternative option for acting on State programs is provided by the interim approval provision of section 502(g). This section states: ''If a program * * * substantially meets the requirements of this title, but is not fully approvable, the Administrator may by rule grant the program interim approval.'' This provision provides EPA with the authority to act on State programs that substantially, but do not fully, meet the requirements of title V and part 70. Only those program submittals that meet the requirements of eleven key program areas are eligible to receive interim approval. *See* 40 CFR subsection 70.4(d)(3)(i)–(xi). Finally, section 502(g) directs EPA to ''specify the changes that must be made before the program can receive full approval.'' 42 U.S.C. subsection 7661a(g); 40 CFR subsection 70.4(e)(3). This explicit directive encompasses another, implicit one: Once a State corrects the specified deficiencies then it will be eligible for full program approval. EPA believes this is so even if deficiencies have been identified sometime after final interim approval, either because the deficiencies arose after EPA granted interim approval or, if the deficiencies existed at that time, EPA failed to identify them as such in proposing to grant interim approval.

Thus, an apparent tension exists between these two statutory provisions. Standing alone, section 502(d) appears to prevent EPA from granting a State operating permit program full approval until the State has corrected all deficiencies in its program no matter how insignificant, and without consideration as to when such deficiency was identified. Alternatively, section 502(g) appears to require that EPA grant a State program full approval if the State has corrected those issues that the EPA identified in the final interim approval. The central question, therefore, is whether Virginia, by virtue of correcting the deficiencies identified in the final interim approval, is eligible at this time for full approval, or whether Virginia must also addresses any newly alleged or recently identified deficiencies as a prerequisite to receiving full program approval.

According to settled principles of statutory construction, statutory provisions should be interpreted so that they are consistent with one another. *See Citizens to Save Spencer County* v. *EPA*, 600 F.2d 844, 870 (D.C. Cir. 1979). Where an agency encounters inconsistent statutory provisions, it must give maximum possible effect to all of the provisions, while remaining within the bounds of its statutory authority. *Id.* at 870–71. Whenever possible, the agency's interpretation should not render any of the provisions null or void. *Id.* Courts have recognized that agencies are often delegated the responsibility to interpret ambiguous statutory terms in such a fashion. *See Chevron U.S.A, Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845 (1984). Harmonious construction is not always possible, however, and furthermore should not be sought if it requires distorting the language in a fashion never imagined by Congress. *Citizens to Save Spencer County*, 600 F.2d at 870.

In this situation, in order to give effect to the principles embodied in title V of

the CAA that major stationary sources of air pollution be required to have an operating permit that conforms to certain statutory and regulatory requirements, and that operating permit programs be administered and enforced by State permitting authorities, the appropriate and more cohesive reading of the statute recognizes EPA's authority to grant Virginia full approval in this situation while working simultaneously with the State, in its oversight capacity, on any additional problems that have been or may be identified. To conclude otherwise would disrupt the current administration of the State program and cause further delay in Virginia's ability to issue operating permits to major stationary sources. A smooth transition from interim approval to full approval is in the best interest of the public and the regulated community and best reconciles the statutory directives of title V of the CAA.

