Form: TH- 03

Virginia Regulatory Town Hall

Final Regulation
Agency Background Document

Agency Name:	State Air Pollution Control Board
Regulation Title:	Regulations for the Control and Abatement of Air Pollution
Primary Action:	9 VAC 5-80-10 and 9 VAC 5-80-11
Secondary Action(s):	Article 6 (9 VAC 5-80-1100 et seq.) of Part II of 9 VAC 5 Chapter 80 and 9 VAC 5-50-240, 250, 260, 320 and 390
Action Title:	Permits for New and Modified Sources (Rev. YY)
Date:	May 28, 2002

Please refer to the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia), Executive Order Twenty-Five (98), and the Virginia Register Form, Style and Procedure Manual for more information and other materials required to be submitted in the final regulatory action package.

Summary

Please provide a brief summary of the new regulation, amendments to an existing regulation, or the regulation being repealed. There is no need to state each provision or amendment or restate the purpose and intent of the regulation.

The regulation applies to the construction or reconstruction of new stationary sources or expansions (modifications) to existing ones. Exemptions are provided for smaller facilities. With some exceptions, the owner must obtain a permit from the agency prior to the construction or modification of the source. The owner of the proposed new or modified source must provide information as needed to enable the agency to conduct a preconstruction review in order to determine compliance with applicable control technology and other standards and to assess the impact of the emissions from the facility on air quality. The regulation also provides the basis for the agency's final action (approval or disapproval) on the permit depending upon the results of the preconstruction review. The regulation provides a source-wide perspective to determine applicability based solely upon the emissions changes directly resulting from the physical or operational change. Procedures for making changes to permits are included. The regulation also allows consideration of additional factors for making Best Available Control Technology (BACT) determinations for sources subject to minor new source review.

Substantial Changes Made Since the Proposed Stage

Please briefly and generally summarize any substantial changes made since the proposed action was published. Please provide citations of the sections of the proposed regulation that have been substantially altered since the proposed stage.

1. Provisions have been added to clarify the counting of fugitive emissions to determine applicability of minor NSR. Fugitive emissions are counted if quantifiable; however, if fugitive emissions are the only emissions that cause the new or modified source to be subject to minor NSR, they are not counted. [see 9 VAC 5-80-1100 D]

2. Provisions have been added to state that (i) exemption from minor NSR does not exempt a project from major NSR, and (ii) exemption from major NSR does not exempt a project from minor NSR. [see 9 VAC 5-80-1100 G]

3. Provisions have been added to allow permit terms and conditions that are state-only enforceable to be designated as such in the permit. [see 9 VAC 5-80-1100 H 4 and 9 VAC 5-80-1120 F]

4. The provisions to allow concurrent construction have been deleted. [see 9 VAC 5-80-1130]

5. Provisions have been added to require certification from the permit applicant that the applicant understands that issuance of the minor NSR permit (i) does not shield the applicant from enforcement of the major NSR permit program and (ii) does not relieve the applicant from compliance with the major NSR program. [see 9 VAC 5-80-1140 E]

6. The provisions covering public participation for sources of hazardous air pollutants have been changed to require a public comment period only for permit applications requiring a case-by-case maximum available control technology (MACT) determination under the FHAPNSR program. [see 9 VAC 5-80-1170 D 1]

7. The provisions to allow plantwide applicability limits have been deleted and replaced with provisions that allow pollution control projects under this permit program and exempt them from major NSR. Pollution control projects are physical or operational changes at a source whose primary function is the reduction of emissions of targeted regulated air pollutants but which also result in an increase in emissions of non-targeted regulated air pollutants that qualify as a major modification subject to major source NSR. [see 9 VAC 5-80-1110 C, definitions of “pollution control project” and "targeted regulated air pollutant," and 9 VAC 5-80-1310.]

8. The provisions concerning exemption levels have been simplified somewhat and clarified in some cases. [see 9 VAC 5-80-1320]

Statement of Final Agency Action

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

On May 21, 2002, the State Air Pollution Control Board adopted final amendments to regulations entitled "Regulations for the Control and Abatement of Air Pollution", specifically permit for new and modified sources (9 VAC 5 Chapter 80, Article 6). The regulation amendments are to be effective on September 1, 2002.

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 and that it comports with applicable state and/or federal law.

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 (i) the State Air Pollution Control Board possesses the statutory authority to promulgate the proposed regulation amendments and that (ii) the proposed regulation amendments comport with the applicable state and/or federal law is available upon request.

Purpose

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

The purpose of the regulation is to protect public health, safety and welfare by establishing the procedural and legal basis for the issuance of new source permits for proposed new or expanded facilities that will (i) enable the agency to conduct a preconstruction review in order to determine compliance with applicable control technology and other standards, (ii) to assess the impact of the emissions from the facility on air quality, and (iii) provide a state and federally enforceable mechanism to enforce permit program requirements. The proposal is being made to bring the program requirements in line with current federal requirements and the state objectives for the permit program.

Substance

Please identify and explain the new substantial provisions, the substantial changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement providing detail of the changes.

1. The major change that is being made to the program is to convert from a permit applicability approach that looks at each physical or operational change to the source individually to determine applicability to an approach, like that of the prevention of significant deterioration (PSD) program, which looks at the changes from a source wide perspective to determine applicability. Changes are based on the net emissions increase in actual emissions. However, unlike PSD the determination of applicability does not look back at historical emissions changes but looks only at the emissions changes directly resultant from the physical or operational change.

2. Provisions have been added to clarify the counting of fugitive emissions to determine applicability of minor NSR. Fugitive emissions are counted if quantifiable; however, if fugitive emissions are the only emissions that cause the new or modified source to be subject to minor NSR, they are not counted.

3. Provisions have been added to state that (i) exemption from minor NSR does not exempt a project from major NSR, and (ii) exemption from major NSR does not exempt a project from minor NSR.

4. Provisions have been added to allow implementation of the federal hazardous air pollutant new source review program (FHAPNSR) by incorporation by reference rather than trying to alter the text of the regulation to accommodate these program elements; it was very difficult to write text to implement this program given the differences and complexities of the various program elements. The FHAPNSR program includes the various preconstruction approval requirements found in 40 CFR Part 61 and 40 CFR Part 63 (including the 112(g) requirements). The provisions covering public participation have been changed to require a public comment period only for permit applications requiring a case-by-case maximum available control technology (MACT) determination under the FHAPNSR program.

5. Provisions have been added to require certification from the permit applicant that the applicant understands that issuance of the minor NSR permit (i) does not shield the applicant from enforcement of the major NSR permit program and (ii) does not relieve the applicant from compliance with the major NSR program.

6. Provisions have been added to allow permit terms and conditions that are state-only enforceable to be designated as such in the permit.

7. Provisions have been added to allow the issuance of general permits.

8. Provisions have been added to allow permit changes.

9. Provisions have been added to allow permit pollution control projects under this permit program and exempt them from major NSR. Pollution control projects are physical or operational changes at a source whose primary function is the reduction of emissions of targeted regulated air pollutants but which also result in an increase in

emissions of non-targeted regulated air pollutants that qualify as a major modification subject to major source NSR.

10. The provisions concerning exemption levels have been simplified somewhat and clarified in some cases.

11. Provisions have been added to allow consideration of additional factors for making best available control technology (BACT) determinations for sources subject to minor new source review as opposed to PSD.

Issues

Please provide a statement identifying the issues associated with the regulatory action. The term "issues" means: 1) the primary advantages and disadvantages to the public of implementing the new or amended provisions; and 2) the primary advantages and disadvantages to the agency or the Commonwealth. If there are no disadvantages to the public or the Commonwealth, please include a sentence to that effect.

1. Public: The focus of the regulation is changed from that of a technology based BACT determination for each emissions unit at a stationary source to that of overall air quality impacts of the modification or minor new source. This shift will bring the minor new source review (MNSR) regulation into line with the proposed federal and Virginia major new source review regulations. In these programs overall air quality impacts of the new or modified source, rather than changes to individual emissions units within the source, determine the permitting requirements.

The advantages to the affected entities will vary widely according to source size and type and the particular options chosen by each source in order to comply with the regulation. The regulation allows an owner to submit a permit application for a modification to a stationary source which combines requirements for multiple emissions units into one permit. It provides a means to make control measures federally and state enforceable without federal review through the use of MNSR permits. It allow an owner of a stationary source or emissions unit to obtain a general permit which establishes source-specific requirements without the need for burdensome case-by-case EPA review.

Permits for pollution control projects may be issued under this permit program, thus precluding the need for review of the projects under the more burdensome major NSR program. Pollution control projects are physical or operational changes at a source whose primary function is the reduction of emissions of targeted regulated air pollutants but which result in an increase in emissions of non-targeted regulated air pollutants that qualify as a major modification subject to major source NSR.

General permits are technology based permits that establish, for a particular source category, BACT limits. By issuing a general BACT determination for a specific category of sources through the general permitting process, the permitting process is simplified at the regional level and consistency is ensured from one region of the state to

another. Much of the time delays in back and forth negotiations between the DEQ and the source will be eliminated.

Sources will have more flexibility to achieve compliance; however, to accommodate the increase in flexibility the regulation has become more complex. This complexity, at first, may be problematic for some sources.

2. Department: The primary benefits as a result of the changes to this regulation are: fewer permits and faster compliance with air quality requirements due to the increased flexibility in the regulation and compliance options available to the sources. Permit writers will only be issuing permits when a change or modification results in an impact to air quality, not necessarily every time a new piece of equipment is installed or changed.

One drawback, as a result in the increased complexity of the regulation, is the potential for an increase in workload of the field inspectors who make compliance determinations.

Public Comment

Please summarize all public comment received during the public comment period and provide the agency response. If no public comment was received, please include a statement indicating that fact.

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

Detail of Changes

Please detail any changes, other than strictly editorial changes, made since the publication of the proposed regulation. This statement should provide a section-by-section description of changes.

1. The regulation applies to the construction, reconstruction, relocation or modification of any stationary source located in the Commonwealth of Virginia. Exemption levels for specific source categories are listed in provisions 9 VAC 5-80-1320. If the emissions from a source are below the exemption levels, the source is exempt from the permit requirements. This exemption, however, does not relieve any owner of the responsibility to comply with any other applicable provisions of the Board's regulations or other laws, ordinances and orders of the governmental entities having jurisdiction. If the emissions from the source are below the exemption levels in 9 VAC 5-80-1320 but exceed the applicability thresholds for any applicable emission standard in 9 VAC 5 Chapter 40 for an existing source or any applicable standard of performance in 9 VAC 5 Chapter 50, the source is subject to the more restrictive provisions. Fugitive emissions are not included in a determination of permit applicability. Any facility subject to Rule 5-5 is not exempt unless the facility is exempt as a result of 9 VAC 5-80-1320 and (i) the facility would be subject only to recordkeeping or reporting at a stationary source which is permitted according to Rule 5-5, or (ii) the facility is constructed, reconstructed or modified at an existing source

which is currently permitted under Rule 5-5. Any boiler, incinerator or industrial furnace subject to 9 VAC 20 Chapter 60 is not exempt from permit requirements. [9 VAC 5-80-1100]

- Provisions have been added to clarify the counting of fugitive emissions to determine applicability of minor NSR. Fugitive emissions are counted if quantifiable; however, if fugitive emissions are the only emissions that cause the new or modified source to be subject to minor NSR, they are not counted. [see subsection D]

- Provisions prohibiting any boiler, incinerator or industrial furnace subject to 9 VAC 20 Chapter 60 from being exempt from permit requirements have been relocated from 9 VAC 5-80-1100 F to 9 VAC 80-1320 E 2.

