Virginia Regulatory Town Hall

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Final Regulation
Agency Background Document

Approving authority name	State Air Pollution Control Board
Primary action	Article 50, 9 VAC 5-40
Secondary action(s)	None
Regulation title	Regulations for the Control and Abatement of Air Pollution
Action title	Consumer Products (Revision G03)
Document preparation date	November 10, 2004

This information is required for executive review (www.townhall.state.va.us/dpbpages/apaintro.htm#execreview) and the Virginia Registrar of Regulations (legis.state.va.us/codecomm/register/regindex.htm), pursuant to the Virginia Administrative Process Act (www.townhall.state.va.us/dpbpages/dpb_apa.htm), Executive Orders 21 (2002) and 58 (1999) (www.governor.state.va.us/Press_Policy/Executive_Orders/EOHome.html), and the *Virginia Register Form, Style, and Procedure Manual* (http://legis.state.va.us/codecomm/register/download/styl8_95.rtf).

Brief Summary

Please provide a brief summary of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation. Also alert the reader to changes made to the regulation since publication of the proposed. Do ***not*** *state each provision or amendment or restate the purpose and intent of the regulation.*

This action will add a new rule (Article 50) to Chapter 40 of Regulations for the Control and Abatement of Air Pollution. The regulation will apply only to sources in the Northern Virginia volatile organic compounds emissions control area designated in 9 VAC 5-20-206. The regulation will limit VOC emissions from consumer products such as adhesives, adhesive removers, aerosol products (like cooking and dusting sprays), air freshener, antiperspirants and deodorants, facial toners and astringents, waxes and polishes (for cars, floors, etc.), tile cleaners, tar removers, bug sprays, rug cleaners, charcoal lighter fluid, disinfectants, cosmetics, soaps.

There have been several changes made to the proposal as the result of review and public comment. Internal transfers of consumer products within a business or governmental entity have been removed from applicability. The compliance date for the regulation has been pushed back to July 1, 2005. The information required on applications for a waiver has been revised and the review period for waiver applications has been shortened. The definition of "adhesive" has been limited to exclude package sizes larger than those that consumers would be expected to use. A "sell-through" provision will allow products that were manufactured before the compliance date to be sold after the compliance date. Finally, the

compliance date for displaying date code information on consumer products has been pushed back and explanations for date codes now only have to be submitted upon request.

Statement of Final Agency Action

Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.

On November 3, 2004, the State Air Pollution Control Board adopted final amendments to regulations entitled "Regulations for the Control and Abatement of Air Pollution", specifically Consumer Products (9 VAC Chapter 40, Article 50). The regulation amendments are to be effective as specified by the Administrative Process Act.

Legal Basis

Please identify the section number and provide a brief statement relating the content of the statutory authority to the specific regulation adopted. Please state that the Office of the Attorney General has certified that the agency has the statutory authority to adopt the regulation.

Section 10.1-1308 of the Virginia Air Pollution Control Law (Title 10.1, Chapter 13 of the Code of Virginia) authorizes the State Air Pollution Control Board to promulgate regulations abating, controlling and prohibiting air pollution in order to protect public health and welfare. Written assurance from the Office of the Attorney General that the State Air Pollution Control Board possesses the statutory authority to promulgate the final regulation amendments is available upon request.

Purpose

Please provide a statement explaining the rationale or justification of the proposed regulation as it relates to the health, safety or welfare of citizens.

The purpose of the regulation is to require owners to limit emissions of air pollution from consumer products to the level necessary for (i) the protection of public health and welfare, and (ii) the attainment and maintenance of the air quality standards. The amendments are being made to help provide emissions reductions sufficient to achieve the ozone standard in Northern Virginia.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the "All Changes Made in this Regulatory Action" section.

This regulatory action will add a new rule, Emission Standards for Consumer Products in the Northern Virginia Volatile Organic Compound Emissions Control Area (Rule 4-50). The provisions of this rule apply to those persons who sell, supply, offer for sale, or manufacture for sale any consumer product that contains volatile organic compounds. The rule does not apply to transfers of consumer products within any business of government entity. Exempted from the regulation is any consumer product manufactured

in the Northern Virginia volatile organic compound emissions control area for shipment and use outside of this area. The provisions of this regulation shall not apply to a manufacturer or distributor who sells, supplies, or offers for sale a consumer product that does not comply with the VOC standards as long as the manufacturer or distributor can demonstrate both that the consumer product is intended for shipment and use outside of the Northern Virginia volatile organic compound emissions control area, and that the manufacturer or distributor has taken reasonable prudent precautions to assure that the consumer product is not distributed to the Northern Virginia volatile organic compound emissions control area. A number of product-specific exemptions are also allowed. The rule specifies a compliance deadline of July 1, 2005.

Issues

Please identify the issues associated with the proposed regulatory action, including: (1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; (2) the primary advantages and disadvantages to the agency or the Commonwealth; and (3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please indicate.

1. Public: The primary advantage to the public is that the adoption of these regulations will significantly decrease emissions of VOCs in the Northern Virginia area, thus benefiting public health and welfare. There are no disadvantages to the public.

2. Department: The primary advantages to the department are that the adoption of these regulations will allow Virginia (1) to avoid federal sanctions that would be imposed for violating the SIP provisions of the Clean Air Act, and (2) to uphold its promise to its jurisdictional neighbors (Maryland and Washington, D.C.). There are no disadvantages to the department.

3. Other Issues: All applications for Alternative Control Plans (ACP) and Innovative Product Exemptions (IPE) will require Department approval. This varies from the Ozone Transport Commission (OTC) model rule that six other OTC states have adopted, and upon which the Virginia regulation is based. The OTC Model rule would require Virginia to automatically accept previous and future ACP and IPE approvals made by the California Air Resources Board (CARB). Interpretations of Virginia law prevent the Department from improperly delegating this authority to a government entity outside of Virginia. While this appears to be a disadvantage for the regulated community, the Department expects to approve ACP and IPE applications promptly if equivalent applications have been previously approved by CARB. Accordingly, there should be no disadvantage to the regulated community resulting from this unavoidable conflict.

Changes Made Since the Proposed Stage

Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar's office, please put an asterisk next to any substantive changes.

Section number	Requirement at proposed stage	What has changed	Rationale for change

20-21 Documents incorporated by reference.	See below.	See below.	See below.
20-21 B.	Provides a list of documents incorporated by reference into 9 VAC 5-10 through 9 VAC 5-80. Specifies the terms under which parts of the Code of Federal Regulations are incorporated by reference.	Updates the version of the Code of Federal regulations that is incorporated by reference.	Change is necessary in order to meet Virginia statutory requirements to make the documents legally enforceable.
20-21 E 6 a.	Specifies the AGCIH publication that is incorporated by reference.	Corrects the title of the ACGIH Handbook.	Change is necessary in order to meet Virginia statutory requirements to make the document legally enforceable.
40-7240 Applicability	See below.	See below.	See below.
* 40-7240 C.	Not in original proposal.	Excludes internal transfers of consumer products within a business or governmental entity from applicability under this article.	Necessary to prevent consumer products purchased for use from becoming applicable because of internal transactions within the same business or government entity.
40-7250 Exemptions	See below.	See below.	See below.
40-7250 G through L.	Lists exemptions to the standards in the order proposed in the OTC model rule.	Reordered subsections G though L in the order of increasing subsection numbers referenced in the exemptions.	Necessary to attain a logical order in the list.
*40-7250 L 1 a (renumbered as K 1 a).	Lists the information that must be submitted in an application for a waiver from the standards in 9 VAC 5-40-7270.	Requires that facts be submitted to support the owner's assertion that compliance is beyond the applicant's reasonable control.	Necessary because supporting information is necessary to properly evaluate the basis for the waiver.
* 40-7250 L 2 (renumbered as K 2).	Specifies the steps in the process of reviewing an application for a waiver from the standards in section 7270,	Revises the deadline for holding a hearing on the application to no later than 75 days from the date of receipt of the application.	Necessary to prevent unnecessary delays in obtaining a waiver.