Furthermore, requiring the Commonwealth of Virginia to fix all of the deficiencies that have been alleged or formally identified in the past year in order to receive full approval runs counter to the established regulatory process that is already in place to deal with newly identified program deficiencies. Section 502(i)(4) of the Act and 40 CFR subsections 70.4(i) and 70.10 provides EPA with the authority to issue NODs whenever EPA makes a determination that a permitting authority is not adequately administering or enforcing an approved part 70 program, or that the State's permit program is inadequate in any other way. Consistent with these provisions, any NOD issued by EPA will specify a reasonable time-frame for the permitting authority to correct the identified deficiency. The interim approval status of Virginia's title V operating permit program expires on December 1, 2001. This deadline would not provide adequate time for the Commonwealth to correct any newly identified issues prior to the expiration of interim approval. Allowing the Commonwealth's program to expire because of issues alleged as recently as March 2001 and November 2001 will cause disruption and further delay in the issuance of permits to major stationary sources in Virginia. As explained above, we do not believe that title V of the CAA requires such a result. Rather, the appropriate mechanism for dealing with additional deficiencies that are identified sometime after a program received interim approval but prior to being granted full approval is the notice of program deficiency or administration deficiency as discussed herein. It should be noted that NODs may also be issued by EPA after a program has been granted full approval. Following the defined process for the identification of program issues and the issuance of NODs will provide the Commonwealth an adequate amount of time after such findings to implement any necessary changes without unduly disrupting the entire State operating permit program. As a result, addressing any newly identified problems separately from the full approval process will not cause these issues to go unaddressed. To the contrary, if EPA determines that any of the alleged deficiencies in Virginia's program are well-founded, it will issue a NOD and place Virginia on notice that it must promptly correct the non-interim approval deficiencies within a specified time period or face CAA sanctions and withdrawal of program approval. At this time, EPA is still evaluating the deficiencies alleged by the commenter and others and will, in the very near future, respond to those allegations in a separate action. The comments EPA received from EarthJustice on March 12, 2001 mentioned above will be considered as part of that separate action.

Virginia also made revisions to its operating permit program since its program received interim approval in 1997. The revisions were not intended to address any of the identified interim approval deficiencies. Rather, the intent of these discretionary program changes was to improve implementation of the existing program. In a rulemaking action separate from this action granting full approval, EPA, in accordance with 40 CFR subsection 70.4(i), proposed approval of those revisions on October 3, 2001 (66 FR 50375). The EPA disagrees with the commenter's assertion that the amendments Virginia made to its program to address the identified interim approval deficiencies are inextricable from the program revisions that are the subject of the October 3, 2001 notice. The approval of the discretionary program revisions is not necessary in order for Virginia to adequately address its interim approval deficiencies, nor must they be approved prior to Virginia receiving full approval. The EPA will proceed with the appropriate administrative process to respond to any comments received pursuant to the October 3, 2001 proposed rulemaking action on the discretionary program revisions. The comments received from EarthJustice on November 2, 2001 will be considered as when taking that separate action.

Therefore, EPA disagrees with the commenter that EPA must consider all program revisions and alleged deficiencies prior to granting full approval of Virginia's operating permit program. The proper administrative procedures have been followed to allow interested parties an opportunity to identify any concerns they may have with the various aspects of Virginia's title V operating permit program. The EPA will address those concerns in the context of the relevant rulemaking or administrative actions, including this final rule granting full approval of Virginia operating permit program; the proposed rulemaking action approving revisions to Virginia's program; and, the process of responding to public comments pursuant to the December 11, 2000 notice (65 FR 77376).

Comment: EarthJustice believes Virginia's insignificant activity provisions for emergency generators are not consistent with title V of the CAA. Specifically, the commenter believes that the potential emissions generated by the types of internal combustion powered generators as defined under 9 VAC 5–80–720 C 4 should not be eligible to be classified as insignificant activities. Further, the commenter contends that Virginia's regulations would allow these types of units to emit pollutants at levels that would trigger title V requirements and still be classified as insignificant activities because there are no explicit restrictions on hours of operation or emissions for these units.

Response: With regard to the emergency generators that are central to EarthJustice's comment, EPA disagrees that emergency generators of the size and fuel-use capability as specified by 9 VAC 5–80–720 C 4 have the potential for significant emissions. First, the regulations specify that in order to be eligible for classification as insignificant activities these types of emergency generators may only be used when power is unavailable from the utility. If the facility in question is not served by a utility, the generators would not qualify as ''emergency'' generators because they would be the principal means by which the facility generated electricity. The EPA interprets 9 VAC 5–80–720 C 4 as excluding generators at facilities not served by a utility. Further, EPA is unaware of any facility in Virginia that is currently required to obtain a title V operating permit that is not served by a utility and the likelihood of such a title V source in the future is negligible. Second, it is unlikely for facilities that are provided power from a utility to need to use their emergency generators in excess of 500 hours in any given year. In support of its guidance document entitled, ''Calculating Potential to Emit (PTE) for

