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Exempt Action Final Regulation Agency Background Document

Agency name	State Air Pollution Control Board
Virginia Administrative Code (VAC) citation(s)	Primary action: Article 1, 9VAC5-80 Secondary action(s): Article 3, 9VAC5-80
Regulation title(s)	Regulations for the Control and Abatement of Air Pollution
Action title	Amend federal operating (Title V) permit regulations to remove an impermissible affirmative defense (Rev. E16)
Final agency action date	September 9, 2016
Date this document prepared	

When a regulatory action is exempt from executive branch review pursuant to § 2.2-4002 or § 2.2-4006 of the Virginia Administrative Process Act (APA) or an agency's basic statute, the agency is not required, however, is encouraged to provide information to the public on the Regulatory Town Hall using this form. Note: While posting this form on the Town Hall is optional, the agency must comply with requirements of the Virginia Register Act, Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

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of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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.

On June 12, 2015 (80 FR 33840), the U.S. Environmental Protection Agency (EPA) issued a final SIP call concerning treatment of excess emissions in state rules by sources during periods of startup, shutdown or malfunction (SSM), including Virginia's SSM rules at 9VAC5-20-180 G. The U.S. Court of Appeals for the District of Columbia Circuit (NRDC v. EPA, No. 10-1371) held that such provisions are illegal, and state plans must be amended accordingly. Essentially, EPA found that 9VAC5-20-180 G created an impermissible affirmative defense for violations of emission limits, and that provision was amended accordingly. EPA's Title V operating permit program at 40 CFR Part 70 contains affirmative defense provisions which EPA is now proposing to remove (June 3, 2016). Virginia's operating permit regulations (Articles 1 and 3 of 9VAC5-80), which are based on 40 CFR Part 70, also contain an affirmative defense for malfunctions that must now also be removed. A number of minor administrative amendments are also being made in order to be more consistent with 9VAC5-20-180.

Acronyms and definitions

Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the “Definition” section of the regulations.

EPA - U.S. Environmental Protection Agency
 SSM - startup/shutdown/malfunction

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 September 9, 2016, the State Air Pollution Control Board took final action to adopt amendments to regulations entitled Regulations for the Control and Abatement of Air Pollution, specifically, Articles 1 and 3 of 9VAC5-80. The regulatory action is to be effective as provided in the Administrative Process Act.

The regulation amendments are exempt from the state administrative procedures for adoption of regulations contained in Article 2 of the Administrative Process Act by the provisions of § 2.2-4006 A 4 b of the Administrative Process Act because they are necessary to conform to an order of a federal court of competent jurisdiction where no agency discretion is involved.

In adopting these amendments, the board affirmed that it will receive, consider and respond to petitions by any person at any time with respect to reconsideration or revision, as provided in § 2.2-4006 B of the Administrative Process Act.

Family impact

Please assess the impact of this 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.

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.

Current section number	Proposed new section number, if	Current requirement	Proposed change and rationale

	applicable		
9VAC5-80-250		Describes actions to be taken to obtain an affirmative defense in the case of a malfunction.	Remove affirmative defense; needed in order to meet a federal court order. Make a number of minor administrative revisions to be more consistent with the general provisions of 9VAC5-20-180; needed for clarity and in order for the regulations to operate properly.
9VAC5-80-650		Describes actions to be taken to obtain an affirmative defense in the case of a malfunction.	Remove affirmative defense; needed in order to meet a federal court order. Make a number of minor administrative revisions to be more consistent with the general provisions of 9VAC5-20-180; needed for clarity and in order for the regulations to operate properly.

Regulatory flexibility analysis

Pursuant to § 2.2-4007.1B of the Code of Virginia, please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

These regulations meet the minimum requirements of the federal Clean Air Act and the minimum requirements of 40 CFR Parts 50 and 51, and an order of the court. Any less stringent compliance requirements, any delays in adopting the standards, any different compliance or reporting requirements, any substitution of performance standards, and any exemption of small businesses from these requirements will not meet the minimum federal requirements. Any such changes would compromise the effectiveness of the regulations in protecting the health and welfare of the public, and could potentially subject the Commonwealth to federal control over the state permitting program.

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