40-7260 Definitions.	See below.	See below.	See below.
"ACP" or "Alternative control plan."	Defines the board-approved alternative for control of emissions from products requiring individualized compliance plans.	Duplicates the definition of "Alternative control plan" under it's abbreviated name "ACP."	Necessary so that the definitions following it in this subsection that contain the abbreviation "ACP" already have the term "ACP" defined.
"ACP VOC standard."	Defines how the maximum allowable VOC content is calculated.	Corrects the formula for determining the ACP VOC standard by changing the units of the maximum allowed VOC content for charcoal lighter material products from "CH_2" to "VOC."	Necessary to conform with the units reported using the test method protocol.
* "Adhesive."	Specifies the types of adhesive products that are subject to the rule, and differentiates between the smaller consumer package sizes to which the standards will be applicable and the larger industrial package sizes to which the standards will not be applicable.	Changed the definition to differentiate between the consumer product package sizes of two different categories of adhesives.	Necessary to prevent the consumer product standards from being applicable to industrial quantities of one of those adhesive categories under the rule.
"Astringent or toner."	Defines pore cleaning products.	Removes the acronym for the Food and Drug Administration ("FDA").	Necessary since it will not be used in the regulation.
"Certified emissions."	Defines the emissions levels approved for charcoal lighter material products.	Corrects the units in which the resultant emissions levels are reported under the cited test method.	Necessary to avoid confusion concerning the units measured and reported.
“Medicated astringent or medicated toner.”	Defines medicated pore cleaning products.	Substitutes the full name of the Food and Drug Administration for the acronym FDA.	Necessary since it will not be used in the regulation.
"Volatile Organic Compound" or "VOC"	Not in original proposal.	References the definition in the General Definitions in 9 VAC 5-10-20.	Necessary to make sure that persons not familiar with the regulations can find this general definition.

40-7270 Standard for volatile organic compounds.	See below.	See below.	See below.
* 40-7270 A.	Specifies the criteria under which consumer products are subject to the standards of Table 4-50.	Changed wording to keep the standards from being applicable to salable consumer products already manufactured and in the distribution system. Also delayed this compliance date until July 1, 2005.	Necessary to mitigate the impact of the new rule on products already produced for sale and to allow enough time for companies to distribute compliant products before the compliance date.
40-7270 A. Table 4-50.	Lists the standards for consumer products by product category.	Added the percent symbol beside each standard.	Necessary to avoid confusion since the standards are not ordered in a table with the units repeated in a header on each page.
40-7270 A. Table 4-50: Product Category: Adhesives.	Specifies the standard for different categories of adhesives.	Corrected a typographical error in the spelling of one type of aerosol special purpose spray adhesive.	Necessary to properly identify the category to which the standard applies.
40-7270 A. Table 4-50: Product Category: Air fresheners.	Specifies the standard for different categories of air fresheners.	Corrects typographical errors in the standards for two types of air fresheners (liquids/pump sprays and solids/gels).	Necessary to apply the proper standards to the product category.
40-7270 A. Table 4-50: Product Category: Deodorants.	Specifies separate VOC standards for high- and medium-density VOCs in deodorants.	Corrects a typographical error in the standards for nonaerosol deodorants to clarify that there is a 0% standard for medium density VOCs.	Necessary to apply the proper standards to the product category.
40-7270 A. Table 4-50: Product Category: General purpose degreasers.	Specifies the standard for different categories of general purpose degreasers.	Corrects typographical errors in the standards for the two types of general purpose degreasers.	Necessary to apply the proper standards to the product category.

* 40-7270 D.	Specifies a delayed compliance date one year after the effective date for other consumer products for those consumer products regulated under FIFRA.	Changes the requirement so as to specify the actual date by which compliance with the standards is required for FIFRA consumer products. Also delays the compliance and effective dates to July 1, 2006 consistent with the FIFRA compliance date requirement of 1 year after the compliance date for other products.	Necessary to avoid confusion over the actual effective date of the standards.
* 40-7270 E 1.	Specifies the criteria under which charcoal lighter material products are subject to the standards of Table 4-50.	Changed wording to clarify when the standards are applicable to charcoal lighter material products and delayed the compliance date for these products until July 1, 2005.	Necessary to apply the standard appropriately to charcoal lighter material products and to allow companies enough time to distribute compliant products before the compliance date.
* 40-7270 F 3.	Specifies the criteria under which aerosol adhesive products are subject to the standards of Table 4-50.	Changed wording to clarify when the standards are applicable to aerosol adhesive products and delayed the compliance date for these products until July 1, 2005.	Necessary to apply the standard appropriately to charcoal lighter material products and to allow companies enough time to distribute compliant products before the compliance date.
40-7280 Alternative control plan (ACP) for consumer products.	See below.	See below.	See below.
40-7280 B 2 a.	Specifies a list of content and the review timing requirements for the ACP agreement.	Corrects a reference for the timing requirements to the proper subdivision.	Necessary to locate the proper reference.
40-7280 B 2 a (1).	Specifies one of the criteria for approving alternative control plans: gross sales.	Corrects the reference to the proper format.	Necessary to locate the proper reference and maintain operational flexibility.

40-7280 F 2 d.	Specifies limits on the dates in which surplus reductions are effective and may be traded or used.	Corrects a typographical error in the referenced paragraph.	Necessary to locate the proper reference for conditions under which an Alternative Control Plan may be cancelled, invalidating any surplus credits created under the ACP.
40-7280 F 3 c.	Specifies the method of calculating the amount of surplus reduction credits.	Corrects a typographical error in the surplus reduction formula.	Necessary to maintain the proper amount of operational flexibility.
40-7280 H 1.	Specifies the procedures for making modifications to the ACP.	Lists those modifications to an ACP that do not have to be pre-approved by the board.	Necessary to clarify which modifications must be pre-approved and those that don't have to be.
40-7280 H 2.	Specifies the procedures for making modifications to the ACP.	Clarifies which modifications must be pre-approved by the board.	Necessary to identify those modifications that must be pre-approved.
40-7280 I 2.	Specifies the procedure for revising standards contained in ACPs.	Corrects the authority for modifying the standards in the regulation.	Necessary to prevent an improper delegation of authority to legal entities outside of Virginia.
40-7280 M.	Specifies the criteria for approving and complying with ACPs previously approved by the California Air Resources Board (CARB).	Limits the area in which the manufacturer is responsible for complying with an approved ACP, to the Northern Virginia VOC Emissions Control Area.	Necessary so that the requirements for compliance with these standards are not extended to areas beyond those required to meet the August 19, 2003 plan submittal.
40-7290 Innovative products.	See below.	See below.	See below.
40-7290 B.	Specifies the criteria for approving, and complying with conditions placed upon, innovative product exemptions previously approved by the California Air Resources Board (CARB).	Corrects a typographical error in the type of application granted by CARB for Innovative products. Limits the area in which the manufacturer is responsible for complying with conditions placed on approved innovative products exemptions, to the Northern Virginia VOC Emissions Control Area.	Necessary so that the requirements for compliance with these standards are not extended to areas beyond those required to meet the August 19, 2003 plan submittal.
40-7300 Administrative Requirements.	See below.	See below.	See below.

* 40-7300 A.	Specifies the uniform labeling requirement for displaying either dates or date codes on consumer products subject to the rule.	Changes the compliance date for the display requirement from a date in the past to the effective date of the standard.	Necessary to ensure that all manufacturers are not automatically out of compliance with the uniform labeling requirements.
* 40-7300 B.	Specifies requirements for the explanation of date codes, if they are used to meet the uniform labeling requirements.	Deletes the compliance date (already in the past) for the submission of explanations of date code information and replaces the it with a requirement to submit the information if requested by the board.	Necessary to ensure that all manufacturers using date codes are not automatically out of compliance with the uniform labeling requirements.
* 40-7300 D 1.	Specifies the uniform labeling requirements for aerosol adhesive products subject to the rule.	Delays the compliance date for displaying the required information on these products until July 1, 2005.	Necessary to be consistent with the delayed date for compliance with the standards.
* 40-7330 Compliance Schedules.	Specifies the compliance date for the new regulation.	Delays the compliance date for the regulation until July 1, 2005.	Necessary to allow enough time for companies manufacture and distribute compliant products before the compliance date.
40-7360 Notification, records and reporting.	See below.	See below.	See below.
40-7360 B 8.	Specifies the requirements for submitting registration information from and by two separate companies.	Corrects an error in the reference identifying the submittal date for the registration information.	Necessary to identify the correct submittal date for compliance with the reporting requirement.

Public Comment

Please summarize all public comment received during the 60-day period following the publication of the proposed stage, and provide the agency response. If no public comment was received, please so indicate.

A summary and analysis of the public testimony, along with the basis for the decision of the Board, is attached.

All Changes Made in this Regulatory Action

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail new provisions and/or all changes to existing sections.

Modifications to Existing Regulatory Requirements

9 VAC 5-20-21 incorporates some applicable documents from government entities and professional organizations into Virginia regulations directly by reference to those documents. This change to existing regulations was made to accommodate the addition of the new rule explained below. There are no consequences for these modifications beyond those associated with the addition of the new rule.

Addition of New Regulatory Requirements

This regulatory action will add a new rule, Emission Standards for Consumer Products in the Northern Virginia Volatile Organic Compound Emissions Control Area (Rule 4-50). The new rule will add new sections to 9 VAC 5 Chapter 40 as indicated below.