Emergency Generators'' (September 6, 1995 memorandum from John S. Seitz, Director, EPA Office of Air Quality Standards and Planning to Directors, EPA Regional Air Divisions), EPA determined that an emergency generator would likely operate 500 hours per year or less under worst case conditions. Therefore, the emergency generators specified by Virginia's regulations would only be in operation for a short time each year and the real potential for significant emissions is minimal. Finally, an analysis of the potential emissions from emergency generators of the size and fuel-type defined by 9 VAC 5080–720 C 4 indicates that if any of these generators were to operate 500 hours in a particular year, the worst case potential emissions from any of the classes of emergency generators would be six tons of nitrogen oxides per year. For these reasons, EPA believes the classification of emergency generators as defined in 9 VAC 5–80–720 C 4 as insignificant activities is appropriate and consistent with title V and part 70. As will be discussed in greater detail, the construction of Virginia's insignificant activities regulations provides additional assurances that emergency generators will not be incorrectly classified as insignificant activities and that all necessary and relevant operational and emissions data will be provided by applicants in order to determine if these types of sources have any title V requirements.

The purpose of insignificant activities lists and designation of units as insignificant activities is to enable permit applicants to streamline their applications by allowing them to exclude certain information and emissions data for individual emission units when such information or data is not needed to determine whether applicable requirements may apply to that unit or whether the source is a ''major source'' according to title V and part 70. The identification of a particular unit as an insignificant activity in no way relieves any applicable requirement that may apply to that unit. The EPA disagrees with the commenter's assertion that Virginia's permit program would allow certain insignificant activities to operate in excess of levels that would trigger title V requirements or ''major source'' requirements. While Virginia's operating permit program allows certain activities to be classified as insignificant, it does not allow these emission units to circumvent any applicable requirements of title V. Virginia's program also provides safeguards to prevent the mis-classification of units as insignificant and the omission of relevant emission data from title V permit applications.

Virginia's operating permit program regulations address insignificant activities in three ways. Virginia's regulations, at 9 VAC 5–80–720 A, provide a specific list of activities for which the permit applicant does not have to include information regarding these emission units in its title V permit application, including emission levels. Virginia's program, at 9 VAC 5–80–720 B, also allows permit applicants to identify emission units which fall below certain emission thresholds as insignificant activities, but does not require specific emission data for each of these units in the application. Finally, under 9 VAC 5–80–720 C, emission units may be listed in the application as insignificant activities if they fall below certain size or production rates for specific categories of units. Pursuant to 9 VAC 5–80–90 D and 9 VAC 5–80–440 D, the permit application must indicate the size or production rate of each unit that is being classified as an insignificant activity. The emergency generators that are the subject of the commenter's concern fall into this last general category.

Virginia's operating permit program regulations at 9 VAC 5–80–90 D and 9 VAC 5–80-440 D require that applicants must include any emissions data or other relevant information that is necessary to determine applicability of title V or of any other applicable requirements. As part of this full approval action, EPA is approving amendments to Virginia's regulations that clarify that permit applicants are obligated to provide this type of information for all emission units, including those that may be classified as insignificant activities. Therefore, even if a specific unit may be classified as an insignificant activity pursuant to 9 VAC 5–80–720, the applicant must provide emissions data or other information if the omission of such information would interfere with determining whether that unit has applicable requirements that must be reflected in a title V permit. Virginia also amended its regulations to require explicitly that all applicable requirements for all emission units, including those for insignificant activities must be contained in the title V permit. These amendments were made to address interim approval issues and are more fully discussed in the October 10, 2001 (66 FR 51581) direct final rulemaking notice.

Virginia's insignificant activity regulations significantly minimize the potential for inappropriate use of the insignificant activities list and the other mechanisms for identifying insignificant activities as provided in 9 VAC 5–80–720, including those for emergency generators. The purpose of the title V permit application is to provide all of the information necessary to develop a title V permit that contains all of a given source's applicable requirements. Virginia's regulations with regard to insignificant activities provide that all information necessary to determine applicable requirements for inclusion in title V permits must be provided by the applicant even if a given unit can be identified as an insignificant activity. Therefore, the various mechanisms to identify insignificant activities may be used by the applicant at their discretion with assumed liability for failure to provide complete and accurate information to Virginia. Pursuant to 9 VAC 5–80–80 G and 9 VAC 5–20–230, all applicants must certify, subject to civil and criminal penalty, that all information contained in its application is complete, accurate and true.