- Provisions have been added to state that (i) exemption from minor NSR does not exempt a project from major NSR, and (ii) exemption from major NSR does not exempt a project from minor NSR. [see subsection G]

2. In addition to the terms defined in 9 VAC 5-10-20, other terms having definitions unique to this article are defined. [9 VAC 5-80-1110]

- The definition of "actual emissions" has been revised to be consistent with the corresponding definition used in the major NSR program.

- The definition of "major modification" has been revised to be consistent with the corresponding definition used in the major NSR program.

- The definition of "significant" has been deleted.

- The definition of "stationary source" has been revised to exclude non-road engines.

3. No one shall begin actual construction of a stationary source without a permit. No relocation of an emissions unit is allowed without a permit. No reduction of a stack or chimney is allowed without a permit. Requirements for emissions units within a single stationary source may be combined into a single application. Permits may be granted for programs of construction or modification in planned incremental phases. Provisions of the federal hazardous air pollutant new source review (FHAPNSR) program are implemented through this permit regulation. [9 VAC 5-80-1120]

- Provisions have been added to allow terms and conditions from a state operating permit (SOP) to be included in a minor NSR permit, and the minor NSR permit may supercede the SOP if the SOP public participation procedures are followed in issuing the minor NSR. [see subsection E]

- Provisions have been added to allow permit terms and conditions that are state-only enforceable to be designated as such in the permit. Permit terms and conditions are

federally enforceable unless designated as state-only enforceable in the permit. [see subsection F]

4. Construction of a modification may begin and be completed prior to receiving a permit provided that: the owner has submitted an application for the modification with a notice to begin actual construction; the owner assumes all financial and other risks associated with his actions and understands that the Board, when reviewing a permit application, will not consider any financial or other consequences of beginning construction without a permit; the owner has not been notified by the Board that his actions cause any air quality concerns; the modification is constructed as described in the permit; and the owner does not begin operation of the modification until receipt of the permit.

Construction or reconstruction of a new stationary source may begin if the requirement for a permit will create undue hardship. The applicant may request a waiver from the Board to proceed with construction. The request must be in writing, explain the circumstances that will cause the hardship, contain a certification that the applicant freely assumes all financial and other risks and acknowledges that the Board, in evaluating the permit application, may not consider any consequences to the applicant of beginning actual construction prior to receiving a permit. If all appropriate information is included in the waiver request, the Board will act upon the request within 30 days. [9 VAC 5-80-1130]

- The provisions to allow concurrent construction have been deleted.

5. An application is required for each stationary source. It may include only a single emissions unit or, where several emissions units are included in one project, a single application covering all units may be submitted. [9 VAC-5-80-1140]

- Provisions have been added to require certification from the permit applicant that the applicant understands that issuance of the minor NSR permit (i) does not shield the applicant from enforcement of the major NSR permit program and (ii) does not relieve the applicant from compliance with the major NSR program. [see subsection E]

6. Each application must contain information as deemed appropriate by the Board to determine impact on air quality and compliance with emission standards. [9 VAC 5-80-1150]

- Provisions have been added to exempt permits issued under the FHAPNSR program from this section. [see 9 VAC 5-80-1120 H]

7. Within 30 days of receipt of the application the Board must notify the owner of the status of the application including: which provisions of the new source review are applicable, the identification of any deficiencies, and whether the application contains adequate information for processing. Processing time for a complete application is normally 90 days, 180 days if public participation is required. [9 VAC 5-80-1160]

- Provisions have been added to exempt permits issued under the FHAPNSR program from this section. [see 9 VAC 5-80-1120 H]

8. An informational public notice is required for a new major stationary source or for a major modification to a stationary source. The following permit applications require a 30 day public comment period with notice to the public: applications for sources emitting hazardous air pollutants if a case-by-case MACT determination under the FHAPNSR program is required; applications for major stationary sources and major modifications; and applications for which any provision exceeds a good engineering practice stack height. A 30 day comment period and public hearing is required for applications that have the potential for public interest, as determined by the Board, based on whether the project is opposed by any person; has resulted in adverse media; or has generated adverse comment. Upon request of the applicant, the permit applications may be processed using the public participation procedures of the federal operating permit program. [9 VAC 5-80-1170]

- The provisions covering public participation for sources of hazardous air pollutants have been changed to require a public comment period only for permit applications requiring a case-by-case maximum available control technology (MACT) determination under the FHAPNSR program. [see subdivision D 1]

- The provisions correcting the public participation requirements for major modifications that have been disapproved by EPA have been rewritten for clarity. [see definition of "major modification" and subdivision D 2]

9. A permit may not be granted unless it is shown that the source is designed, built and equipped to operate without causing a violation of the applicable provisions of the regulations and that certain specified standards have been met. Permits may be granted to stationary sources or emissions units that contain emission caps provided the caps are made enforceable as a practical matter. Permits may contain emissions standards as necessary to implement the provisions of the NSR program, and certain specified criteria must be met in establishing emission standards to the extent necessary to assure that emissions levels are enforceable as a practical matter. Permits must contain, but not be limited to, certain specified elements as necessary to ensure that the permits are enforceable as a practical matter. [9 VAC 5-80-1180]

10. A permit may not be granted unless compliance with the standards cited above is demonstrated to the satisfaction of the board by a review and analysis (control technology review and, if appropriate, air quality analysis) of the application performed on a source-by-source basis using specified criteria. Applications for sources subject to the FHAPNSR program are subject to a control technology review to determine if the source will be designed, built and equipped to comply with all applicable emission standards. [9 VAC 5-80-1190]

11. There must be a compliance determination and verification by emission testing for stationary sources using reference methods. Based on specified criteria, use of equivalent

or alternative methods may be allowed or waivers from testing may be granted. [9 VAC 5-80-1200]

- Provisions have been added clarify that the granting of a waiver does not shield the owner from enforcement of any applicable federal requirement. [see subsection G]

12. Permits granted under these provisions become invalid if: construction doesn't begin within 18 months after issuance; construction is terminated for more than 18 months or is not completed within a reasonable timeframe; or a permittee knowingly makes misstatements in the application, fails to comply with the terms of the permit, fails to comply with any emission standard, or causes emissions from the stationary source which result in violations of any air quality standard. Noncompliance of any provision of the permit is grounds for enforcement action, termination or revocation. Nothing in the regulations of the board are to be construed to prevent the board and the owner from making a mutual determination that a permit is rescinded. [9 VAC 5-80-1210]

- Provisions have been added to exempt permits issued under the FHAPNSR program from the permit invalidation provisions of this section. [see subsection M]

13. A permit does not relieve any owner of the responsibility to comply with any applicable regulations, laws, ordinances and orders of the governmental entities having jurisdiction. A source owner must comply with existing zoning ordinances and regulations in the locality of the source. [9 VAC 5-80-1220, 1230]

14. No person may transfer a permit from one location to another or from one piece of equipment to another. In the case of a transfer of ownership or name change of a source, the new owner must abide by any current permit issued to the previous owner or to the same owner under the previous source name and must notify the board of the change in ownership or source name or both within 30 days of the transfer or name change. [9 VAC 5-80-1240]

15. The board may issue a general permit covering a source category containing numerous similar sources that meet certain criteria, which must be specified in the permit. The general permit may specify a reasonable time period after which a source that has submitted a complete application is deemed to be authorized to operate under the general permit. Sources covered under a general permit may be issued a document attesting that the source is covered by the general permit. The source is subject to enforcement action for operation without a permit if the source is later determined by the board or the administrator not to qualify for the conditions and terms of the general permit. [9 VAC 5-80-1250]

16. The permittee may initiate a change to a permit by submitting a written request to the board for an administrative permit amendment, a minor permit amendment, or a significant permit amendment. This request for a change must include a statement of the reason for the proposed change. The board may initiate a change to a permit through the use of permit reopenings. [9 VAC 5-80-1260]

17. Administrative permit amendments are used for the correction of typographical or other error which does not substantially affect the permit; change in the name, address, or phone number of any person identified in the permit, or of a similar minor administrative change at the source; change in ownership or operational control of a source; or the combining of permits. The board will normally take final action on a request for an administrative permit amendment no more than 60 days from receipt of the request, incorporating the changes without providing notice to the public. The owner may implement the changes requested immediately upon submittal of the request. [9 VAC 5-80-1270]

18. Minor permit amendment procedures are used for permit amendments that do not violate any applicable regulatory requirement; do not involve significant changes to existing monitoring, reporting, or record keeping requirements in the permit; do not require or change a case-by-case determination of an emission limitation or other standard; do not seek to establish or change a permit term or condition for which there is no corresponding underlying applicable regulatory requirement; are not modifications under the new source review program or under § 112 of the federal Clean Air Act; and are not required to be processed as a significant amendment or as an administrative permit amendment. Under certain conditions, minor permit amendment procedures may be used for permit amendments involving the use of economic incentives and emissions trading; to require more frequent monitoring or reporting by the permittee or to reduce the level of an emissions cap; or to rescind a provision of a permit. Normally within 90 days of receipt by the board of a request under minor permit amendment procedures, the board will issue the permit amendment as proposed; deny the permit amendment request; or determine that the requested amendment does not meet the minor permit amendment criteria and should be reviewed under the significant amendment procedures. The owner may make the change proposed in the minor permit amendment request immediately after the request is filed. Until the board takes action on the request, the source must comply with the applicable regulatory requirements governing the change and the proposed permit terms and conditions. During this time, the owner need not comply with the existing permit terms and conditions he seeks to modify, but if he fails to comply with the proposed permit terms and conditions during this time, the existing permit terms and conditions he seeks to modify may be enforced against him. [9 VAC 5-80-1280]

19. Significant amendment procedures are used for permit amendments that involve significant changes to existing monitoring, reporting, or record keeping requirements; require or change a case-by-case determination of an emission limitation or other standard; or seek to establish or change a permit term or condition for which there is no corresponding underlying applicable regulatory requirement. The board will normally take final action on significant permit amendments within 90 days after receipt of a request. The owner may not make the change applied for in the significant amendment request until the amendment is approved by the board. [9 VAC 5-80-1290]

20. A permit may be reopened and revised if additional regulatory requirements or changes to existing requirements become applicable to emissions units or pollutants

covered by the permit; if the board determines that the permit contains a material mistake or that inaccurate statements were made in establishing the terms or conditions of the permit; or if the board determines that the permit must be revised to assure compliance with the applicable regulatory requirements or that the conditions of the permit will not be sufficient to meet all applicable standards and requirements; or if a new standard prescribed under 40 CFR Parts 60, 61 or 63 becomes effective after a permit is issued but prior to startup. Proceedings to reopen and reissue a permit must follow the same procedures as apply to initial permit issuance and may affect only those parts of the permit for which cause to reopen exists. Reopenings may not be initiated before a notice of intent is provided to the source by the board at least 30 days in advance of the date that the permit is to be reopened, except that the board may provide a shorter time period in the case of an emergency. [9 VAC 5-80-1300]

21. A plantwide applicability limit (PAL) for one or more pollutants may be granted for an entire stationary source provided the certain specified conditions are met. The PAL may be established only after public comment has been obtained; the PAL may not be established for hazardous air pollutants; the PAL must be established based on either actual emissions or source-wide limits on annual emissions consistent with a control strategy demonstration; the PAL must be enforceable as a practical matter; and PALs do not relieve the owner of the responsibility to comply fully with any applicable control technology requirements. The requirement to use best available control technology (BACT) applies to each emissions unit that undergoes a physical or operational change and contributes to the emissions increase above the PAL. As long as the source's emissions remain below the emissions cap, the owner can make any changes at the source without having to obtain a major NSR permit. The PAL permit may contain advance approvals of physical or operational changes that would otherwise be subject to minor NSR, thus eliminating the need for a minor NSR permit for those projects. A minor NSR permit would be required for any changes not covered by the advance approvals. However, the source remains obligated to meet any applicable NSPS, NESHAPS, MACT or other control technology requirements. PALs may be modified. PALs are voluntary and therefore may be rescinded upon mutual consent by the Board and the owner. [9 VAC 5-80-1310]