1. 9 VAC 5-40-7240 specifies that the provisions of the rule apply to those who sell, supply, offer for sale, or manufacture for sale any consumer product that contains volatile organic compounds. It also specifies that the provisions of the rule apply throughout the Northern Virginia volatile organic compound emissions control area designated in 9 VAC 5-20-206.

2. 9 VAC 5-40-7250 specifies exemptions from the rule.

3. 9 VAC 5-40-7260 specifies definitions of terms used within the rule.

4. 9 VAC 5-40-7270 specifies standards for volatile organic compounds.

5. 9 VAC 5-40-7280 specifies provisions for alternative control plans.

6. 9 VAC 5-40-7290 specifies provisions addressing innovative products.

7. 9 VAC 5-40-7300 specifies administrative requirements.

8. 9 VAC 5-40-7310 cross-references the standard for visible emissions.

9. 9 VAC 5-40-7320 cross-references the standard for fugitive dust/emissions.

10. 9 VAC 5-40-7330 cross-references the standard for odor.

11. 9 VAC 5-40-7340 cross-references the standard for toxic pollutants.

12. 9 VAC 5-40-7350 cross-references provisions for compliance.

13. 9 VAC 5-40-7360 specifies a compliance deadline of July 1, 2005.

14. 9 VAC 5-40-7370 specifies test methods and procedures.

15. 9 VAC 5-40-7380 cross-references provisions for monitoring.

16. 9 VAC 5-40-7390 specifies provisions for notification, records and reporting.

The consequences of the new requirements are as follows:

(a) Certain types of consumer products manufactured after July 1, 2005 and distributed for sale or supplied to consumers within the Northern Virginia VOC Emissions Control Area must comply with new VOC emissions standards that will achieve certain VOC emission reductions. There may be additional costs associated with producing compliant products and distributing them within the applicable area. However, any increased costs should be mitigated by the fact that these compliant products will also be manufactured for, and distributed in, two contiguous VOC emissions control areas in Maryland and Washington, D.C. and in VOC emissions control areas in four other states in the northeastern U.S.

(b) Manufacturers of consumer products subject to the new requirements have the flexibility to choose among a number of options to achieve the required VOC emission reductions, so as to mitigate an adverse impact upon that business. Manufacturers that choose a means of compliance other than direct compliance with the Table of Standards must obtain prior Department approval. Those products that have such an approval from the California Air Resources Board may expect expedited approval from the Department.

Legal Requirements

Please identify the state and/or federal source of the legal requirements that necessitate promulgation of the proposed regulation, including: (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly bill and chapter numbers, if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the legal requirements and the extent to which the requirements are is mandatory or discretionary.

Promulgating Entity

The promulgating entity for this regulation is the State Air Pollution Control Board.

Federal Requirements

Sections 109 (a) and (b) of the Clean Air Act require EPA to prescribe primary and secondary air quality standards to protect public health and welfare, respectively, for each air pollutant for which air quality criteria were issued before the enactment of the 1970 Clean Air Act. These standards are known as the National Ambient Air Quality Standards (NAAQS). Section 109 (c) requires EPA to prescribe such standards simultaneously with the issuance of new air quality criteria for any additional air pollutant. The primary and secondary air quality criteria are authorized for promulgation under Section108.

Section 110(a) of the Clean Air Act (CAA) mandates that each state adopt and submit to EPA a plan which provides for the implementation, maintenance, and enforcement of each primary and secondary air quality standard within each air quality control region in the state. The state implementation plan shall be adopted only after reasonable public notice is given and public hearings are held. The plan shall include provisions to accomplish, among other tasks, the following:

(1) establish enforceable emission limitations and other control measures as necessary to comply with the provisions of the CAA, including economic incentives such as fees, marketable permits, and auctions of emissions rights;

(2) establish schedules for compliance;

(3) prohibit emissions which would contribute to nonattainment of the standards or interference with maintenance of the standards by any state; and

(4) require sources of air pollution to install, maintain, and replace monitoring equipment as necessary and to report periodically on emissions-related data.

40 CFR Part 50 specifies the NAAQS: sulfur dioxide, particulate matter, carbon monoxide, ozone (and its precursors, volatile organic compounds) nitrogen dioxide, and lead.

40 CFR Part 51 sets out requirements for the preparation, adoption, and submittal of state implementation plans. These requirements mandate that any such plan shall include several provisions, including those summarized below.

Subpart G (Control Strategy) specifies the description of control measures and schedules for implementation, the description of emissions reductions estimates sufficient to attain and maintain the standards, time periods for demonstrations of the control strategy's adequacy, an emissions inventory, an air quality data summary, data availability, special requirements for lead emissions, stack height provisions, and intermittent control systems.

Subpart K (Source Surveillance) specifies procedures for emissions reports and record-keeping, procedures for testing, inspection, enforcement, and complaints, transportation control measures, and procedures for continuous emissions monitoring.

Subpart L (Legal Authority) specifies the requirements for legal authority to implement plans.

Section 51.230 under Subpart L specifies that each state implementation plan must show that the state has the legal authority to carry out the plan, including the authority to perform the following actions:

(1) adopt emission standards and limitations and any other measures necessary for the attainment and maintenance of the national ambient air quality standards;

(2) enforce applicable laws, regulations, and standards, and seek injunctive relief;

(3) abate pollutant emissions on an emergency basis to prevent substantial endangerment to the health of persons;

(4) prevent construction, modification, or operation of a facility, building, structure, or installation, or combination thereof, which directly or indirectly results or may result in emissions of any air pollutant at any location which will prevent the attainment or maintenance of a national standard;

(5) obtain information necessary to determine whether air pollution sources are in compliance with applicable laws, regulations, and standards, including authority to require record-keeping and to make inspections and conduct tests of air pollution sources;

(6) require owners or operators of stationary sources to install, maintain, and use emission monitoring devices and to make periodic reports to the state on the nature and amounts of emissions from such stationary sources; and

(7) make emissions data available to the public as reported and as correlated with any applicable emission standards or limitations.

Section 51.231 under Subpart L requires the identification of legal authority as follows:

(1) the provisions of law or regulation which the state determines provide the authorities required under this section must be specifically identified, and copies of such laws or regulations must be submitted with the plan; and

(2) the plan must show that the legal authorities specified in this subpart are available to the state at the time of submission of the plan.

Subpart N (Compliance Schedules) specifies legally enforceable compliance schedules, final compliance schedule dates, and conditions for extensions beyond one year.

Part D of Title I of the Clean Air Act describes how nonattainment areas are established, classified, and required to meet attainment. Subpart 1 provides the overall framework of what nonattainment plans are to contain, while Subpart 2 provides more detail on what is required of areas designated nonattainment for ozone.

Section 171 defines "reasonable further progress," "nonattainment area," "lowest achievable emission rate," and "modification."

Section 172(a) authorizes EPA to classify nonattainment areas for the purpose of assigning attainment dates. Section 172(b) authorizes EPA to establish schedules for the submission of plans designed to achieve attainment by the specified dates. Section 172(c) specifies the provisions to be included in each attainment plan, as follows:

(1) the implementation of all reasonably available control measures as expeditiously as practicable and shall provide for the attainment of the national ambient air quality standards;

(2) the requirement of reasonable further progress;

(3) a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutants in the nonattainment area;

(4) an identification and quantification of allowable emissions from the construction and modification of new and modified major stationary sources in the nonattainment area;

(5) the requirement for permits for the construction and operations of new and modified major stationary sources in the nonattainment area;

(6) the inclusion of enforceable emission limitations and such other control measures (including economic incentives such as fees, marketable permits, and auctions of emission rights) as well as schedules for compliance;

(7) if applicable, the proposal of equivalent modeling, emission inventory, or planning procedures; and

(8) the inclusion of specific contingency measures to be undertaken if the nonattainment area fails to make reasonable further progress or to attain the national ambient air quality standards by the attainment date.

Section 172(d) requires that attainment plans be revised if EPA finds inadequacies. Section 172(e) authorizes the issuance of requirements for nonattainment areas in the event of a relaxation of any national ambient air quality standard. Such requirements shall provide for controls which are not less stringent than the controls applicable to these same areas before such relaxation.

Under Part D, Subpart 2, §182(a)(2)(A) requires that the existing regulatory program requiring reasonably available control technology (RACT) for stationary sources of volatile organic compounds (VOCs) in marginal nonattainment areas be corrected by May 15, 1991, to meet the minimum requirements in existence prior to the enactment of the 1990 amendments. RACT is 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. EPA has published control technology

guidelines (CTGs) for various types of sources, thereby defining the minimum acceptable control measure or RACT for a particular source type.