Comment: EarthJustice asserts that the identified interim approval issue regarding malfunction as an affirmative defense in Virginia's title V operating permit program has not been fully corrected. The commenter also believes Virginia's malfunction provisions at 9 VAC 5–20–180 are not consistent with title V of the CAA. Specifically, EarthJustice contends that title V sources may claim an affirmative defense for malfunctions to a degree far broader than provided under title V and 40 CFR subsection 70.6(g).

Response: Virginia's title V operating permit program regulations establish the permissible scope of claims for affirmative defense for noncompliance with title V permits due to emergencies at 9 VAC 5–80–250 and 9 VAC 5–80–650. (Virginia uses the term ''malfunction'' instead of ''emergency'', however, the term as defined at 9 VAC 5–80–60 C and 5–80–370 is consistent with EPA's definition of ''emergency'.) The commenter has not asserted that the provisions of 9 VAC 5–80–250 and 5–80–650 are inconsistent with title V or 40 CFR subsection 70.6(g). Virginia made amendments to these sections of its regulations to address interim approval issues. In the proposed and final actions granting interim approval of Virginia's program (March 18, 1997, 62 FR 12778 and June 10, 1997, 62 FR 31516, respectively), EPA fulfilled its obligation under section 502(g) of the CAA by specifying the changes Virginia must make to its program in order to receive full approval. 42 U.S.C. subsection 7661a(g); 40 CFR subsection 70.4(e)(3). EPA directed Virginia to

amend 9 VAC 5–80–250 B 4 and 9 VAC 5–80 650 to require permittees to properly report malfunctions of any duration in order for those malfunctions to be eligible for consideration as an affirmative defense. Previously, these regulations did not require permittees to report malfunctions of less than one hour, yet allowed for an affirmative defense for these unreported malfunctions. As instructed by EPA, Virginia amended 9 VAC 5–80–250 B 4 and 9 VAC 5–80–650 to require the reporting of malfunctions of any duration. These amendments are more fully discussed in the October 10, 2001 (66 FR 51581) direct final rulemaking notice granting full approval of Virginia's program. Therefore, Virginia has met its statutory obligation under section 502(g) of the CAA to make changes to its operating permit program as specified by EPA and, consequently, its program may now receive full approval.

EarthJustice's main concern regards Virginia's malfunction provisions as they exist outside of the operating permit program regulations. The malfunction defenses provided by 9 VAC 5–20–180 are codified as part of the general provisions of Virginia's air pollution control regulations. In its proposed and final rulemaking granting interim approval of Virginia's program, EPA did not identify any concerns with these provisions of Virginia's regulations, nor did it instruct Virginia to make any corrections to 9 VAC 5–20–180. Likewise, the malfunction provisions of 9 VAC 5–20–180 were not discussed in the October 10, 2001 proposed rulemaking action regarding full approval of Virginia's operating permit program. Therefore, in its November 9, 2001 comment letter, EarthJustice is expressing a concern with Virginia's operating permit program that has heretofore not been identified by EPA or any other interested party. As discussed more fully above, Virginia's receipt of full approval of its operating permit program is contingent upon it successfully correcting its regulations as directed by EPA in the March 18, 1997 and June 10, 1997 notices granting interim approval and not the correction of all deficiencies alleged or identified after interim approval was granted.

The EPA will carefully consider EarthJustice's concerns regarding the impact of 9 VAC 5–20–180 on Virginia's operating permit program and determine whether a notice of deficiency is warranted. Any such notice of deficiency will be issued in an action separate from this full approval.