- The provisions to allow plantwide applicability limits have been deleted and replaced with provisions that allow pollution control projects under this permit program and exempt them from major NSR. Pollution control projects are physical or operational changes at a source whose primary function is the reduction of emissions of targeted regulated air pollutants but which also result in an increase in emissions of non-targeted regulated air pollutants that qualify as a major modification subject to major source NSR. [also see definitions of “pollution control project” and "targeted regulated air pollutant"]

22. Permit exemption levels are identified for: (i) the construction, reconstruction, relocation and modification of specific stationary sources and emissions units based on equipment size or potential emissions, (ii) the reconstruction of a stationary source or emissions unit if there is no increase in potential to emit, (iii) the relocation of portable

emissions units under certain specified conditions, (iv) the reactivation of a stationary source or emissions unit under certain conditions, and (v) the use of an alternative fuel or raw material, if the owner demonstrates that the emissions are decreased. Exemptions for toxic or hazardous air pollutants must be made independent of other pollutants. Sources of hazardous air pollutants are exempt if exempt from the FHAPNSR program. [9 VAC 5-80-1320]

- Provisions have been added to require source owners to keep records to demonstrate any claim that a project is exempt from this permit program. [see subdivision A 4]

- The provisions concerning exemption levels have been simplified somewhat and clarified in some cases. [see subsection B]

- Provisions have been added to provide that particulate matter emissions are to be used to determine exemptions only if PM_{10} emissions cannot be determined in a manner acceptable to the agency. [see subdivisions C 3 and D 3]

- The exemption of stationary sources under 9 VAC 5-80-1320 D has been rewritten to exclude the facilities exempted under 9 VAC 5-80-1320 B from the calculation of potential to emit. [see subdivision D 2]

22A. Provisions have been added to clarify that the provisions of Article 4 of 9 VAC 5 Chapter 50 apply only to facilities subject to the new source review program. [9 VAC 5-50-240]

23. The definition of Best Available Control Technology (BACT) is being changed to allow consideration of additional factors for making BACT determinations for sources subject to minor new source review program as opposed to the prevention of significant deterioration permit program. [9 VAC 5-50-250]

24. Emissions from a new stationary source must conform to the levels established by the BACT determination for the affected facility. Due to minor new review program changes that base the applicability of the program on the entire stationary source instead of each individual emissions unit, provisions have been added to specify which pollutants and which emissions units are subject to a BACT determination. For phased construction projects, provisions have been added specifying that BACT must be reviewed no later than 18 months prior to the commencement of construction of each independent phase of the project. [9 VAC 5-50-260]

Family Impact Statement

Please provide an analysis of the regulatory action that assesses the impact on the institution of the family and family stability including the extent to which 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.

COMMONWEALTH OF VIRGINIA

STATE AIR POLLUTION CONTROL BOARD
SUMMARY AND ANALYSIS OF PUBLIC TESTIMONY FOR REGULATION REVISION YY CONCERNING

NEW AND MODIFIED SOURCE REVIEW (9 VAC 5 CHAPTER 80)

INTRODUCTION

At the January 1999 meeting, the Board authorized the Department to promulgate for public comment a proposed regulation revision concerning new and modified source review.

A public hearing was advertised accordingly and held in Richmond on March 17, 1999 and the public comment period closed on March 18, 1999. The original proposal 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.

In response to that request, comments were submitted that resulted in several changes being made to the original proposal. Because of the substantive nature of some of these additional changes, a notice of public hearing and request for comment on the additional changes was promulgated. Comment was requested only on the additional changes made to the original proposal.

A public hearing was advertised accordingly and held in Richmond on September 26, 2001 and the public comment period closed on October 26, 2001. The additional changes 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 ORIGINAL PROPOSAL

The proposed regulation amendments concerned provisions covering new and modified source review. A summary of the amendments follows:

1. The regulation applies to the construction, reconstruction, relocation or modification of any stationary source located throughout the Commonwealth of Virginia. Exemption levels for specific source categories are listed in provisions 9 VAC 5-80-1320. If the emissions from a source are below the exemption levels, the source is exempt from the permit requirements. This exemption, however, does not relieve any owner of the

responsibility to comply with any other applicable provisions of the Board's regulations or other laws, ordinances and orders of the governmental entities having jurisdiction. If the emissions from the source are below the exemption levels in 9 VAC 5-80-1320 but exceed the applicability thresholds for any applicable emission standard in 9 VAC 5 Chapter 40 for an existing source or any applicable standard of performance in 9 VAC 5 Chapter 50, the source is subject to the more restrictive provisions. Fugitive emissions are not included in a determination of permit applicability. Any facility subject to Rule 5-5 is not exempt unless the facility is exempt as a result of 9 VAC 5-80-1320 and (i) the facility would be subject only to recordkeeping or reporting at a stationary source which is permitted according to Rule 5-5, or (ii) the facility is constructed, reconstructed or modified at an existing source which is currently permitted under Rule 5-5. Any boiler, incinerator or industrial furnace subject to 9 VAC 20 Chapter 60 is not exempt from permit requirements. [9 VAC 5-80-1100]

2. In addition to the terms defined in 9 VAC 5-10-20, other terms having definitions unique to this article are defined. [9 VAC 5-80-1110]

3. Except as provided in 9 VAC 5-80-1130, no one shall begin actual construction of a stationary source without a permit. No relocation of an emissions unit is allowed without a permit. No reduction of a stack or chimney is allowed without a permit. Requirements for emissions units within a single stationary source may be contained into a single application. Plantwide applicability limits (PALs) are only be authorized after the effective date of this regulation. Permits may be granted for programs of construction or modification in planned incremental phases. Provisions of the federal hazardous air pollutant new source review (FHAPNSR) program are implemented through this permit regulation. [9 VAC 5-80-1120]

4. Construction of a modification may begin and be completed prior to receiving a permit provided that: the owner has submitted an application for the modification with a notice to begin actual construction; the owner assumes all financial and other risks associated with his actions and that the Board, when reviewing a permit application will not consider any financial or other consequences of beginning construction without a permit; the owner has not been notified by the Board that his actions cause any air quality concerns; the modification is constructed as described in the permit; and that the owner does not begin operation of the modification until receipt of the permit.

Construction or reconstruction of a new stationary source may begin if the requirement for a permit will create undue hardship. The applicant may request a waiver from the Board to proceed with construction. The request must be in writing, explain the circumstances that will cause the hardship, contain a certification that the applicant freely assumes all financial and other risks and acknowledges that the Board, in evaluating the permit application, may not consider any consequences to the applicant of beginning actual construction prior to receiving a permit. If all appropriate information is included in the waiver request, the Board will act upon the request within 30 days.

The Board will determine what activities constitute beginning of actual construction on the source and what portions of the source may be constructed prior to issuing a permit. In making this determination, the Board will consider which portions of the source may irrevocably determine the emissions of the completed source and the undue hardship upon the applicant of delaying construction until the permit has been issued. If a waiver is granted, the permit application shall be submitted to the Board no latter than 30 days after the waiver has been granted. The applicant may proceed with construction of the portions of the source identified in the waiver at his own risk. However, under no circumstances shall operation of the source begin until a permit has been issued by the Board.

The application for a permit will be denied if, after construction has begun or been completed, the source does not meet applicable regulatory requirements. Alterations to the source to effect approval of the permit may be made if executed within a reasonable time as specified by the Board.

Under no conditions may construction of a source begin without a permit if the source is (i) a stationary source or emissions unit subject to the major source NSR requirements for PSD or nonattainment areas, (ii) a stationary source for which a plantwide applicability limit is established, or (iii) a synthetic minor or other stationary source receiving a minor NSR permit that would establish terms and conditions that would enable the source to avoid major source permit and other requirements. [9 VAC 5-80-1130]

5. An application is required for each stationary source. It may include only a single emissions unit or, where several emissions units are included in one project, a single application covering all units may be submitted. [9 VAC-5-80-1140]

6. Each application must contain information as deemed appropriate by the Board to determine impact on air quality and compliance with emission standards. [9 VAC 5-80-1150]

7. Within 30 days of receipt of the application the Board must notify the owner of the status of the application including: which provisions of the new source review are applicable, the identification of any deficiencies, and whether the application contains adequate information for processing. Processing time for a complete application is normally 90 days, 180 days if public participation is required. [9 VAC 5-80-1160]

8. An informational public notice is required for a new major stationary source or for a major modification to a stationary source. The following permit applications require a 30 day public comment period with notice to the public: applications for sources emitting of hazardous air pollutants if a case-by-case MACT determination under the FHAPNSR program is required; applications for major stationary sources and major modifications; and applications for which any provision exceeds a good engineering practice stack height. A 30 day comment period and public hearing is required applications that meet the following criteria: establish a plantwide applicability limit or have the potential for public interest, as determined by the Board, based on whether the project is opposed by any person, has resulted in adverse media, or has generated adverse comment. Upon

request of the applicant, the permit applications may be processed using the public participation procedures of the federal operating permit program. [9 VAC 5-80-1170]

9. A permit may not be granted unless it is shown that the source is designed, built and equipped to operate without causing a violation of the applicable provisions of the regulations and that certain specified standards have been met. Permits may be granted to stationary sources or emissions units that contain plantwide applicability limits and emission caps provided the limits or caps are made enforceable as a practical matter. Permits may contain emissions standards as necessary to implement the provisions of the NSR program and certain specified criteria must be met in establishing emission standards to the extent necessary to assure that emissions levels are enforceable as a practical matter. Permits must contain, but not be limited to, certain specified elements as necessary to ensure that the permits are enforceable as a practical matter. [9 VAC 5-80-1180]

10. A permit may not be granted unless compliance with the standards cited above is demonstrated to the satisfaction of the board by a review and analysis (control technology review and, if appropriate, air quality analysis) of the application performed on a source-by-source basis using specified criteria. Applications for sources subject to the FHAPNSR program are subject to a control technology review to determine if the source will be designed, built and equipped to comply with all applicable emission standards. [9 VAC 5-80-1190]

11. There must be a compliance determination and verification by emission testing for stationary sources using reference methods. Based on specified criteria, use of equivalent or alternative methods may be allowed or waivers from testing may be granted. [9 VAC 5-80-1200]

12. Permits granted under these provisions become invalid if: construction doesn't begin within 18 months after issuance; construction is terminated for more than 18 months or is not completed within a reasonable timeframe; or a permittee knowing makes misstatements in the application, fails to comply with the terms of the permit, fails to comply with any emission standard, or causes emissions form the stationary source which results in violations of any air quality standard. Noncompliance of any provision of the permit is grounds for enforcement action, termination or revocation. Nothing in the regulations of the board are to be construed to prevent the board and the owner from making a mutual determination that a permit is rescinded. [9 VAC 5-80-1210]

13. A permit does not relieve any owner of the responsibility to comply with any applicable regulations, laws ordinances and orders of the governmental entities having jurisdiction. A source owner must comply with existing zoning ordinances and regulations in the locality of the source. [9 VAC 5-80-1220, 1230]

14. No person may transfer a permit from one location to another, or from one piece of equipment to another. In the case of a transfer of ownership or name change of a source, the new owner must abide by any current permit issued to the previous owner or

to the same owner under the previous source name and must notify the board of the change in ownership or source name or both within 30 days of the transfer or name change. [9 VAC 5-80-1240]