Section 182(b) requires stationary sources in moderate nonattainment areas to comply with the requirements for sources in marginal nonattainment areas. The additional, more comprehensive control measures in §182(b)(2)(A) require that each category of VOC sources employ RACT if the source is covered by a CTG document issued between enactment of the 1990 amendments and the attainment date for the nonattainment area. Section 182(b)(2)(B) requires that existing stationary sources emitting VOCs for which a CTG existed prior to adoption of the 1990 amendments also employ RACT.

Section 182(c) requires stationary sources in serious nonattainment areas to comply with the requirements for sources in both marginal and moderate nonattainment areas.

EPA has issued detailed guidance that sets out its preliminary views on the implementation of the air quality planning requirements applicable to nonattainment areas. This guidance is titled the "General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990" (or "General Preamble"). See 57 FR 13498 (April 16, 1992) and 57 FR 18070 (April 28, 1992). The General Preamble has been supplemented with further guidance on Title I requirements. See 57 FR 31477 (July 16, 1992) (announcing the availability of draft guidance for lead nonattainment areas and serious PM10 nonattainment areas); 57 FR 55621 (Nov. 25, 1992) (guidance on NOX RACT requirements in ozone nonattainment areas). For this subject, the guidance provides little more than a summary and reiteration of the provisions of the Act.

State Requirements

These specific regulations are not required by state mandate. Rather, Virginia's Air Pollution Control Law gives the State Air Pollution Control Board the discretionary authority to promulgate regulations "abating, controlling and prohibiting air pollution throughout or in any part of the Commonwealth" (§ 10.1-1308). The law defines such air pollution as "the presence in the outdoor atmosphere of one or more substances which are or may be harmful or injurious to human health, welfare or safety, to animal or plant life, or to property, or which unreasonably interfere with the enjoyment by the people or life or property" (§ 10.1-1300).

Need

Please explain the need for the new or amended regulation and the potential consequences that may result in the absence of the regulation. Detail the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

Identification of Specific Plan Requirement Establishing the Need

The rule is to make legally enforceable one of several control measures identified in and designed to implement a plan submitted by the Commonwealth on August 19, 2003 for the attainment and maintenance of the ozone air quality standard in the Northern Virginia area. The plan was approved by the Metropolitan Washington Air Quality Committee (MWAQC) on August 13, 2003 and is entitled: State Implementation Plan (SIP) Demonstrating Rate of Progress for 2002 and 2005; Revision to 1990 Base Year Emissions; and Severe Area Attainment Demonstration for the Washington DC-MD-VA Nonattainment Area. MWAQC is the entity certified by the mayor of the District of Columbia and the governors of Maryland and Virginia to prepare an air quality plan for the DC-MD-VA Metropolitan Statistical Area under Section 174 of the federal Clean Air Act Amendments of 1990. The plan may be viewed at the following location:

http://www.mwcog.org/environment/air/

General Plan Requirements

Among the primary goals of the federal Clean Air Act are the attainment and maintenance of the National Ambient Air Quality Standards (NAAQS).

The NAAQS, developed and promulgated by the U.S. Environmental Protection Agency (EPA), establish the maximum limits of pollutants that are permitted in the outside ambient air. EPA requires that each state submit a plan (called a State Implementation Plan or SIP), including any laws and regulations necessary to enforce the plan, that shows how the air pollution concentrations will be reduced to levels at or below these standards (attainment). Once the pollution levels are within the standards, the SIP must also demonstrate how the state will maintain the air pollution concentrations at the reduced levels (maintenance).

A SIP is the key to the state's air quality programs. The Clean Air Act is specific concerning the elements required for an acceptable SIP. If a state does not prepare such a plan, or EPA does not approve a submitted plan, then EPA itself is empowered to take the necessary actions to attain and maintain the air quality standards—that is, it would have to promulgate and implement an air quality plan for that state. EPA is also, by law, required to impose sanctions in cases where there is no approved plan or the plan is not being implemented, the sanctions consisting of loss of federal funds for highways and other projects and/or more restrictive requirements for new industry. Generally, the plan is revised, as needed, based upon changes in the federal Clean Air Act and its requirements.

The basic approach to developing a SIP is to examine air quality across the state, delineate areas where air quality needs improvement, determine the degree of improvement necessary, inventory the sources contributing to the problem, develop a control strategy to reduce emissions from contributing sources enough to bring about attainment of the air quality standards, implement the strategy, and take the steps necessary to ensure that the air quality standards are not violated in the future.

The heart of the SIP is the control strategy. The control strategy describes the emission reduction measures to be used by the state to attain and maintain the air quality standards. There are three basic types of measures: stationary source control measures, mobile source control measures, and transportation source control measures. Stationary source control measures are directed at limiting emissions primarily from commercial/industrial facilities and operations and include the following: emission limits, control technology requirements, preconstruction permit programs for new industry and expansions, and source-specific control requirements. Stationary source control measures also include area source control measures which are directed at small businesses and consumer activities. Mobile source control measures are directed at tailpipe and other emissions primarily from motor vehicles and include the following: Federal Motor Vehicle Emission Standards, fuel volatility limits, reformulated gasoline, emissions control system anti-tampering programs, and inspection and maintenance programs. Transportation source control measures limit the location and use of motor vehicles and include the following: carpools, special bus lanes, rapid transit systems, commuter park and ride lots, bicycle lanes, signal system improvements, and many others.

Federal guidance on states' approaches to the inclusion of control measures in the SIP has varied considerably over the years, ranging from very general in the early years of the Clean Air Act to very specific in more recent years. Many regulatory requirements were adopted in the 1970s when no detailed guidance existed. The legally binding federal mandate for these regulations is general, not specific, consisting of the Clean Air Act's broad-based directive to states to attain and maintain the air quality standards. However, in recent years, the Clean Air Act, along with EPA regulations and policy, has become much more specific, thereby removing much of the states' discretion to craft their own air quality control programs.

Generally, a SIP is revised, as needed, based upon changes in air quality or statutory requirements. For the most part the SIP has worked, and the standards have been attained for most pollutants in most areas. However, attainment of NAAQS for one pollutant--ozone--has proven problematic. While ozone is needed at the earth's outer atmospheric layer to shield out harmful rays from the sun, excess concentrations at the surface have an adverse effect on human health and welfare. Ozone is formed by a chemical reaction between volatile organic compounds (VOCs), nitrogen oxides (NOX), and sunlight. When VOC and NOX emissions from mobile sources and stationary sources are reduced, ozone is reduced.

Congress enacted the 1977 Amendments to the Clean Air Act in order to address unsuccessful SIPs and areas that had not attained the NAAQS (that is, nonattainment areas). Although SIP revisions submitted pursuant to the requirements of the 1977 amendments did achieve some progress in eliminating nonattainment areas, some areas remained.

In 1990 Congress once again enacted comprehensive amendments to the Act to address SIP requirements for nonattainment areas. The new Act established a process for evaluating the air quality in each region and identifying and classifying each nonattainment area according to the severity of its air pollution problem. Nonattainment areas are classified as marginal, moderate, serious, severe and extreme. Marginal areas are subject to the least stringent requirements and each subsequent classification (or class) is subject to successively more stringent control measures. Areas in a higher classification of nonattainment must meet the mandates of the lower classifications plus the more stringent requirements of their class. In addition to the general SIP-related sanctions, nonattainment areas have their own unique sanctions. If a particular area fails to attain the federal standard by the legislatively mandated attainment date, EPA is required to reassign it to the next higher classification level (denoting a worse air quality problem), thus subjecting the area to more stringent air pollution control requirements. The Clean Air Act includes specific provisions requiring these sanctions to be issued by EPA if so warranted.

The new Act required EPA, based on the air quality data from each state, to propose geographic boundaries and pollution classification levels for all nonattainment areas to each state's governor. If states disagreed with EPA's proposals, they had the opportunity to propose different boundaries; however, EPA had the authority to make the final decision.

The process provided in the new Act yielded three nonattainment areas for Virginia. The classifications for Virginia's nonattainment areas were marginal for the Hampton Roads Nonattainment Area, moderate for the Richmond Nonattainment Area, and serious for the Northern Virginia Nonattainment Area. Since that time, air quality has improved. Although Northern Virginia remains a nonattainment area, Richmond and Hampton Roads have achieved the one-hour ozone standard and are now considered maintenance areas: that is, specific strategies that were implemented must continue; however, no additional new requirements are necessary provided the areas do not measure ozone concentrations in levels high enough to reclassify them into nonattainment.