Comment: EarthJustice has expressed concern with the discussion of Virginia's Voluntary Environmental Assessment Privilege Law (''Privilege Law''), Va. Code Sec. 10.1–1198, and Immunity Against Administrative or Civil Penalties for Voluntarily Disclosed Violation Law (''Immunity Law''), Va. Code Sec. 10.1–1199 as contained in the October 10, 2001 notice. The commenter is not satisfied with EPA's conclusion that these laws do not preclude Virginia from enforcing its operating permit program in a manner consistent with the CAA. EarthJustice further argues that the Virginia Attorney General's interpretation of these laws that supports EPA's conclusion are not binding on the courts of Virginia. EarthJustice suggests that the most appropriate remedies are for Virginia to either repeal the laws in their entirety or amend them to expressly exclude the title V program from their scope.

The EPA disagrees with the commenter's assertion that the Agency's and Virginia Office of Attorney General's interpretation of the existing Privilege and Immunity Laws may apply to Virginia's operating permit program. To the contrary, the commenter has not demonstrated that these laws pose any threat to the enforcement of title V operating permits in Virginia. EarthJustice has not identified a single instance where any source has successfully asserted protection under these laws from the enforcement of their title V operating permits by EPA, the Commonwealth of Virginia, or the public, in manner that is inconsistent with the CAA. As to the relevance of the Virginia Office of Attorney General's opinion on this matter, section 502(d) of the CAA requires as part of any approvable title V operating permit program a legal opinion from the State Attorney General, or equivalent, indicating that the State can enforce its operating permit program in a manner consistent with federal law. 42 U.S.C. subsection 7661a(d); 40 CFR subsection 70.4(b)(3). The EPA relies on the Attorney General's interpretation of the law, although the Agency recognizes it is always theoretically possible for developing case law to eventually overrule certain, or even all, of the opinions expressed by the Attorney General.

In this instance, the Virginia Office of Attorney General provided EPA legal opinions on December 29, 1997 and January 12, 1998 that state that the Commonwealth's Privilege Law does not extend to information required by federal law and that the Immunity Law does not apply to federally authorized programs such as the title V operating permit program. In absence of any rulings by the Virginia courts that further illuminate the application of these laws, EPA maintains its conclusion that the Commonwealth of Virginia's Privilege and Immunity Laws do not apply to enforcement of Virginia's operating permit program, and any permits issued pursuant to that program. Should the Virginia courts come to interpret these laws in the future in a manner that conflicts with the CAA, EPA will consider the full effect of those rulings and determine the most appropriate response, including the possible issuance of a NOD. Any such NOD will be issued in an action separate from this full approval.

What Action Is Being Taken by EPA?

Based on analysis of the comments received, EPA has determined that the concerns raised do not constitute deficiencies in the Virginia operating permit program. The Commonwealth of Virginia has satisfactorily addressed the six program deficiencies identified when EPA granted final interim approval of its operating permit program on June 10, 1997, as corrected on March 19, 1998. The operating permit program amendments submitted by Virginia on November 20, 2000 considered together with that portion of Virginia's operating permit program that was earlier approved on an interim basis fully satisfy the minimum requirements of 40 CFR part 70 and the Clean Air Act. Therefore, EPA is granting final full approval of the Commonwealth of Virginia's title V operating permit program.

What Is the Effective Date of EPA's Full Approval of the Virginia Title V Operating Permit Program?

EPA is using the good cause exception under the Administrative Procedure Act (APA) to make the full approval of the Virginia's program effective on November 30, 2001. In relevant part, the APA provides that publication of ''a substantive rule shall be made not less than 30 days before its effective date, except—* * * (3) as otherwise provided by the agency for good cause found and published with the rule.'' 5 U.S.C. § 553(d)(3). Section 553(b)(3)(B) of the APA provides that good cause may be supported by an agency determination that a delay in the effective date is impracticable, unnecessary, or contrary to the public interest. EPA finds that it is necessary and in the public interest to make this action effective sooner than 30 days following publication. In this case, EPA believes that it is in the public interest for the program to take effect before

December 1, 2001. EPA's interim approval of Virginia's prior program expires on December 1, 2001. In the absence of this full approval of Virginia's amended program taking effect on November 30, the federal program under 40 CFR part 71 would automatically take effect in Virginia and would remain in place until the effective date of the fully approved state program. EPA believes it is in the public interest for sources, the public and the Commonwealth of Virginia to avoid any gap in coverage of the State program, as such a gap could cause confusion regarding permitting obligations. Furthermore, a delay in the effective date is unnecessary because Virginia has been administering the title V permit program for four years under an interim approval. Through this action, EPA is approving a few revisions to the existing and currently operational program. The change from the interim approved program which substantially met the part 70 requirements, to the fully approved program is relatively minor, in particular if compared to the changes between a state-established and administered program and the federal program.