15. The board may issue a general permit covering a source category containing numerous similar sources that meet certain criteria, which must be specified in the permit. The general permit may specify a reasonable time period after which a source that has submitted a complete application is deemed to be authorized to operate under the general permit. Sources covered under a general permit may be issued a document attesting that the source is covered by the general permit. The source is subject to enforcement action for operation without a permit if the source is later determined by the board or the administrator not to qualify for the conditions and terms of the general permit. [9 VAC 5-80-1250]

16. The permittee may initiate a change to a permit by submitting a written request to the board for an administrative permit amendment, a minor permit amendment, or a significant permit amendment. This request for a change must include a statement of the reason for the proposed change. The board may initiate a change to a permit through the use of permit reopenings. [9 VAC 5-80-1260]

17. Administrative permit amendments are used for the correction of typographical or other error which does not substantially affect the permit; change in the name, address, or phone number of any person identified in the permit, or of a similar minor administrative change at the source; change in ownership or operational control of a source; or the combining of permits. The board will normally take final action on a request for an administrative permit amendment no more than 60 days from receipt of the request, incorporating the changes without providing notice to the public. The owner may implement the changes requested immediately upon submittal of the request. [9 VAC 5-80-1270]

18. Minor permit amendment procedures are used for permit amendments that do not violate any applicable regulatory requirement; do not involve significant changes to existing monitoring, reporting, or record keeping requirements in the permit; do not require or change a case-by-case determination of an emission limitation or other standard; do not seek to establish or change a permit term or condition for which there is no corresponding underlying applicable regulatory requirement; are not modifications under the new source review program or under § 112 of the federal Clean Air Act; and are not required to be processed as a significant amendment or as an administrative permit amendment. Under certain conditions, minor permit amendment procedures may be used for permit amendments involving the use of economic incentives and emissions trading; to require more frequent monitoring or reporting by the permittee or to reduce the level of an emissions cap; or to rescind a provision of a permit. Normally within 90 days of receipt by the board of a request under minor permit amendment procedures, the board will issue the permit amendment as proposed; deny the permit amendment request; or determine that the requested amendment does not meet the minor permit amendment criteria and should be reviewed under the significant amendment procedures. The owner may make the

change proposed in the minor permit amendment request immediately after the request is filed. Until the board takes action on the request, the source must comply with the applicable regulatory requirements governing the change and the proposed permit terms and conditions. During this time, the owner need not comply with the existing permit terms and conditions he seeks to modify, but if he fails to comply with the proposed permit terms and conditions during this time, the existing permit terms and conditions he seeks to modify may be enforced against him. [9 VAC 5-80-1280]

19. Significant amendment procedures are used for permit amendments that involve significant changes to existing monitoring, reporting, or record keeping requirements; require or change a case-by-case determination of an emission limitation or other standard; or seek to establish or change a permit term or condition for which there is no corresponding underlying applicable regulatory requirement. The board will take normally final action on significant permit amendments within 90 days after receipt of a request. The owner may not make the change applied for in the significant amendment request until the amendment is approved by the board. [9 VAC 5-80-1290]

20. A permit may be reopened and revised if additional regulatory requirements or changes to existing requirements become applicable to emissions units or pollutants covered by the permit; if the board determines that the permit contains a material mistake or that inaccurate statements were made in establishing the terms or conditions of the permit; or if the board determines that the permit must be revised to assure compliance with the applicable regulatory requirements or that the conditions of the permit will not be sufficient to meet all applicable standards and requirements; or if a new standard prescribed under 40 CFR Parts 60, 61 or 63 becomes effective after a permit is issued but prior to startup. Proceedings to reopen and reissue a permit must follow the same procedures as apply to initial permit issuance and may affect only those parts of the permit for which cause to reopen exists. Reopenings may not be initiated before a notice of intent is provided to the source by the board at least 30 days in advance of the date that the permit is to be reopened, except that the board may provide a shorter time period in the case of an emergency. [9 VAC 5-80-1300]

21. A plantwide applicability limit (PAL) for one or more pollutants may be granted for an entire stationary source provided the certain specified conditions are met. The PAL may be established only after public comment has been obtained; the PAL may not be established for hazardous air pollutants; the PAL must be established based on either actual emissions or source-wide limits on annual emissions consistent with a control strategy demonstration; the PAL must be enforceable as a practical matter; and PALs do not relieve the owner of the responsibility to comply fully with any applicable control technology requirements. The requirement to use best available control technology (BACT) applies to each emissions unit that undergoes a physical or operational change and contributes to the emissions increase above the PAL. As long as the source's emissions remain below the emissions cap, the owner can make any changes at the source without having to obtain a major NSR permit. The PAL permit may contain advance approvals of physical or operational changes that would otherwise be subject to minor NSR thus eliminating the need for a minor NSR permit for those projects. A minor

NSR permit would be required for any changes not covered by the advance approvals. However, the source remains obligated to meet any applicable NSPS, NESHAPS, MACT or other control technology requirements. PALs may be modified and PALs are voluntary and therefore may be rescinded upon mutual consent by the Board and the owner. [9 VAC 5-80-1310]

22. Permit exemption levels are identified for: (i) the construction, reconstruction, relocation and modification of specific stationary sources and emissions units based on equipment size or potential emissions, (ii) the reconstruction of a stationary source or emissions unit if there is no emissions increase, (iii) the relocation of portable emissions units under certain specified conditions, (iv) the reactivation of a stationary source or emissions unit under certain conditions, and (v) the use of an alternative fuel or raw material, if the owner demonstrates that the emissions are decreased. Exemptions for toxic or hazardous air pollutants must be made independent of other pollutants. Sources of hazardous air pollutants are exempt if exempt from the FHAPNSR program. [9 VAC 5-80-1320]

23. The definition of Best Available Control Technology (BACT) is being changed to allow consideration of additional factors for making BACT determinations for sources subject to minor new source review program as opposed to the prevention of significant deterioration permit program. [9 VAC 5-50-250]

24. Emissions from a new stationary source must conform to the levels established by the BACT determination for the affected facility. Due to minor new review program changes that base the applicability of the program on the entire stationary source instead of each individual emissions unit, provisions have been added to specify which pollutants and which emissions units are subject to a BACT determination. For phased construction projects, provisions have been added specifying that BACT must be reviewed no later than 18 months prior to the commencement of construction of each independent phase of the project. [9 VAC 5-50-260]

SUMMARY OF CHANGES TO ORIGNAL PROPOSAL

1. The provisions that would convert permit applicability from an emissions unit approach to a plant wide approach have been changed to use uncontrolled emissions rather than actual emissions as the baseline for determining emission changes due to physical or operational changes. Major source NSR programs use actual emissions as the baseline. [see 9 VAC 5-80-1110 C, definitions of “modification”, “net emissions increase” and “uncontrolled emission rate”.]

2. Provisions have been added (i) to state that exemption from minor NSR does not exempt a project from major source NSR and (ii) to require certification from the permit applicant that the project is not subject to major source NSR. [see 9 VAC 5-80-1100 H and 9 VAC 5-80-1140 E.]

3. Provisions have been added to allow permit terms and conditions that are state-only enforceable to be designated as such in the permit. [see 9 VAC 5-80-1100 I 4 and 9 VAC 5-80-1120 F.]

4. The provisions to allow concurrent construction have been deleted.

5. The provisions covering public participation for sources of hazardous air pollutants have been changed to require a public comment period only for permit applications requiring a case-by-case maximum available control technology (MACT) determination under the FHAPNSR program. [see 9 VAC 5-80-1170 D 1.]

6. The provisions to allow plantwide applicability limits have been deleted.

7. Provisions have been added to allow permit pollution control projects under this permit program and exempt them from major NSR. Pollution control projects are physical or operational changes at a source whose primary function is the reduction of emissions of targeted regulated air pollutants but which result in an increase in emissions of non-targeted regulated air pollutants that qualify as a major modification subject to major source NSR. [see 9 VAC 5-80-1110 C, definition of “pollution control project” and 9 VAC 5-80-1310.]

8. The provisions concerning exemption levels have been simplified somewhat and clarified in some cases. [see 9 VAC 5-80-1320.]

SUMMARY OF PUBLIC PARTICIPATION PROCESS

A public hearing was held in Richmond, Virginia on March 17, 1999. No one attended the hearing; and six 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 February 15, 1999 in the Virginia Register and in seven major newspapers (one in each Air Quality Control Region) throughout the Commonwealth. 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.

A second public hearing was held in Richmond, Virginia on September 26, 2001. Six persons attended the hearing, with two of those offering testimony; and seven 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 27, 2001 in the Virginia Register and in seven major newspapers (one in each Air Quality Control Region) throughout the Commonwealth. 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.

ANALYSIS OF TESTIMONY FOR PUBLIC COMMENT PERIOD AUGUST 27, 2001 THROUGH OCTOBER 26, 2001

1. **SUBJECT:** Definitions (9 VAC 5-80-1110)

COMMENTER: Judith Katz, Director, Air Protection Division, United States Environmental Protection Agency, Region III

TEXT: Under the new Section 9 VAC 5-80-1110 Definitions, (c) “Terms defined”, Fugitive emissions”, delete the following language ....[designed for eliminating emissions from the structure]. This language is not contained in any other Virginia permitting program regulation and may leave open the interpretation the issue that a stack, chimney, vent, etc. must already exist.

Under the same section, referenced above, the definition of “Modification” is being revised to include a new definition of “net emissions increase” in the evaluation of what constitutes a modification. EPA has concern with this proposed definition. The definition is based on the sum of the uncontrolled emissions from a particular physical change or change in the method of operation at a stationary source; and any other increases and decreases in uncontrolled emissions at the source that are concurrent with the particular change and are otherwise creditable. Evaluating the uncontrolled emissions increase from the physical change rather than the actual change in emissions does not provide an accurate assessment of air quality impact associated with the proposed modification. Also, looking at the uncontrolled emissions increase that is concurrent with the physical change rather than the actual emissions increase will not accurately quantify actual emissions increases from any debottlenecked sources. In order to accurately assess the environmental impact associated with the physical change or change in the method of operation of an existing source, along with concurrent increases resulting from the change, EPA would require the netting calculations to look at past-actual to future-potential emissions changes resulting from the modification and other sources affected by the modification in order to approve this definition. Furthermore, although the proposed regulation requires minor sources to

certify that they are not major, requiring different calculations for minor and major sources in determining applicability for modifications may prove confusing.

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

2. **SUBJECT:** General (9 VAC 5-80-1120)

COMMENTER: Judith Katz, Director, Air Protection Division, United States Environmental Protection Agency, Region III

TEXT: Under new section 9 VAC 5-80-1120 “General”, (F), delete sentence (1)(ii) ....”it is designated in the proposed permit as provided in subdivision 2 of this section and public review of the designation takes place under 9 VAC 5-80-1170". Also, under (F)(2), delete the words “...not...” in the second sentence which reads “Failure to mark a term or condition as state-only enforceable shall not render it federally enforceable, or delete the sentence it its entirety.” This language allows the state-only enforceable provisions to be open-ended and could not be approved by EPA.

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

3. **SUBJECT:** Public Participation (9 VAC 5-80-1170)

COMMENTER: Marcia L. Spink, Associate Director, Office of Air Programs, United States Environmental Protection Agency, Region III

TEXT: In your letter, you specifically requested comment on the changes to 9 VAC 5-80-1170 (public participation), and whether the proposed changes made the requirement at least as stringent as the current federally approved SIP version as reflected in the Federal Register items relating to the current SIP approval: September 12, 1995 (60 FR 47320) and July 24, 1996 (61 FR 38388). We believe that the proposed changes do make the public participation requirement at least as stringent as the federally approved SIP. Specifically, by deleting the language under 9 VAC 5-80-1170(A), “with a net emissions increase of 100 tons per year of any single pollutant”, it removes the basis for disapproval of the prior revisions to these requirements which were the subject of the above referenced rulemaking action.