Once the nonattainment areas were defined, each state was then obligated to submit a SIP demonstrating how it would attain the air quality standards in each nonattainment area. First, the new Act requires that certain specific control measures and other requirements be adopted and included in the SIP; a list of those that necessitated the adoption of state regulations is provided below. In addition, the state had to demonstrate that it would achieve a VOC emission reduction of 15%. Finally, the SIP had to include an attainment demonstration by photochemical modeling (including annual emission reductions of 3% from 1996 to 1999) in addition to the 15% emission reduction demonstration. In cases where the specific control measures shown below were inadequate to achieve the emission reductions or attain the air quality standard, the state was obligated to adopt other control measures as necessary to achieve this end.

ALL AREAS

- correct existing VOC regulatory program (controls on certain sources identified in EPA control technology guidelines)
- requirement for annual statements of emissions from industries
- preconstruction review (permit) program for new industry and expansions (with variable major source definition, variable offset ratio for addition of new pollution, and special requirements for expansions to existing industry in serious areas)
- offset ratio for addition of new pollution of 1.1 to 1
- procedures to determine if systems level highway plans and other federally financed projects are in conformity with air quality plans

MODERATE AND ABOVE AREAS

- requirement for controls for all major (100 tons per year) VOC sources
- requirement for controls for all major (100 tons per year) NOX sources
- case by case control technology determinations for all major VOC and NOX sources not covered by a EPA control technology guideline
- offset ratio for addition of new pollution of 1.15 to 1
- requirement for vapor recovery controls for emissions from filling vehicles with gasoline (stage II)

SERIOUS AND ABOVE AREAS

- requirement for controls for all major (50 tons per year) VOC sources
- requirement for controls for all major (50 tons per year) NOX sources
- offset ratio for addition of new pollution of 1.2 to 1
- enhanced monitoring (source emissions) program
- correct existing motor vehicle emissions inspection and maintenance (I&M) program
- enhanced motor vehicle emissions I&M program
- clean fuel fleet vehicle program
- oxygenated fuels program

SEVERE AND ABOVE AREAS

- requirement for controls for all major (25 tons per year) VOC sources
- requirement for controls for all major (25 tons per year) NOX sources
- offset ratio for addition of new pollution of 1.3 to 1

- requirement for major sources to pay a penalty fee if area does not attain air quality standard by attainment date

- transportation control strategies and measures to offset emissions growth from VMT

The Clean Air Act mandates that states include in their SIPs certain control measures. Virginia has submitted for federal approval a plan for the Northern Virginia area (formerly classified Serious, now classified Severe) that meets all the requirements for the Serious areas. These federally mandated measures, however, will not fill the gap between air quality goals and actual air quality, so the SIP must now incorporate additional measures as needed to meet the air quality goals. These additional measures have been determined in consultation with locally affected officials, who provide input on control strategy development and associated control measures.

In the Northern Virginia area, the pertinent body of locally affected officials is the Metropolitan Washington Air Quality Committee (MWAQC). MWAQC is the entity certified by the mayor of the District of Columbia and the governors of Maryland and Virginia to prepare an air quality plan for the DC-MD-VA Metropolitan Statistical Area under Section 174 of the federal Clean Air Act Amendments of 1990. Based on the region's current and projected future emissions and other regional data, MWAQC determined that the attached regulations are necessary for the area to meet its emissions reductions and attainment requirements. MWAQC therefore decided on January 23, 2002, that Maryland, Virginia, and Washington, D.C., would adopt the regulations.

Impact on Family

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: (1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; (2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; (3) strengthen or erode the marital commitment; and (4) increase or decrease disposable family income.

It is not anticipated that these regulation amendments will have a direct impact on families. However, there will be positive indirect impacts in that the regulation amendments will ensure that the Commonwealth's air pollution control regulations will function as effectively as possible, thus contributing to reductions in related health and welfare problems.

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COMMONWEALTH OF VIRGINIA
STATE AIR POLLUTION CONTROL BOARD
SUMMARY AND ANALYSIS OF PUBLIC TESTIMONY FOR
REGULATION REVISION G03
CONCERNING

CONSUMER PRODUCTS
(9 VAC 5 CHAPTER 40)

INTRODUCTION

At the November, 2003 meeting, the Board authorized the Department to promulgate for public comment a proposed regulation revision concerning Consumer Products.

A public hearing was advertised accordingly and held in Woodbridge, Virginia on September 9, 2004 and the public comment period closed on October 8, 2004. The proposed regulation amendments subject to the hearing are summarized below followed by a summary of the public participation process and an analysis of the public testimony, along with the basis for the decision of the Board.

SUMMARY OF PROPOSED AMENDMENTS

The proposed regulation amendments concerned provisions covering Consumer Products. A summary of the amendments follows:

Current section number	Current requirement	Proposed change and rationale
20-21	Provides a list of documents incorporated by reference into 9 VAC 5-10 through 9 VAC 5-80.	Adds new documents generated by Article 50 of 9 VAC 5-40. Change is necessary in order to meet Virginia statutory requirements to make the documents legally enforceable.

New section number	New requirement	Rationale for new requirement
40-7240	Specifies that the provisions of the rule apply to those who sell, supply, offer for sale, or manufacture for sale any consumer product that contains volatile organic compounds. It also specifies that the provisions of the rule apply throughout the Northern Virginia volatile organic compound emissions control area designated in 9 VAC 5-20-206.	Necessary to identify the regulated entities that are subject to the rule. Regulated entities are consistent with plan submitted by the Commonwealth on August 19, 2003 for the attainment and maintenance of the ozone air quality standard in the Northern Virginia area.
40-7250	Specifies exemptions from the rule.	Necessary in order to exclude emission reductions from regulated entities not needed to achieve emission

		reduction goals.
40-7260	Specifies definitions of terms used within the rule.	Necessary to support the other provisions of the rule.
40-7270	Establish emission limits of volatile organic compounds which are precursors to the formation of ozone.	Necessary to achieve emission reductions specified in the August 19, 2003 plan submittal.
40-7280	Specifies provisions for alternative control plans.	Necessary to provide operational flexibility.
40-7290	Specifies provisions addressing innovative products.	Necessary to provide incentives to the regulated entity to develop innovative products.
40-7300	Specifies administrative requirements.	Necessary to ensure uniform labeling and other requirements to allow spot monitoring of compliance with the rule.
40-7310	Cross-references the standard for toxic pollutants.	Necessary to identify existing general requirements applicable to all entities regulated under 9 VAC 5-40. Necessary to ensure that there are no collateral emissions of toxic pollutants.
40-7320	Cross-references provisions for compliance.	Necessary to identify existing general requirements applicable to all entities regulated under 9 VAC 5-40.
40-7330	Specifies a compliance deadline of January 1, 2005.	Necessary to achieve compliance by the date specified in the August 19, 2003 plan submittal.
40-7340	Specifies test methods and procedures.	Necessary to identify existing general requirements applicable to all entities regulated under 9 VAC 5-40. Necessary to ensure that the same test methods are used by all regulated entities.
40-7350	Cross-references provisions for monitoring.	Necessary to identify existing general requirements applicable to all entities regulated under 9 VAC 5-40.
40-7360	Specifies provisions for notification, records and reporting.	Necessary to identify existing general requirements applicable to all entities regulated under 9 VAC 5-40. Necessary to specify unique reporting requirements that provide for on going monitoring of compliance with the rule

SUMMARY OF PUBLIC PARTICIPATION PROCESS

A public hearing was held in Woodbridge, Virginia on September 9, 2004. Four persons attended the hearing, with only one of those persons offering oral and written testimony concerning Consumer Products. Three sets of additional written comments were received during the public comment period. As required by law, notice of this hearing was given to the public on or about August 9, 2004 in the Virginia Register and in The Washington Times. In addition, personal notice of this hearing and the opportunity to comment was given by mail to those persons on the Department's list to receive notices of proposed regulation revisions. A list of hearing attendees and the complete text or an account of each person's testimony is included in the hearing report which is on file at the Department.

ANALYSIS OF TESTIMONY

Below is a summary of each person's testimony and the accompanying analysis. Included is a brief statement of the subject, the identification of the commenter, the text of the comment and

the Board's response (analysis and action taken). Each issue is discussed in light of all of the comments received that affect that issue. The Board has reviewed the comments and developed a specific response based on its evaluation of the issue raised. The Board's action is based on consideration of the overall goals and objectives of the air quality program and the intended purpose of the regulation.

1. **SUBJECT:** Uniformity with regulations in other OTC states.

   COMMENTER: Mr. Joe Yost, representing the Consumer Specialty Products Association (CSPA) and the Automotive Specialty Products Association (ASPA).

   TEXT: As a threshold matter, CSPA (and ASPA) strongly support uniform regulations throughout the Mid-Atlantic and Northeastern States. CSPA commends the Department of Environmental Quality (Department) for producing a very comprehensive proposed regulation. In summary, the proposed rule incorporates the most stringent technology-forcing regulations developed by the California Air Resources Board (CARB) during the past 15 years. These proposed VOC standards will pose a significant challenge for CSPA (and ASPA) members – particularly the small companies that manufacture and market their products on a regional basis.