What Is the Scope of EPA's Full Approval?

In its program submission, Virginia did not assert jurisdiction over Indian country. To date, no tribal government in Virginia has applied to EPA for approval to administer a title V program in Indian country within the Commonwealth. EPA regulations at 40 CFR part 49 govern how eligible Indian tribes may be approved by EPA to implement a title V program on Indian reservations and in non-reservation areas over which the tribe has jurisdiction. EPA's part 71 regulations govern the issuance of federal operating permits in Indian country. EPA's authority to issue permits in Indian country was challenged in *Michigan* v. *EPA*, (D.C. Cir. No. 99–1151). On October 30, 2001, the court issued its decision in the case, vacating a provision that would have allowed EPA to treat areas over which EPA determines there is a question regarding the area's status as if it is Indian country, and remanding to EPA for further proceedings. EPA will respond to the court's remand and explain EPA's approach for further implementation of part 71 in Indian country in a future action.

Administrative Requirements

Under Executive Order 12866, ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993), this final approval is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) the Administrator certifies that this final approval will not have a significant economic impact on a substantial number of small entities because it merely approves state law as meeting federal requirements and imposes no additional requirements beyond those imposed by state law. This rule does not contain any unfunded mandates and does not significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) because it approves pre-existing requirements under state law and does not impose any additional enforceable duties beyond that required by state law. 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, ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000). This rule also does not have Federalism implications because it will 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, ''Federalism'' (64 FR 43255, August 10, 1999). This rule merely approves existing requirements under state law, and does not alter the relationship or the distribution of power and responsibilities between the State and the Federal government established in the Clean Air Act. This final approval also is not subject to Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997) or Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866. This action will not impose any collection of information subject to the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, other than those previously approved and assigned OMB control number 2060–0243. For additional information concerning these requirements, see 40 CFR part 70. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

In reviewing State operating permit programs submitted pursuant to title V of the Clean Air Act, EPA will approve State programs provided that they meet the requirements of the Clean Air Act and EPA's regulations codified at 40 CFR part 70. 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 State operating permit program for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews an operating permit program, to use VCS in place of a State program 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.

The Congressional Review Act, 5 U.S.C. section 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. section 804(2). This rule will be effective on November 30, 2001.

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 February 4, 2002. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action granting final full approval of Virginia's title V operating permit program may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 70

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

Dated: November 27, 2001.

Donald S. Welsh,

Regional Administrator, Region III.

Appendix A of part 70 of title 40, chapter I, of the Code of Federal Regulations is amended as follows:

PART 70—[AMENDED]

1. The authority citation for part 70 continues to read as follows:

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

2. Appendix A to part 70 is amended by revising paragraph (b) in the entry for Virginia to read as follows:

Appendix A to Part 70—Approval Status of State and Local Operating Permits Programs

* * * * *

Virginia

(b) The Virginia Department of Environmental Quality submitted operating permit program amendments on November 20, 2000. The rule revisions contained in the November 20, 2000 submittal adequately addressed the conditions of the interim approval effective on March 12, 1998. The Commonwealth is hereby granted final full approval effective on November 30, 2001.

[FR Doc. 01–29961 Filed 12–3–01; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 70

[FRL–7111–7]

Clean Air Act Final Full Approval of the Operating Permits Program; Minnesota

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to fully approve the operating permits program submitted by the State of Minnesota. Minnesota submitted its operating permits program in response to the directive in the 1990 Clean Air Act Amendments that permitting authorities develop, and submit to EPA, programs for issuing operating permits to all major stationary sources and to certain other sources within the permitting authority's jurisdiction.

EFFECTIVE DATE: The effective date of this action is November 30, 2001.