RESPONSE: Comment is appreciated.

No changes have been made to the proposal based on this comment.

4. **SUBJECT:** Permit Exemption Levels (9 VAC 5-80-3120)

COMMENTER: Marcia L. Spink, Associate Director, Office of Air Programs, United States Environmental Protection Agency, Region III

TEXT: In order to exempt any non-major source from minor new source review (NSR) permitting, Virginia would have to demonstrate, in accordance with 40 CFR 51.160, that its revised minor source permit regulations will enable it to determine whether the construction or modification of a facility, building, structure or installation, or combination of these would result in a) A violation of applicable portions of the control strategy; or b) Interference with attainment or maintenance or a national standard in Virginia or a neighboring state. Please provide any information you have to explain how this revision is tightening the existing federally approved regulations, status of air quality in Virginia under existing regulations and projected under the revised regulations, and any other support information you have to address the above criteria. Until EPA has reviewed this information, we cannot determine whether these proposed permit exemptions can be approved as changes to Virginia's federally approved SIP.

RESPONSE: The required documentation will be provided as part of the SIP submittal.

5. **SUBJECT:** Permit Exemption Levels (9 VAC 5-80-1320)

COMMENTER: Judith Katz, Director, Air Protection Division, United States Environmental Protection Agency, Region III

TEXT: Under new section 9 VAC 5-80-1320, (C) and (D) pertaining to emission rate exemptions for new and relocated (C), and modified sources (D), respectively, the emission rate threshold for municipal solid waste landfill emissions (measured as non methane organic compounds) is specified as 50 tons per year. However, Virginia's VOC regulations in Northern Virginia require source regulation at 25 tons per year. Therefore, your minor source permit thresholds must be revised to be consistent with this emission level. In order to provide some gap between sources triggering major new source review and those being exempt under minor new source review, EPA requires setting a threshold somewhat below the major source significance levels (i.e., 10-20%). Further, using the same rationale, EPA requires that all new pollutants added under these sections have lower emission thresholds below major source significance levels (i.e., 10-20%). These changes would have to be made for EPA to approve these revisions.

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

6. **SUBJECT:** General

COMMENTER: Dominion

TEXT: Dominion generally supports these regulatory revisions because they bring needed clarity and certainty to many regulated facilities in Virginia.

RESPONSE: Support for the proposal is appreciated.

7. **SUBJECT:** General

COMMENTER: International Paper

TEXT: International Paper supports the comments submitted separately by the Virginia Manufacturing Association (VMA). We were involved in the development of VMA's comments. The enclosed comments reflect the views/issues, of International Paper's Franklin Mill. We request that the DEQ review both the comments submitted by VMA and International Paper.

RESPONSE: Comment is noted.

8. **SUBJECT:** Applicability (9 VAC 5-80-1100)

COMMENTER: Virginia Manufacturers Association

TEXT: VMA strongly supports the proposed deletion of the provision at 9 VAC 5-80-10.A.4 of the current regulations. This provision is confusing in that it could be interpreted in more than one way. It could be interpreted as an anti-circumvention rule prohibiting the artificial segmenting of one coherent project in order to avoid NSR, or it could be interpreted as an emissions "aggregation" rule requiring the aggregation of all "contemporaneous" emission increases at a source even if they are unrelated to the particular project under review.

EPA and Virginia major NSR regulations and policies do not require the aggregation of de minimis emission increases unless the emission increase from the particular source change under review itself exceeds the "significance level" for the particular pollutant(s). VMA believes the policy reasons against aggregating small, unrelated emission increases apply equally in the context of minor NSR. Therefore, we strongly support the elimination of this regulatory provision from Virginia's minor NSR regulations.

The Board proposes to eliminate subsection D, which states that fugitive emissions are not counted in determining the applicability of the minor NSR regulations. The DEQ's notice of the Board's proposal does not set out any explanation for this change from the 1999 proposal. VMA believes that absent a clear reason for its elimination, this provision should be retained in the amended regulations.

RESPONSE: With regard to deletion of 9 VAC 5-80-10 A 4, support for the proposal is appreciated. As far as 9 VAC 5-80-1100 D is concerned, the provision has been restored but revised to provide that fugitive emissions are counted only to the extent quantifiable.

9. **SUBJECT:** Applicability (9 VAC 5-80-1100)

COMMENTER: International Paper

TEXT: International Paper does not support the deletion of 9 VAC 5-80-1100 D pertaining to fugitive emissions. We believe the current regulations should not change and fugitive emissions alone should not be included in determining applicability. Fugitive emissions can only be estimated crudely and are not as well defined as specific emissions from a source. This could inappropriately cause a false applicability determination.

RESPONSE: See response to comment #8.

10. **SUBJECT:** Applicability (9 VAC 5-80-1100)

COMMENTER: Dominion

TEXT: We are unable to determine why DEQ proposes to delete the proposed provision regarding the inclusion of fugitive emissions in determining applicability. In the absence of good reasons, the proposed 9 VAC 5-80-1100 D should be retained in the final rule.

RESPONSE: See response to comment #8.

11. **SUBJECT:** Definitions (9 VAC 5-80-1110)

COMMENTER: Virginia Manufacturers Association

TEXT: VMA supports the proposed revision to the definition of "fugitive emissions." There may be points of escape from a structure that are not designed for eliminating emissions. Emissions from these points should be considered fugitive, rather than stack, emissions.

The newly proposed definition of "net emissions increase" contains an important change from the prior (1997 and 1999) versions of the proposed regulations. In the prior proposals, a net emission increase was determined by summing the increases and decreases in "actual emissions" resulting directly from the particular change under review. The prior proposals also contained a definition of "actual emissions" that has been deleted from the Board's new proposal. In combination, the definitions of "net emissions increase" and "actual emissions" set up an applicability test based on the difference between the source's actual annual rate of emissions prior to the proposed change and the source's potential to emit resulting directly from the proposed change. This approach reflected the consensus of the ad hoc advisory group that assisted the DEQ in drafting the amendments proposed by the Board in 1997 and again in 1999.

VMA can support the switch from the "past-actual-to-future-potential" applicability test to an applicability test based on uncontrolled emissions if one key change is made to the wording of the proposed definition of "net emissions increase." We advocate inserting the word "annual" before "uncontrolled emissions" wherever that term appears in the definition

of "net emissions increase." We believe this clarifies that a change in a short term (e.g., hourly) emission rate alone does not constitute a net emissions increase. A net emissions increase occurs only if the annual rate of uncontrolled emissions increases as the direct result of the particular change to the source. This approach is supported by the intent and past application of the definition of "uncontrolled emission rate" in the current minor NSR regulations (which the Board proposes to retain, with some changes, in the newly proposed regulations). It is also supported by the newly proposed requirement in 9 VAC 5-80-1150.B.4A2 that permit applicants submit information on the "uncontrolled emission rates in tons per year and other information as may be necessary to determine the net emissions increase of uncontrolled emissions."

In a change from the prior (1997 and 1999) proposals, the Board now proposes to retain the definition of "uncontrolled emission rate" found in the current version of the minor NSR regulations. This shift back to the definition in the current regulations appears to be necessary to support the shift back from an actual-to-potential applicability test in the prior proposals to the uncontrolled emissions applicability test in the newly proposed regulations.

With certain changes, VMA can support the definition of "uncontrolled emission rate" in the Board's new proposal. We recommend that the definition be reworded as follows:

"Uncontrolled emission rate" means the emission rate of a source when operating at maximum capacity without air pollution control equipment. Air pollution control equipment includes control equipment which is not vital to the source's operation, except that its use enables the source to conform to applicable air pollution control laws and regulations. Annual uncontrolled emissions shall be based on the maximum annual rated capacity (based on 8760 hours of operation per year) of the source, unless the source is subject to state and federally enforceable limitations on the annual hours of operation or the type or amount of material combusted or processed. Secondary emissions do not count in determining the uncontrolled emission rate of a stationary source.

This revision substitutes the term "state and federally enforceable limitations" for "state and federally enforceable permit conditions." There may be enforceable limitations on hours of operation and type or amounts of materials combusted or processed that originate not only from permits, but also from regulatory requirements, e.g., new source performance standards. Sources should be able to take credit for these enforceable limitations as well as those that arise out of a permit.

RESPONSE: See response to comment #1.

12. **SUBJECT:** Definitions (9 VAC 5-80-1110)

COMMENTER: International Paper

TEXT: IP supports the proposed revision to the definition of "fugitive emissions." Many points of escape from a structure that are not designed or intended for

collecting and emitting emissions but for building ventilation. Emissions from these points should be considered fugitive, rather than stack, emissions.

International Paper supports the deletion of the proposed definition of actual emissions since it is no longer needed with the proposed change in the net emission increase applicability test. We agree with basing the applicability test for the net emission increase on an annual uncontrolled emission based on the resulting impact to the maximum capacity of the emission unit.

In the definition of "Net Emission Increase" the word "Annual" needs to be inserted in front of the "uncontrolled emissions". This would then help clarify the basis of the evaluation for net emission increase. In the definition of "uncontrolled emission rate", DEQ clearly indicates that uncontrolled emissions are an annualized value based on the maximum annual rated capacity of the source (8760 hours of operation per year).

RESPONSE: See response to comment #1.

13. **SUBJECT:** Definitions (9 VAC 5-80-1110)

COMMENTER: United States Department of Agriculture, Forest Service, George Washington & Jefferson National Forests and United States Department of the Interior, National Park Service, Shenandoah National Park

TEXT: Under the definition of "Modification", exemption #5 should describe how the Department of Environmental Quality (DEQ) would determine whether or not "emissions resulting from the use of the alternative fuel or raw material supply are decreased." Does this mean that emissions across all typical averaging times (hourly, 3-hr, 8-hr, 24-hr, 30-day rolling, quarterly, 365-day rolling) must decrease? DEQ should, at a minimum, specify that annual emissions calculated on a 365-day rolling average must decrease.

Under the definition of "Reconstruction", item #2 should define or quantify what is meant by "significantly" with respect to extending the life of an emissions unit.

RESPONSE: With respect to exemption #5 under the definition of modification, the averaging times used would have to be consistent with how the definition of modification is applied to any given situation. This could vary so it would be inadvisable to specify an averaging time for this one element of the definition that might not be consistent with other applicable averaging times. With respect to the definition of reconstruction, the definition can be implemented adequately without further explanation beyond the dictionary definition of the term.

No changes have been made to the proposal based on this comment.

14. **SUBJECT:** Definitions (9 VAC 5-80-1110)

COMMENTER: Dominion

TEXT: We support the revisions to the definition of the term “commence,” changing the applicability from “source” to “emissions unit.” Basing decisions on “emissions units” rather than “sources” provides needed clarity.

We strongly support the clarification to the definition of the term “fugitive emissions.” We believe that the proposed definition has long been used by DEQ staff, but the proposed clarification provides certainty regarding what is and what is not a fugitive emission.

The definition of “net emissions increase” should refer to the “annual uncontrolled emission rate” rather than “uncontrolled emissions” at every occurrence in the definition. The definition of “uncontrolled emission rate” contains the methodology to be used in calculating annual uncontrolled emissions. We are concerned that if DEQ does not make this correction, regulated sources and permit writers will be unable to consistently make determinations regarding applicability of the regulation. With this change, we support this revision.