   While CSPA supports the Department's proposal to adopt definitions and VOC standards that are consistent with the OTC Model Rule, we have serious concerns about the Department's inadvertent omission of key terms and revisions to important provisions of the Model Rule. CSPA comments identify significant deviations from the OTC Model Rule that undermine the OTC's primary goal: uniform regulations throughout the region. Absent such consistency, we cannot support the Department's proposed regulation. Therefore, CSPA urges the Department to revise the proposed regulation so that it will be consistent with the OTC Model Rule.

   RESPONSE: It is recognized that uniformity among the OTC states is desirable. However, regulations must also meet the appropriate legal requirements of the individual states. No change has been made to the proposed regulation in response to this comment.

2. **SUBJECT:** Standard for volatile organic compounds (9 VAC 5-40-7270 A).

   COMMENTER: Mr. Joe Yost, representing CSPA and ASPA.

   TEXT: There is an apparent inadvertent omission of the word "manufactured" in this very important section of the proposed regulation. Thus, the Department's proposed regulation is at variance with the OTC Model Rule and the consumer products regulations that have been promulgated to-date by six states. The omission of this word will have significant and adverse effects since the whole

regulatory framework of the stringent VOC standards set forth in the OTC Model Rule is premised on the date that a product is manufactured. Moreover, the apparent unintentional omission undercuts the Department's stated intention of promulgating a regulation that is consistent will all the states in the Ozone Transport Region. Therefore, CSPA strongly urges the Department to add the necessary word "manufactured" to this critically important provision of the consumer products regulation as follows:

> 9 VAC 5-40-7270. Standard for volatile organic compounds.
>
> A. Except as provided in 9 VAC 5-40-7250, 9 VAC 5-40-7280, and 9 VAC 5-40-7290, no person shall sell, supply, offer for sale, or manufacture for sale a consumer product manufactured on or after January 1, 2005, which contains volatile organic compounds in excess of the limits specified in Table 4-50A.

The above-stated revisions will make the Department's applicability provision consistent with the OTC Model Rule and regulations promulgated by six states that have adopted OTC-based consumer products regulations.

RESPONSE: This comment is acceptable and appropriate changes reflecting the intent of the comment have been made to the proposal.

3. **SUBJECT:** Table of Standards (9 VAC 5-40-7270 A, Table 4-50).

COMMENTER: Mr. Joe Yost, representing CSPA and ASPA.

TEXT: There are two errors in the table of standards – the same errors appear in the OTC Model Rule. In addition, several other states made the same error in their proposed consumer products regulation. Specifically, on page 41 of the Department's proposed regulation, there is an error in the air freshener product category: the VOC standard for liquids/pump sprays should be 18 – not 183; and the standard for solids/gels should be 3 – not 183.

Second, on page 42 of the proposed regulation, the VOC standard for general purpose degreasers should be corrected: the standard for aerosols should be 50 – not 504; and non-aerosols should be 4 – not 504.

RESPONSE: This comment is acceptable and appropriate changes reflecting the intent of the comment have been made to the proposal.

4. **SUBJECT:** Alternative Control Plan (ACP) (9 VAC 5-40-7280).

COMMENTER: Mr. Joe Yost, representing CSPA and ASPA.

TEXT: The ACP is an innovative regulation developed by CARB approximately 10 years ago. In summary, the ACP produces significant quantifiable additional reductions in VOC emissions every year. The ACP provides substantial environmental benefits for California and it will provide similar benefits for the Commonwealth of Virginia. CSPA (and ASPA) strongly support the inclusion of this provision in the proposed regulation.

CSPA is very concerned that the Department radically redrafted key sections of the OTC Model Rule's ACP provision. The ACP is an extremely complex regulation. In fact, the complexity of this provision is readily apparent on its face; the text of this provision comprises more than 20 percent of the entire text of the Department's proposed regulation. Therefore, CSPA urges Virginia to conform to the OTC Model Rule, as every other state which has adopted the OTC Model Rule has done. By doing so, Virginia – or any other state in the OTR – is not ceding its state sovereignty. Rather, it is a pragmatic decision recognizing that it is both unrealistic and unreasonable for any OTR state agency to attempt to duplicate CARB's comprehensive review process for reviewing and approving an ACP. Moreover, Virginia – and any other OTR State – retains the ability to exercise its sovereign authority (if necessary in a particular case) to require a manufacturer to provide further clarification before approving application for an ACP.

Currently, CARB has a large staff of 67 full-time equivalents to administer and enforce its consumer products and architectural coatings regulations. With all due respect, unless DEQ intends to commit a similar amount of resources to administer this proposed regulation, the Department should not seek to "reinvent the wheel" by attempting to replicate CARB's procedures for reviewing ACPs. Rather, the Department should follow the more reasonable approach of adopting the provisions set forth in the OTC Model Rule and recognize an ACP approved by CARB. All six states that have adopted OTC-based regulations have followed this pragmatic and reasonable approach. Our industry fears that without such uniformity, timely and efficient launching and marketing of product will be compromised needlessly. Therefore, CSPA strongly urges the Department to incorporate the necessary revisions to the proposed regulation so that this important provision is consistent with the OTC Model Rule and the six states that have promulgated OTC-based regulations.

RESPONSE: With the exception of those provisions automatically accepting all new Alternative Control Plans approved by the California Air Resources Board (CARB), this section of the proposed regulation is substantially the same as the OTC model rule. Virginia regulatory authorities may not improperly delegate their regulatory authority to another governmental or private entity. Thus, incorporation of an existing California regulation, compliance plan or order into a Virginia regulation is only effective for that version of the regulation, plan or order that is in effect as of the date it is adopted into regulation in Virginia. The OTC model rule is not consistent with Virginia regulatory authority in this

respect. The Department has the resources to approve CARB-approved ACPs in a timely manner such that there should be little or no impact upon the timely and efficient launching and marketing of consumer products. No change has been made to the proposed regulation in response to this comment.

5. **SUBJECT:** Innovative Products (9 VAC 5-40-7290).

COMMENTER: Mr. Joe Yost, representing CSPA and ASPA.

TEXT: The innovative products provision provides a win-win solution to reducing VOC emissions in Virginia and in other OTR states. Specifically, this provision encourages manufacturers to develop new approaches for reducing VOC emissions while maintaining product efficacy and providing value to consumers. Simply stated: the innovative product provision is a good case study of how the discipline of the marketplace produces results that parallels state environmental objectives.

However, the text of the Department's proposed innovative product provision deviates drastically from the text of the OTC Model Rule. Again, with all due respect, unless the DEQ intends to commit a similar amount time and resources as CARB to reviewing and approving applications for innovative product exemptions, it is neither reasonable nor appropriate for the DEQ to duplicate California's comprehensive process. Moreover, since the DEQ's proposed regulation varies significantly form the OTC Model Rule on this important provision, the Department's proposal contravenes the Department's commitment to support the model rule. Therefore, we urge the Department to make revisions to this essential provision so that it is consistent with the OTC Model Rule and the OTC-based regulations that have been promulgated in six other states.

RESPONSE: With the exception of those provisions automatically accepting all new Innovative Product (IP) exemptions approved by CARB, this section of the proposed regulation is substantially the same as the OTC model rule. Virginia regulatory authorities may not improperly delegate their regulatory authority to another governmental or private entity. Thus, incorporation of an existing California regulation, compliance plan or order into a Virginia regulation is only effective for that version of the regulation, plan or order that is in effect as of the date it is adopted into regulation in Virginia. The OTC model rule is not consistent with Virginia law in this respect. The Department has the resources to approve CARB-approved IP exemptions in a timely manner such that there should be little or no impact upon the timely and efficient launching and marketing of consumer products. No change has been made to the proposed regulation in response to this comment.

6. **SUBJECT:** Administrative Requirements (9 VAC 5-40-7300 B).

COMMENTER: Mr. Joe Yost, representing CSPA and ASPA.

TEXT: As currently drafted, manufacturers (or other responsible parties) will be required to submit code-date information at least twelve months before the effective date of this regulation. See 9 VAC 5-40-7300 B. There is a substantially identical provision in OTC Model Rule. See Administrative Requirements at Section 6(b). CSPA member companies do not object to such a requirement. In fact, CSPA and CTFA worked closely with four states and the District of Columbia to develop an initial code-date reporting form for our respective member companies to comply with this requirement. As a practical matter, the requirement for companies to submit code-date information one year before the effective date for the Model Rule was reasonable for those states that considered the issue before January 1, 2004 (i.e., Delaware, Pennsylvania, New York, Maryland). However, such a requirement is impossible to meet when a state (e.g., Virginia) initiates a rulemaking process on an expedited basis after that date. Assuming that the Department's final rule takes effect in January 2005, companies would have been required to submit information to the Department by last January – at least eight months before the Department issued its proposed rule in August 2004. Thus, CSPA urges the Department to revise this provision so that code-dating information must be submitted on (or before) the effective date of this rule.