ADDRESSES: Copies of the state's submittal and other supporting information used in developing the final full approval are available for inspection during normal business hours at the following location: EPA Region 5, 77 West Jackson Boulevard, AR–18J, Chicago, Illinois 60604. Please contact Robert Miller at (312) 353–0396 to arrange a time if inspection of the submittal is desired.

FOR FURTHER INFORMATION CONTACT: Rachel Rineheart, AR–18J, 77 West Jackson Boulevard, Chicago, Illinois 60604, Telephone Number: (312) 886–7017, E-Mail Address: rineheart.rachel@epa.gov.

SUPPLEMENTARY INFORMATION: This section provides additional information by addressing the following questions:

What is being addressed in this document?
What is involved in this final action?

What Is Being Addressed in This Document?

As required under Subchapter V of the Clean Air Act (''the Act''), EPA has promulgated regulations which define the minimum elements of an approvable state operating permits program and the corresponding standards and procedures by which the EPA will approve, oversee, and withdraw approval of state operating permits programs (see 57 FR 32250 (July 21, 1992)). These regulations are codified at 40 Code of Federal Regulations (CFR) part 70. Pursuant to Subchapter V, generally known as title V, states developed, and submitted to EPA, programs for issuing these operating permits to all major stationary sources and to certain other sources.

The EPA's program review occurs under section 502 of the Act and the part 70 regulations, which together outline criteria for approval or disapproval. Where a program substantially, but not fully, met the requirements of part 70, EPA granted the program interim approval. If EPA has not fully approved a program by the expiration of an interim program, it must establish and implement a federal program.

The Minnesota Pollution Control Agency (MPCA) submitted its title V operating permits program (title V program) for approval on November 15, 1993. EPA promulgated interim approval of the Minnesota title V program on June 16, 1995 (60 FR 31637), and the program became effective on July 16, 1995. Subsequently, EPA extended Minnesota's title V interim approval period on several occasions, most recently to December 1, 2001 (65 FR 32036).

MPCA submitted amendments to its title V program for our approval on June 9, 2000, July 21, 2000, and June 12, 2001. Minnesota intended these amendments to correct interim approval issues identified in the June 16, 1995, action. Based on this submittal, EPA proposed full approval for the Minnesota title V program on October 30, 2001 (66 FR 54739). EPA did not receive any adverse public comment(s) on the proposal; therefore, EPA is taking final action to give full approval to the Minnesota title V program.

What Is Involved in This Final Action?

The EPA is granting full approval of the operating permits program submitted by MPCA based on the interim approval corrections submitted on June 9, 2000, July 21, 2000, and June 12, 2001. These revisions satisfactorily address the program deficiencies identified in EPA's June 16, 1995, interim approval rulemaking.

On May 22, 2000, EPA promulgated a rulemaking that extended the interim approval period of 86 operating permits programs until December 1, 2001 (65 FR 32035). The action was subsequently challenged by the Sierra Club and the New York Public Interest Research Group. In settling the litigation, EPA agreed to publish a notice in the **Federal Register**, so that the public would have the opportunity to identify and bring to EPA's attention alleged programmatic and/or implementation deficiencies in title V programs. In turn, EPA would respond to the public's allegations within specified time periods, if the comments were made within 90 days of publication of the **Federal Register** notice.

The EPA received one timely comment letter pertaining to the Minnesota title V program. As stated in the **Federal Register** notice published on October 30, 2001 proposing to fully approve Minnesota's operating permit program, EPA takes no action on those comments in today's action. Rather, EPA expects to respond by December 1, 2001 to timely public comments on programs that have obtained interim approval, and by April 1, 2002 to timely comments on fully approved programs. The EPA will publish a notice of deficiency (NOD) if EPA determines that a deficiency exists, or will notify the commenter in writing to explain the reasons for not making a finding of deficiency. EPA Region 5 will also post its response letters on the Internet at http://yosemite.epa.gov/r5/ardcorre.nsf/title+V+Program+Comments. EPA Region 5 includes the states of Michigan, Minnesota, Illinois, Indiana, Ohio, and Wisconsin. The EPA will also