We are disappointed that the previously proposed revisions to the definition of the term “actual emissions” and the proposed addition of “plantwide applicability limit” have been deleted. Both of these definitions would have brought innovative changes to the way that Virginia regulates stationary sources of emissions without compromising environmental protection. We strongly encourage DEQ to revisit this issue either as part of this or a near-future rulemaking.

RESPONSE: Support for the proposal is appreciated. See response to comments #1 and #33.

15. **SUBJECT:** General (9 VAC 5-80-1120)

COMMENTER: Virginia Manufacturers Association

TEXT: Subsection F establishes an important concept in Virginia's minor NSR permitting program - not all terms and conditions of the permit must be "federally enforceable" (as defined in the proposed regulations). Instead, certain terms and conditions could be included in a minor NSR permit as state-only enforceable terms and conditions. VMA strongly supports this approach.

Proposed subsection F.1 sets out two instances in which a minor NSR permit term would be state-only enforceable. In the first instance, any term that is derived from or designed to implement Virginia's regulations governing odorous emissions (Rules 4-2 and 5-2) or emissions of "air toxics" (Rules 4-3 and 5-3) is state-only enforceable. VMA supports this but believes this provision should extend also to permit terms and conditions based on 9 VAC 5-170-160. This regulation authorizes the DEQ to establish permit conditions based on the "policy of the Virginia Air Pollution Control Law" provided the term or condition is "consistent with the regulations of the board." In other words, DEQ uses 9 VAC 5-170-160

to set permit requirements that have no direct basis in Virginia's air regulations; they are drafted by the DEQ on an ad hoc basis.

VMA in general and many of its members specifically have in the past objected to the DEQ's exercise of this ad hoc authority. While we recognize that this authority to set such ad hoc permit terms and conditions arises out of a regulation included in the Virginia SIP, we also recognize that the actual permit terms and conditions based on 9 VAC 5-170-160 are not based on regulatory requirements that form a part of the Virginia SIP. (If they did, DEQ would base them on the specific regulatory requirement, not on the ad hoc authority granted by 9 VAC 5170-160.) In other words, like permit terms and conditions based on Virginia's odor and state air toxics regulations, which are not part of the Virginia SIP, permit terms and conditions based on 9 VAC 5-170-160 should be designated state-only enforceable. Therefore, VMA advocates the following rewording of proposed 9 VAC 5-80-1120.F.1:

A term or condition of any permit issued under this article shall not be federally enforceable if (i) it is derived from or is designed to implement Article 2 (9 VAC 5-40-130 et seq.) or Article 3 (9 VAC 5-40-160 et seq.) of 9 VAC 5 Chapter 40, Article 2 (9 VAC 5-50-130 et seq.) or Article 3 (9 VAC 5-50-160 et seq.) of 9 VAC 5 Chapter 50, or 9 VAC 5-170-160, or (ii) it is designated in the proposed permit as provided in subdivision 2 of this section and public review of the designation takes place under 9 VAC 5-80-1170.

RESPONSE: See response to comment #2.

16. **SUBJECT:** General (9 VAC 5-80-1120)

COMMENTER: Dominion

TEXT: DEQ proposes needed changes in 9 VAC 5-80-1120 F to clarify which provisions in a permit are state-only enforceable. We believe that it would also be appropriate to include 9 VAC 5-170-160 to the list of provisions that are “state-only” enforceable. This provision allows permit writers to add permit terms that cannot be directly attributed to a specific regulation.

RESPONSE: See response to comment #2.

17. **SUBJECT:** Concurrent Construction (9 VAC 5-80-1130)

COMMENTER: Virginia Manufacturers Association

TEXT: In the new proposal the Board has deleted the regulations implementing an innovative approach to allowing sources to quickly initiate the construction or modification of facilities to meet the demands of the fast paced global marketplace. VMA has previously commented in support of the concurrent construction provisions in the 1997 and 1999 proposed regulations.

VMA and its members have strongly advocated the Board's adoption of concurrent construction provisions. We are disappointed that the Board, apparently based on comments by EPA Region III, has eliminated these valuable provisions from Virginia's minor NSR regulations. We hope for the possibility in the future of a rulemaking to incorporate the flexibility of concurrent construction into Virginia's NSR programs.

RESPONSE: Initially, EPA commented that the provisions must be deleted because they were in conflict with 40 CFR 51.160. Later, they relented and indicated that these provisions would be acceptable if they were changed to not apply to: (i) any stationary source or emissions unit subject to the major source NSR requirements for prevention of significant deterioration (PSD) or nonattainment areas, (ii) any stationary source for which a plantwide applicability limit is established, or (iii) any synthetic minor or other stationary source receiving a minor NSR permit that would establish terms and conditions that would enable the source to avoid major source permit and other requirements. The changes required by EPA significantly diminished the benefits associated with use of the provisions and made them confusing and difficult to implement. Also, the concurrent construction provisions could not be used until the regulation is approved by EPA.

In addition to problems mentioned above, another practical problem surfaced in the review of the provisions. The provisions were taken from a Michigan regulation. One of the elements that applicants must demonstrate to use the provisions is that waiting for the permit to begin construction would be an “undue hardship.” The issue then became what constitutes an undue hardship. Consultation with Michigan officials revealed that they applied criteria for determining undue hardship that would not work in today’s economy. The example they gave of undue hardship was when Chrysler Corporation was in such dire economic straits that it had to borrow money from the federal government. They also said that for this reason, little use had been made of the provision. They also related that it had not been approved by EPA.

No changes have been made to the proposal based on this comment.

18. **SUBJECT:** Concurrent Construction (9 VAC 5-80-1130)

COMMENTER: International Paper

TEXT: International Paper strongly recommends not removing provisions for concurrent constructions. International Paper Franklin Mill's experience with permitting in Virginia indicates that these provisions are necessary to help both the permittee and DEQ manage permitting efforts. In today's economic climate companies like International Paper need to be able to respond rapidly to market/product changes in order to stay competitive within our industry. This requires construction and permitting activities to be initiated and completed as quickly and effectively as possible. Concurrent construction would provide industry a means of beginning limited construction activities while the final details of a permit are being resolved. International Paper believes concurrent construction activities could be limited to construction activities, which would not in the interim period

(while working on the permit) increase air emissions, and therefore would result in no impact to the environment. Concurrent construction could be activities that the permittee would do at their own risk. These types of activities can be effectively managed and monitored by DEQ and industry. It is our understanding that other states (like North Carolina) are pursuing these types of provisions in their regulations.

RESPONSE: See response to comment #17.

19. **SUBJECT:** Concurrent construction (9 VAC 5-80-1130)

COMMENTER: Dominion

TEXT: We object to the deletion of the proposed regulation allowing concurrent construction while the permit application is in the approval process. Other states, most notably North Carolina, are pursuing concurrent construction authority through legislative means. We believe that this kind of regulation can result in a progressive business climate without any environmental harm. We believe such a climate is appropriate for the Commonwealth of Virginia. We would support 9 VAC 5-80-1130 in its previously proposed entirety.

RESPONSE: See response to comment #17.

20. **SUBJECT:** Applications (9 VAC 5-80-1140)

COMMENTER: Virginia Manufacturers Association

TEXT: Subsection E contains a new proposal requiring permit applicants to submit a "certification" that the project proposed in the minor NSR permit application is not subject to major NSR, i.e. prevention of significant deterioration ("PSD") or major nonattainment area NSR. (Although the proposed certification requirement is worded differently, we pose the new certification requirement this way because if one of our member companies knew that a proposed project triggers major NSR, the company would not be submitting an application for a minor NSR permit.)

VMA strongly objects to this proposed certification requirement. EPA's approach to the entire major NSR program has been in turmoil and constant flux for the past few years. Given this uncertainty and EPA's aggressive enforcement approach over the past few years in the NSR area, our members have no way to be absolutely certain that EPA would not find any particular project to be subject to major NSR. Yet this is exactly what the proposed certification in subsection E would require.

VMA's members are very concerned about the potential criminal implications arising out of the proposed requirement to make a blanket certification that a proposed project is not subject to major NSR. Experts, including those at DEQ and EPA, can render different opinions as to the applicability of major NSR to a particular project, but in the end it is the DEQ or the EPA that makes the decision. Even then, the regulators' determinations are

subject to reversal by the courts. The ultimate decision belongs to the regulators and the courts and the applicant should not be placed in the untenable position of certifying the outcome of that unpredictable process. In short, the proposed certification provision in subsection E must be deleted.

RESPONSE: The provisions in question have been significantly revised. Applicants are no longer required to certify that the project proposed in the minor NSR permit application is not subject to major NSR. The revised version requires the applicant to certify that they understand the existence of the minor NSR permit does not provide a shield against enforcement of the major NSR regulations nor their responsibility to comply with major NSR regulations.

21. **SUBJECT:** Applications (9 VAC 5-80-1140)

COMMENTER: International Paper

TEXT: International Paper strongly recommends the removal of the new requirement identified in 9 VAC 5-80-1140 Subsection E. It is our understanding that subsection E requires a certification by the permittee that a proposed modification is not subject to major NSR such as Prevention of Significant Deterioration (PSD). This type of certification is not possible under the everchanging interpretations pertaining to NSR and its applicability. Many NSR determinations are constantly challenged and only resolved by legal interpretations. Our experience indicates that the permittee and DEQ review PSD applicability/implications during the minor source permitting process when emission inventories and the actual modifications are reviewed. Therefore major NSR certifications should not be required. DEQ and the permittee should continue to review PSD applicability during the permit application review period.

RESPONSE: See response to comment #20.

22. **SUBJECT:** Applications (9 VAC 5-80-1140)

COMMENTER: Dominion

TEXT: We recommend that the newly proposed 9 VAC 5-80-1140 E be deleted in its entirety. This regulation would require applicants to certify the applicability or non-applicability of major NSR. The final determination of major or minor NSR status is made by the Department, not by the source (although appeals are allowed). Second, the recent interpretations of the applicability of major NSR frequently throw determinations into question. EPA has an evolving policy on what is and what is not subject to major NSR. In short, sources cannot be expected to certify with any great degree of accuracy the non-applicability of major NSR.

RESPONSE: See response to comment #20.

23. **SUBJECT:** Application information required (9 VAC 5-80-1150)

COMMENTER: Virginia Manufacturers Association

TEXT: VMA believes the application information requirements in the proposed minor NSR regulations may be needlessly burdensome in cases where an owner seeks a permit for construction or reconstruction of a source of HAPs pursuant to 40 CFR 63.5. In such cases, where the source is subject to a promulgated MACT standard, the preconstruction review is cut and dried - HAP emissions must be controlled by the application of the MACT standard. In recognition of this, the MACT standard may specify reduced application information requirements. For example, in the Pharmaceutical MACT (40 CFR Part 63, subpart GGG), EPA eliminated several of the application requirements that are specified in the General Provisions, 40 CFR Part 63, subpart A (see 40 CFR 63.1259(a)(5)). To the extent that the Board's standard application forms do not address such source category-specific exceptions to the general application requirements they will result in requirements that are more stringent than federal. To address this issue, VMA recommends that the regulation be revised to add a new subsection D as follows:

D. The application requirements specified in a particular MACT standard(s) applicable to a source subject to the requirements of this article shall take precedence over the requirements in this subsection.

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

24. **SUBJECT:** Action on permit applications (9 VAC 5-80-1160)

COMMENTER: Virginia Manufacturers Association

TEXT: Preconstruction approvals in accordance with 40 CFR 63.5 are required to be accomplished within 60 days per 40 CFR 63.5. In subsection B, we recommend that the following sentence be added after the first sentence:

Processing time for a permit issued pursuant to the federal hazardous air pollutant new source review program under this article shall not exceed 60 days.