RESPONSE: This comment is acceptable and appropriate changes reflecting the intent of the comment have been made to the proposal.

7. **SUBJECT:** Uniformity with regulations in other OTC states.

COMMENTER: Mark Collatz, representing The Adhesive and Sealant Council, Inc. (ASC).

TEXT: The Adhesive and Sealant Council, Inc. (ASC) is an international trade association representing 120 manufacturers of adhesives and sealants and suppliers of raw materials to the industry.

The Council and its members have generally been supportive of the Ozone Transport Commission and its member states in their efforts to establish uniform clean air regulations within the Ozone Transport Region (OTR). Clearly it benefits both the regulators and the regulated throughout the region to maintain consistency in the language of the various rules addressing consumer products. A lack of uniformity in these regulations ultimately costs manufacturers and the consumers in these states because of the greatly increased production and distribution costs.

RESPONSE: See the response to comment 1. No change has been made to the proposed regulation in response to this comment.

8. **SUBJECT:** Terms Defined (9 VAC 5-40-7260 C).

COMMENTER: Mark Collatz, representing the ASC.

TEXT: This discrepancy rests in the area of the container size limit in the definition for adhesives. In its original draft proposal, the OTC incorporated a size limit definition for all consumer adhesive products of one pound or 16 fluid ounces. This limit was consistent with the present California consumer regulation on which their model was based.

Other OTC states have consistently made adjustments to their rules with regard to this definition.

During the model rule development, ASC and its members as a well as other national associations expressed concern with the 16 fluid ounce limit for contact adhesives. Instead it was suggested that the consumer market for contact adhesives would be better represented by a limit of one gallon. The overlying reason for the expanded container size definition rests with the fact that the U.S. Consumer Product Safety Commission (CPSC) requires that contact adhesive products in container sizes up to one gallon have a flash point of greater than 20 degrees Fahrenheit. Manufacturers design these products for the retail market to comply with the CPSC requirement.

At the time the model was finalized, OTC addressed the industry's concerns but in revising the rule incorporated the one-gallon size limit for all adhesive categories covered by the model. The action, while satisfying the contact adhesive issue, placed stricter VOC limits on a wide range of other products that generally are not meant for or marketed to the retail consumer.

The OTC believed it was too late to change the model but their staff acknowledged the problem and said that they hoped to alert states of the inconsistency as they brought their own versions of the rule on line. ASC and its members have also made an effort to alert states during their rule making activities.

RESPONSE: This comment is acceptable and appropriate changes reflecting the intent of the comment have been made to the proposal.

9. **SUBJECT:** Standard for volatile organic compounds (9 VAC 5-40-7270 A).

COMMENTER: Mark Collatz, representing the ASC.

TEXT: As currently drafted the proposal lacks an explicit sell through period as is typical in the other regulations that have been adopted. Specifically, DEQ proposal does not make it clear your intent is to require compliance for a given product only if it is manufactured after its category's VOC limit goes into effect. Such a provision is extremely important in aiding all parties in complying while avoiding the burden of destroying inventories that were in commerce prior to the effective date of a given VOC limit. Failure to include such a provision will result in the forced destruction of otherwise viable consumer product at a considerable cost-products that were legally put into the distribution pipeline.

Again, it should be noted that every OTC state that has adopted this rule has included the same sell through provision.

RESPONSE: See the response to comment 2. This comment is acceptable and appropriate changes reflecting the intent of the comment have been made to the proposal.

10. **SUBJECT:** Compliance date of the regulation.

COMMENTER: Mark Collatz, representing the ASC.

TEXT: The Council and its members would request that upon finalization of the rule, the DEQ allow a minimum of six months for the rule to become effective. This additional time is necessary to allow adhesive and sealant manufacturers to make adjustments to their product supply chain to ensure that distributors have a continuous supply of compliant products available to Virginia consumers.

RESPONSE: The OTC model rule was first published on March 6, 2001 with considerable input from the affected consumer products industry. That model rule, which has been endorsed by representatives of the affected entities, contains a proposed compliance date of January 1, 2005. Virginia's proposed rule, which contained a compliance date identical to the OTC model rule, was first publicly proposed at the November 2003 Board meeting almost a year ago. The proposed rule was then offered to the public and affected entities for comment on August 9, 2004, almost five months before the proposed compliance date. There is no basis for the argument that the consumer products industry has had inadequate notice of the proposed compliance date. Additionally, there have never been any restrictions that would prevent the manufacture and distribution of compliant products before the January 1, 2005 compliance date.

Arguments that the distribution system is so complex as to require additional time to respond are disingenuous. Manufacture and distribution of compliant products for Maryland and Washington, D C are already underway, since their compliance dates are either January 1, 2005 or earlier. It should be easier to distribute compliant products in Northern Virginia consistent with those adjoining areas

than it would be to create a new area with a different compliance or implementation date.

However, since it is likely that the effective date of the rule will be after the proposed compliance date of January 1, 2005 and the associated control measure in the Northern Virginia attainment plan is specified as a contingency measure, an adjustment of the compliance date to July 1, 2005 seemed reasonable. Appropriate changes reflecting the intent of the comment have been made to the proposal.

11. **SUBJECT:** Compliance with the regulation.

COMMENTER: Catherine Beckley, representing the Cosmetic, Toiletries and Fragrance Association (CTFA).

TEXT: CTFA has worked for four years with all the OTC states to draft a consumer product regulation that would limit VOCs for several categories of personal care products. CTFA, however, thinks that the Virginia VOC proposal in its current form deviates so substantially from the OTC Model Consumer Product Rule and the adopted rules of its sister states of Maryland and D.C. in the Metropolitan Council of Governments that its adoption would make compliance impossible.

RESPONSE: With the exception of automatic approvals of CARB ACPs and Innovative Product Exemptions (IPEs), the proposed regulation is substantively the same as the OTC model rule. Compliance with the applicability, exemptions, standards, administrative requirements, compliance requirements, test methods, monitoring, notification, record and reporting requirements of the proposed rule should not be any more difficult that it is with consumer product rules in other states that have adopted the OTC model rule. Virginia's deviations from sections of the OTC model rule concerning the automatic approval of CARB-approved ACPs and IPEs are necessary to conform to current interpretations of Virginia law. The Department has the resources to conduct the necessary review and to issue approvals of CARB-approved ACPs and IPEs, so that compliance with the Virginia version of these provisions of the OTC model rule will be possible. No change has been made to the proposed regulation in response to this comment.

12. **SUBJECT:** Inadequate notice for compliance.

COMMENTER: Catherine Beckley, representing the CTFA.

TEXT: In a December 12, 2003 letter to Virginia's Director of the DEQ, CTFA stated that we "will work with our member companies in their effort to provide reformulated products that meet the ***OTC Consumer Products Model VOC Rule***

specifications." (emphasis added) The rule proposed by DEQ in August 2004, however, deviates sharply from the OTC Model Rule and would make ***voluntary or mandatory*** compliance very difficult for manufacturers. DEQ's moving up its original implementation date from early to mid-2005 to January 1, 2005 gives stakeholders a mere two months to review the formally proposed DEQ rule. DEQ has stated that the current record for consideration of stakeholder comments ends October 8 and the rule will go into effect January 1, 2005. That is an inadequate notice and comment period.

RESPONSE: The Department has provided the required 60 days for notice and public comment on the proposed rule. A protracted comment period does not provide more time for compliance between approval and the actual implementation of the rule. It merely delays consideration and approval of the rule by the Board. No additional comment period was provided in response to this comment.

However, since it is likely that the effective date of the rule will be after the proposed compliance date of January 1, 2005 and the associated control measure in the Northern Virginia attainment plan is specified as a contingency measure, an adjustment of the compliance date to July 1, 2005 seemed reasonable. Appropriate changes reflecting the intent of the comment have been made to the proposal.

13. **SUBJECT:** Uniformity with regulations in other OTC states.

COMMENTER: Catherine Beckley, representing the CTFA.

TEXT: When CTFA voluntarily offered to work with its member companies to provide personal care products that meet the VOC standards in the OTC Model rule, Maryland and the District of Columbia, it did so with the understanding that when Virginia adopted its rule in early to mid-2005, the Commonwealth would follow the OTC Model Rule for Consumer Products. Virginia DEQ's proposed rule did not follow the OTC Model and would disrupt the uniformity of regulation within the OTR.