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

25. **SUBJECT:** Public participation (9 VAC 5-80-1170)

COMMENTER: Virginia Manufacturers Association

TEXT: VMA supports the proposed changes to the public participation requirements. We particularly support the change in subsection D.1 that would subject applications for sources of hazardous air pollutants to public participation only if the permit requires a case-by-case MACT determination. We believe the process of issuing a minor NSR permit as the preconstruction approval for the construction or reconstruction of a

HAP source subject to an EPA promulgated MACT standard should be a straightforward process of incorporating the MACT requirements into the permit.

RESPONSE: Support for the proposal is appreciated.

26. **SUBJECT:** Public participation (9 VAC 5-80-1170)

COMMENTER: International Paper

TEXT: IP supports the proposed changes to the public participation requirements pertaining to subsection D.1 that would require applications for sources of hazardous air pollutants to require public participation only if the permit requires a case-by-case MACT determination. We believe the process of issuing a minor NSR permit for the construction or reconstruction of a source subject to an EPA promulgated MACT standard should not require public participation since the proposed modification is required by a MACT standard, which has already undergone public comment.

RESPONSE: Support for the proposal is appreciated.

27. **SUBJECT:** Public participation (9 VAC 5-80-1170)

COMMENTER: Dominion

TEXT: Regarding the public participation requirements, we suggest that 9 VAC 5-80-1170 D 2 be revised to clarify that only applications for the construction of major stationary sources (and major modifications) would be automatically subject to the public participation procedures. In its current wording, it could reasonably be interpreted that even a minor modification at a major stationary source would be subject to the public participation procedures. We do not believe this is the intent of the public participation procedural requirements.

RESPONSE: No change is needed here because the provisions of 9 VAC 9-80-1100 H 2 prevent such an interpretation from being applied not only here but throughout the regulation.

No changes have been made to the proposal based on this comment.

28. **SUBJECT:** Standards for granting permits (9 VAC 5-80-1180)

COMMENTER: Virginia Manufacturers Association

TEXT: Proposed subsection A.4 now says a source must be designed, built and equipped to operate without causing a violation of the applicable provisions of regulations of the board "or the applicable control strategy portion of the implementation plan." We do not know exactly what the additional language in quotes is intended to cover. Owners or operators contemplating the construction of a new source or the modification of an existing source would have the opportunity to determine well in advance of submitting a

permit application whether the proposed project would violate any of the Board's regulations. However, such owners or operators have no way to determine for themselves whether a contemplated project would violate an "applicable control strategy portion of the implementation plan." Our members don't know what the "control strategy portion of the implementation plan" is, where to find it, or how to interpret it.

More importantly, we believe the "control strategy portion of the implementation plan" should be embodied in regulations adopted by the Board. The acceptability of a proposed project should be determined by testing the project against the requirements of the Board's regulations, not an esoteric agency document prepared for EPA's approval in the state implementation plan.

It is a hallmark of good government that members of the public can know what the law requires and order their affairs accordingly. Our members have no effective way to plan, prepare, and execute important projects that may be deemed acceptable or rejected based on the "control strategy portion of the implementation plan." On the other hand, our members can plan, prepare, and execute important projects if the tests of their acceptability are clearly articulated in the Board's regulations. In short, VMA believes the newly added phrase "or the applicable control strategy portion of the implementation plan" should be deleted from subsection A.4.

RESPONSE: The change was made in order for the regulation to comply with 40 CFR 51.160 (a)(1). The control strategy portion of the implementation plan consists of those specific strategies for controlling the emissions of and reducing ambient levels of pollutants in order to satisfy federal Clean Air Act requirements for demonstrations of reasonable further progress and attainment or maintenance. Nonregulatory provisions in the implementation plan applicable to specific sources are rare and assistance will be available to identify those requirements.

No changes have been made to the proposal based on this comment.

29. **SUBJECT:** Standards for granting permits (9 VAC 5-80-1180)

COMMENTER: Dominion

TEXT: We do not understand the rationale for deleting the requirement that emission standards in permits must be achievable. The deletion of this requirement (9 VAC 5-80-1180 A3) could result in impractical permit conditions. This regulation is an important safeguard that regulated sources have against unrealistic permit conditions. We recommend that this provision be restored.

RESPONSE: Inclusion of this provision has the potential to conflict with both the application of best available control technology and the use of innovative control technology.

No changes have been made to the proposal based on this comment.

30. **SUBJECT:** Permit invalidation, suspension, revocation and enforcement (9 VAC 5-80-1210)

COMMENTER: Virginia Manufacturers Association

TEXT: VMA has concerns with the automatic expiration provisions for permits where the source has not begun construction or reconstruction within 18 months of permit issuance. This cutoff was apparently borrowed from Virginia's criteria pollutant NSR permit programs. We understand that one of the primary reasons for such a provision in the PSD regulations is to prevent the holder of a preconstruction permit from "locking up" increment consumption for an indefinite period, thereby possibly excluding others from obtaining PSD permits for new emissions into the same airshed. This concern does not arise in the permitting of sources subject to MACT standard.

Also, an 18-month cutoff makes some sense in criteria pollutant NSR programs because those programs entail case-by-case BACT or LAER determinations that might get "stale" or outdated after 18 months. In the case of sources subject to a MACT standard this cannot happen because the control requirement is the MACT standard as promulgated by EPA. There is no concern that the applicable HAP control requirement will become stale or outdated with time. Removing the automatic expiration time could allow the Department to approve these construction or reconstruction projects well into the future (with the requirement, of course, that any then-applicable MACT standards must be met upon construction and operation of the source). This "long-look" preconstruction approval could provide considerable flexibility to Virginia businesses, while cutting down on repetitive, routine permitting by the Department. To accomplish this, we recommend adding a new subsection D. as follows:

D. For permits issued pursuant to the federal hazardous air pollutant new source review program under this article, no delay in the commencement of construction or reconstruction shall cause the permit to become invalid.

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

31. **SUBJECT:** General permits (9 VAC 5-80-1250)

COMMENTER: Virginia Manufacturers Association

TEXT: VMA supports the proposed deletion of subsection A.5.d. The level of detailed information specified in this subsection is unnecessary and unwarranted in the case of general permitting. The other information specified in subdivisions a, b, c, e, and f are more than adequate for a public notice of DEQ's intent to grant coverage to a source under the general permit.

RESPONSE: Support for the proposal is appreciated.

32. **SUBJECT:** Minor Permit Amendments (9 VAC 5-80-1280)

COMMENTER: Dominion

TEXT: We support the proposed additions to the list of activities or situations that could result in a minor permit amendment under 9 VAC 5-80-1280 B. These additions serve to make the minor amendment provisions more practical.

RESPONSE: Support for the proposal is appreciated.

33. **SUBJECT:** Plantwide applicability limit (9 VAC 5-80-1310)

COMMENTER: Virginia Manufacturers Association

TEXT: The Board proposes to delete the provisions that would have established plantwide applicability limit, or "PAL," permitting. We commented extensively in support of the PAL provisions in the 1997 proposed regulations. Unfortunately, it appears EPA Region III's objections to the proposed PAL permitting have caused the Board to abandon this innovative permitting approach. We regret this and hope there will be an opportunity in a future rulemaking to establish a PAL permitting program in Virginia.

RESPONSE: Initially, EPA commented that the provisions must be deleted. Later, they relented and indicated they would be acceptable if the provisions be changed to incorporate the following provisions: (i) plantwide applicability limits (PAL) may only be used for the entire stationary source not just a part, (ii) the definition of actual emissions from the current PSD regulations is used in lieu of the version used for the regulation at large, and (iii) PALs may only be used to avoid permits for major source modifications. The revision required by EPA significantly diminished the benefits associated with use of the provisions and made them confusing and difficult to implement. Also, EPA is probably going to issue its own regulations for use of a PAL which would likely render the state version inconsistent and unusable. Finally, the PAL provisions could not be used until the regulation is approved by EPA.

No changes have been made to the proposal based on this comment.

34. **SUBJECT:** Plant wide Applicability Limit (9 VAC 5-80-1310)

COMMENTER: International Paper

TEXT: International Paper does not support the removal of the proposed Plant wide Applicability Limit (PAL) provisions from the draft regulations. International Paper strongly believes Virginia needs to develop PAL provisions in the final promulgated regulation. The ability for International Paper to develop a permit action under a PAL could help to greatly streamline future permitting actions. International Paper believes PALs would allow the Franklin Mill to meet future marketplace needs quicker by having an established PAL permit at the Franklin Mill. PALs exist in many States providing industry

with a tool to implement modifications that fall within the emission limit or caps established for pollutants at a facility. This helps to simplify permitting actions for both the permittee and DEQ, while allowing the Virginia facilities to minimize permit approval timing such that construction activities can be initiated and completed in a more timely fashion. Virginia needs to aggressively implement PAL regulations in order for its industry to remain competitive. PAL is a way for industry to react quickly to marketplace needs while simultaneously allowing DEQ to control emissions through use of a plant wide cap.

RESPONSE: See response to comment #33.

35. **SUBJECT:** Pollution control projects (9 VAC 5-80-1310)

COMMENTER: Virginia Manufacturers Association

TEXT: VMA generally supports the newly proposed provisions authorizing minor NSR permitting for pollution control projects ("PCPs") that might result in collateral emission increases above the major NSR significance levels. However, one counterproductive provision in the PCP regulation should be eliminated.

Proposed subsections E and H.4 together appear to establish a requirement that a source owner who undertakes a PCP must control any collateral emissions increase from the project by the application of best available control technology ("BACT") as specified in 9 VAC 5-50-260. Subsection H.4 says that "if the pollution control project will result in an increase in non-targeted pollutants, the board shall determine that the collateral increase will be minimized and will not result in environmental harm." If the project would not result in an increase in non-targeted pollutants, it wouldn't even meet the definition of "pollution control project" in proposed 9 VAC 5-80-1110.C. In fact, such a project would not require a permit in the first place because the targeted and non-targeted emissions would not increase. In short, by definition, if the project is a PCP, it will result in a significant collateral emissions increase. According to subsection H.4 then, the Board must determine that the collateral increase will be minimized.

Subsection E says, in effect, that if the Board makes a determination under subsection H.4 (which as explained above, it must for any true PCP), then the BACT requirement of 9 VAC 5-50-260 applies. Although subsection E does not explicitly indicate to which emissions BACT applies, the best interpretation in conjunction with subsection H.4 is that BACT applies to the collateral increase in non-targeted emissions. In effect then, the source owner who undertakes a PCP to control a targeted pollutant must then install BACT to control the collateral emission increase of any non-targeted pollutant.

While we believe it is appropriate to minimize the collateral increase in non-targeted emissions, we believe it makes no sense to require BACT controls for collateral emissions generated from the control of the targeted emissions for each and every PCP. We do not believe source owners would voluntarily undertake a PCP to control targeted emissions if they would also be required to spend additional money to install BACT controls to reduce

the collateral emissions generated from the first set of controls. Source owners will not be willing to essentially pay twice to control the targeted emissions.

We believe a PCP regulation that requires emission controls on emission controls creates a serious disincentive to voluntary pollution control projects. To eliminate this disincentive, we advocate deleting the BACT mandate by deleting proposed subsection E. The BACT mandate is unwarranted and subsection E is unnecessary. The requirement to minimize the collateral increase of non-targeted emissions is stated clearly in proposed subsection H.4. Subsection H.4 provides the DEQ with the flexibility to prescribe in the PCP permit whatever level of emission control, perhaps less than BACT, necessary so that the PCP "will not result in environmental harm." In sum, subsection E should be eliminated.

Subsection G.3 refers to a determination whether an emissions increase from a PCP is "significant." We assume this means a "significant" emissions increase as defined by Virginia's PSD regulations, but it would be better to specifically indicate that in subsection G.3.