RESPONSE: See the response to comment 1. No change has been made to the proposed regulation in response to this comment.

14. **SUBJECT:** Terms Defined (9 VAC 5-40-7260 C).

COMMENTER: Catherine Beckley, representing the CTFA.

TEXT: The final rule should include a definition for "Volatile Organic Compound" as the OTC Model and other states have included it. Including the definition in the consumer product VOC rule allows manufacturers to comply

more easily by knowing which chemicals should be included in the calculation of a product's VOC content. For example, to meet the 75% VOC limit for nail polish removers, it is important for formulators to know that acetone is not a VOC under the OTC rule definition of VOC.

RESPONSE: The definition of VOC is located in the General Definitions in Chapter 10 of the regulations (9 VAC 5-10-20 C). That definition contains all of the volatile organic compounds listed in the model rule. However, since the persons that might use this regulation may be unfamiliar with where to find this general definition the regulations, a more direct reference seemed appropriate. Appropriate changes reflecting the intent of the comment have been made to the proposal.

15. **SUBJECT:** Standard for volatile organic compounds (9 VAC 5-40-7270).

COMMENTER: Catherine Beckley, representing the CTFA.

TEXT: There is a significant drafting error in Section A that must be corrected. This Section dictates when sellers, suppliers and manufacturers must comply with the proposed rule's consumer product VOC standards. For the Virginia rule to be consistent with the OTC Model Rule and the rules of six OTR states the following changes must be made:

Except as provided in 9 VAC 5-40-7250, 9 VAC 5-40-7280, and 9 VAC 5-40-7290, no person shall sell, supply, offer for sale, or manufacture for sale a consumer product manufactured on or after January 1, 2005, which contains volatile organic compounds in excess of the limits specified in Table 4-50A.

Without adding "manufactured" to Virginia's rule there will be widespread confusion among manufacturers, distributors and DEQ regulators over which products are subject to the rule's VOC limits.

RESPONSE: See the response to comment 2. This comment is acceptable and appropriate changes reflecting the intent of the comment have been made to the proposal.

16. **SUBJECT:** Innovative Products (9 VAC 5-40-7290).

COMMENTER: Catherine Beckley, representing the CTFA.

TEXT: CTFA has serious concerns that the proposed Virginia rule does not follow the OTC Model or the other OTC states approach to innovative product applications.

There appears to be an error in Section 5-40-7290 (B) that states "[i]n granting an exemption under this section, the board will take into consideration whether the applicant has been granted an ACP [alternate control plan] by CARB." The intention of the drafter likely was that the board would consider California's granting an "innovative product application," but not an "ACP" Alternative Control Plan. Both the ACP and Innovative Product provisions offer manufacturers flexibility in meeting the VOC limits, but are markedly different in the criteria to be met and not synonymous.

RESPONSE: This comment is acceptable and appropriate changes reflecting the intent of the comment have been made to the proposal.

17. **SUBJECT:** Innovative Products (9 VAC 5-40-7290).

COMMENTER: Catherine Beckley, representing the CTFA.

TEXT: CTFA has serious concerns that the proposed Virginia rule does not follow the OTC Model or the other OTC states approach to innovative product applications.

The OTC Model and all the OTC member states that adopted individual state rules contain an Innovative Products provision that offers manufacturers two options to allow compliance with the VOC rule in a manner other than by VOC content. The Commonwealth's proposed Innovative Product Provision does not offer the necessary flexibility and as drafted, would impede innovation.

The DEQ should change the proposed Innovative Product provision to conform to the OTC Model and the OTC states' Innovative Product provisions that offer two options for seeking approval of an innovative product. One option allows a party to submit an innovative product application (with supporting documentation) that was approved by the California Air Resources Board (CARB). The other option states that if CARB approved an IPA based on California-specific information or if the manufacturer has not been granted an IP exemption, then they must apply to the state (e.g., Virginia) for an exemption.

The Virginia approach would cause significant disruption of the marketing of Innovative Product because it would merely "take into consideration" whether CARB has granted an IPA and require a Virginia-approved IPA. The OTC and the OTR states that signed the MOU (including Virginia) and those that adopted their own rules recognize that approving an IPA is extremely resource intensive for an individual state. Other reasons for the OTC's decision to accept a CARB-approved IPA include the following:

1. If an individual OTC state requires pre-approval on its own, the introduction of an innovative product sold region-wide could be significantly delayed causing a distribution and compliance nightmare for manufacturers;
2. The basis for the OTC Model was California's strict consumer product regulation;
3. California has extensive experience in processing and reviewing IP applications;
4. States recognize the rigor involved in California's scrutiny of IPAs;
5. An individual state receives not only the California certificate of approval, but a copy of the decision and conditions attached to an IPA; and
6. Accepting a CARB-approved IPA does not contravene an OTC state's sovereignty or its ability to meet its SIP needs. The Virginia proposal allows CARB Method 310 to test for compliant products, for example.

RESPONSE: See the response to comment 5. No change has been made to the proposed regulation in response to this comment.

18. **SUBJECT:** Innovative Products (9 VAC 5-40-7290).

COMMENTER: Catherine Beckley, representing the CTFA.

TEXT: The issue of whether DEQ has the resources needed for a case-by-case review of each Innovative Product application is raised in the context of the Variance process. In Section 9 VAC 5-40-7250 (L) Exemptions, dealing with Variances, a process that is separate from the IPA process, DEQ's lack of resources is apparent because the Commonwealth asks for additional time in processing such a case-by-case request. Specifically, the OTC Model states that variance applications need to be completed in "75 days," but Virginia asks for "120 days," likely because of a resource crunch.

RESPONSE: The Department has the resources to review and approve Innovative Product exemptions previously approved by CARB. No change has been made to 9 VAC 5-40-7290 in response to this comment. However, the comment concerning the processing time for variances is acceptable and appropriate changes reflecting the intent of the comment have been made to 9 VAC 5-40-7250.

19. **SUBJECT:** Administrative requirements (9 VAC 5-40-7300 B).

COMMENTER: Catherine Beckley, representing the CTFA.

TEXT: Meeting the proposed rule's current requirement that manufacturers using a date code, rather than the month, day and year, must file their products' date codes is impossible given the January 1, 2005 effective date. The proposed rule

would require manufacturers to file its date codes no later than January 1, 2004 creating a situation where manufacturers are in violation of the rule before it is even final. A more reasonable filing date would be on or after the effective date of the rule.

RESPONSE: See the response to comment 6. This comment is acceptable and appropriate changes reflecting the intent of the comment have been made to the proposal.

20. **SUBJECT:** Standard for volatile organic compounds (9 VAC 5-40-7270 A).

COMMENTER: Heidi K. McAuliffe, representing the National Paint and Coatings Association (NPCA).

TEXT: The proposed rule does not make it clear that products manufactured prior to January 1, 2005 are granted an unlimited sell-through and may be sold after the effective date. This unlimited sell-through is a prominent element of the OTC Model Rule and it is the reason that the date-code provisions are extremely important. Products manufactured prior to the effective date are not subject to the proposed limits and should not be impacted by adoption of this rule (just as they are not impacted by the adoption of similar rules in other states).

RESPONSE: See the response to comment 2. This comment is acceptable and appropriate changes reflecting the intent of the comment have been made to the proposal.

21. **SUBJECT:** Administrative Requirements (9 VAC 5-40-7300 B).

COMMENTER: Heidi K. McAuliffe, representing the NPCA.

TEXT: It will be impossible for manufacturers to comply with the requirement that any date-codes in use be submitted to the Department of Environmental Quality twelve months before the effective date of these standards. Since it is already October and the standards will become effective in January 2005, this provision should be rewritten in order to provide manufacturers adequate time to submit date-code files so that they are not immediately in "non-compliance."

RESPONSE: See the response to comment 6. This comment is acceptable and appropriate changes reflecting the intent of the comment have been made to the proposal.

22. **SUBJECT:** Applicability (9 VAC 5-40-7240).

COMMENTER: Christine Porter, representing the Department of the Navy.

TEXT: DOD requests that the following paragraph be added:

9 VAC 5-40-7240. Applicability.
c. For the purposes of this article, the terms "supply" or "supplied" do not include internal transactions within a business or governmental entity. These terms onlyy apply to transactions between manufacturers/commercial distributors that sell, or otherwise provide, products to businesses/governmental entities/individuals.

This is the same language your department added in 9 VAC 5-40-7120.D so that the Architectural and Industrial Maintenance Coatings regulation exempted internal transactions within a business or governmental entity. The Consumer Products regulation should have equivalent exemptions for internal transactions.

RESPONSE: This comment is acceptable and appropriate changes reflecting the intent of the comment have been made to the proposal.

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