The word "which" should be deleted in subsection H.3.

We recommend that subsection H.6 be reworded as follows for clarity:

The board may not approve as a pollution control project any project that constitutes the replacement of an existing emissions unit with a newer or different one (albeit more efficient and less polluting) or the reconstruction of an existing emissions unit.

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

36. **SUBJECT:** Pollution control projects (9 VAC 5-80-1310)

COMMENTER: International Paper

TEXT: International Paper supports the proposed provisions authorizing minor NSR permitting for pollution control projects (PCP) that might result in collateral emission increases above the major NSR significance levels. Subsections E and H.4 together appear to establish a requirement that a source owner must control any collateral emissions increase from a PCP by the use of best available control technology (BACT).

We do not believe source owners would voluntarily undertake a PCP to control targeted emissions if they would also be required to install BACT controls to reduce the collateral emissions. We believe the requirement to minimize the collateral increase of non-targeted emissions is stated clearly in proposed subsection H.4. Subsection H.4 provides the DEQ with the flexibility to prescribe in the PCP permit the level of emission control, less than BACT (if applicable) such that the PCP will not result in environmental harm.

RESPONSE: See response to comment #35.

37. **SUBJECT:** Pollution Control Projects (9 VAC 5-80-1310)

COMMENTER: Dominion

TEXT: We support the addition of the term "pollution control project." However, the definition should be revised to include all pollution control project scenarios, which may include pollution prevention projects and process or raw material changes.

DEQ proposes that there must be an "increase" in a non-targeted emission that is above its major modification threshold for a project to be classified as a "pollution control project." Absent the WEPCo rules, the United States Environmental Protection Agency (EPA) requires every major stationary source to make a "past actual to future potential" comparison when making any change at a facility to determine whether major NSR applies. Therefore, without a broader exemption for pollution control projects, EPA may attempt to require major NSR for facilities that are legitimately attempting to add air pollution control equipment. At nearly every major stationary source, a past actual to future potential comparison will result in a "significant net emissions increase" and thus subject the source to major NSR.

We believe that it is not contrary to the Clean Air Act to completely exempt from NSR (both major and minor) any legitimate activity that is conducted for the purposes of reducing emissions. Sources should retain the liability for justifying such an exemption. We provide additional comments on pollution control projects later in this letter. We suggest that the definition of "pollution control project" read as follows:

"Pollution control project" means physical or operational changes whose primary function is the reduction of emissions of air pollutants. The fabrication, manufacture, or production of pollution control or prevention equipment and inherently less-polluting fuels or raw materials are not pollution control projects.

We are deeply interested in the provisions relating to pollution control projects. Generally, in the absence of specific WEPCo-style exemptions for pollution control projects at electric utility units, we support the concept of exempting pollution control projects from major NSR. Notwithstanding this support, we believe that there is a circular reference in the proposed regulation that should be removed. The provisions that cause this circular reference appear to be irrelevant to achieving the desired result of the pollution control project exclusion, so we recommend that they both be deleted in their entirety. The first provision is 9 VAC 5-80-1310 E which exempts the collateral emissions increase resulting from the pollution control project from the requirements of state Best Available Control Technology (BACT) "unless the board finds it necessary to make a determination under subdivision H4 of this section." Subdivision H4 states:

If the pollution control project will result in an increase in non-targeted pollutants, the board shall determine that the collateral increase will be minimized and will not result in environmental harm. (9 VAC 5-80-1310 H4)

This requirement makes these two provisions circular, because the definition of “pollution control project” states that the project “results in an increase in emissions of non-targeted regulated air pollutants that qualify as a major modification.” We believe that the intent of these two provisions is to ensure that collateral emission increases resulting from the application of pollution control projects in conjunction with the project itself result in a net benefit to the environment. We believe that the board has other powers in its regulations to ensure the minimization of these collateral increases. For example, from its earliest days, the SIP has contained a provision that requires that air pollution control devices be operated with good principles and practices of air pollution control to minimize emissions. This requirement is most clearly stated in 9 VAC 5-20-180 A:

At all times, including periods of startup, shutdown and malfunction, owners shall, to the extent practicable, maintain and operate any affected facility, including associated air pollution control equipment or monitoring equipment, in a manner consistent with good air pollution control practice of minimizing emissions.

This regulation does not restrict its applicability to only “pollutants of concern” or some other more narrow scope. It applies to “emissions.” The board could utilize this provision of the regulations without resorting to the confusing provisions about state BACT applicability. However, we do believe it is important to exempt the collateral increases from state BACT. We believe that the “net environmental benefit” test provides exactly the same result as a formal state BACT analysis would, without the extra time it takes to conduct the BACT analysis. The US EPA supports this assertion in the Director of the Office of Air Quality Planning and Standards July 1, 1994 memorandum entitled “Pollution Control Projects and New Source Review (NSR) Applicability:”

[P]ollution control projects which result in an increase in non-targeted pollutants should be reviewed to determine that the collateral increase has been minimized and will not result in environmental harm. Minimization here does not mean that the permitting agency should conduct a BACT-type review or necessarily prescribe add-on control equipment to treat the collateral increase. Rather, minimization means that, within the physical configuration and operational standards usually associated with such a control device or strategy, the source has taken reasonable measures to keep any collateral increase to a minimum. (pages 13-14)

Again, we believe that 9 VAC 5-80-1310 E and 9 VAC 5-80-1310 H4 should be deleted from the final rule. This deletion will not affect the overall effectiveness of the pollution control project exclusion.

Alternatively, DEQ could revise 9 VAC 5-80-1310 E to state that the provisions of 9 VAC 5-50-260 do not apply to any emissions increases associated with a pollution control project. This will clarify that sources installing pollution control projects do not need to perform a state BACT analysis for collateral increases. Such an approach is completely consistent with the EPA guidance discussed above.

Proposed regulation 9 VAC 5-80-1310 G3 states:

Where a pollution control project will result in a significant increase in emissions and that increased level has not been previously analyzed for its air quality impact and raises the possibility of a violation of an ambient air quality standard, prevention of significant deterioration increment in 9 VAC 5-80-1730, or adversely affect visibility or other air quality related values, the application shall include an air quality analysis sufficient to demonstrate the impact of the project.

This would place the onus on the applicant to provide an air quality analysis when there is the "possibility" of ambient air quality problems caused by the pollution control project. What criteria are to be used by the applicant (or the DEQ permit writer) to determine whether this "possibility" is raised? Will applications be deemed incomplete when an air quality analysis is not included with a pollution control project application? We believe that this provision could be worded to provide greater clarity regarding when an air quality analysis is expected. We also believe that most air pollution control projects, by their nature, will not cause ambient air quality problems and should be allowed to proceed without a significant air quality analysis for the collateral impacts. We believe that the "environmentally beneficial" test should safeguard any concerns about air quality impacts from a pollution control project without resorting to a formal modeling analysis.

The environmentally beneficial test is contained in 9 VAC 5-80-1310 H2. This regulation requires the board to determine that the pollution control project as a whole benefits the environment. Most of the provisions in this regulation relate to situations where a project cannot be environmentally beneficial. The first exception is "[a] project which would result in an unacceptable increased risk due to the release of air toxics." This wording is vague and could be troublesome to all parties, including the DEQ and regulated sources. What are the criteria to be used by the DEQ in determining "an unacceptable increased risk?" To some people, any additional risk is perceived as unacceptable. We understand that this proposed provision comes directly from the US EPA July 1, 1994 policy memorandum cited above. However, that memorandum goes on to say: "[U]nless there is reason to believe otherwise, permitting agencies my presume that such [pollution control] projects by their nature will result in reduced risks from air toxics" (page 14, emphasis added). We believe that some form of this clause would also be appropriate for inclusion in the regulations.

We also disagree with the wording that "[p]ollution control projects that increase utilization rate may not qualify as environmentally beneficial." It still remains in the board's power to determine that a pollution control project was not conducted primarily for the purpose of reducing emissions to the air.

DEQ also proposes in 9 VAC 5-80-1310 H3 that "[t]he board shall determine that the proposed pollution control project which [sic] will not cause or contribute to a violation of an ambient air quality standard, prevention of significant deterioration increment. . ., or adversely affect visibility or other air quality related values." This requirement implies that someone will do an analysis of ambient air impacts, whether it is the DEQ or the applicant.

Again, we believe that this requirement may be satisfied by the environmentally beneficial test. If a project will cause unacceptable problems, whether or not the problems relate to air quality, then it is not approvable. This provision should be deleted from the final rule.

Finally, we believe that 9 VAC 5-80-1310 H5 should further specify what the "adverse collateral environmental impacts" to be "identified, minimized, and, where appropriate, mitigated" are. Are any additional impacts "adverse?" As discussed above, we believe that the holistic view should be taken and a wide variety of projects should be considered environmentally beneficial even if they theoretically could have a small adverse impact on some aspect of the environment.

RESPONSE: With regard to the definition of "pollution control project" support for the proposal is appreciated. However, the new provisions concerning pollution control projects (PCP) are intended to implement the EPA policy memorandum from the Director of the Office of Air Quality Planning and Standards, July 1, 1994, entitled "Pollution Control Projects and New Source Review (NSR) Applicability" and must be consistent with that policy. The objective of the provisions is to allow the use of the minor NSR program to issue PCP permits in cases where industry reduces a pollutant (the target pollutant) and this reduction causes a collateral increase in a different pollutant such that the collateral increase qualifies as a major modification under major NSR. The issuance of the PCP permit would allow the industry to avoid major NSR. To make the change to the definition suggested by the commenter would simply require the applicant to be issued a PCP permit but would not allow the associated benefit of avoiding major NSR.

With regard to 9 VAC 5-80-1310 E and 9 VAC 5-80-1310 H 4, this comment is acceptable and appropriate changes reflecting the intent of the comment have been made to the proposal.

With regard to 9 VAC 5-80-1310 G 3, 9 VAC 5-80-1310 H 3 and 9 VAC 5-80-1310 H 5, the proposal is consistent with the EPA policy. Also, inherent in any NSR program is the duty to assure protection of the NAAQS. Given that the emission increases being analyzed are those that qualify as major modifications under major NSR, it is not unreasonable to include the air quality analysis requirement in conjunction with the application procedures for PCP permits.

With regard to 9 VAC 5-80-1310 H 2, this comment is acceptable and appropriate changes reflecting the intent of the comment have been made to the proposal.

38. **SUBJECT:** Permit exemption levels (9 VAC 5-80-1320)

COMMENTER: Virginia Manufacturers Association

TEXT: We are not sure why certain categories of sources, e.g., large appliance coating application systems, were deleted from subsection B while other categories of sources, e.g., paper and fabric coating application systems, were left in subsection B. We believe that with a few exceptions, e.g. wood sawmills, specific

categories should be eliminated from subsection B in favor of the other, generally applicable exemptions, e.g., those based on emission rate, stated in the regulation.

The Board has recently re-proposed new amendments substantially changing Virginia's state air toxics regulations, including 9 VAC 5-50-160 et seq., the rule that applies to new and modified sources of air toxics. 18 Va. Reg. 270-282 (Oct. 22, 2001). The new amendments will radically alter the number and nature of sources subject to (and also, exempt from) the state air toxics regulations. Like the current state air toxics regulations, the new regulations will contain specific exemption provisions. The exemption provisions in proposed 9 VAC 5-80-1320.E (as correctly redesignated) are the same as the exemption provisions in the current air toxics regulation at 9 VAC 5-50-160.1) and are included as part of the exemption provisions in the proposed state air toxics regulations at 9 VAC 5-60-300.C. It is also very important to note that proposed 9 VAC 5-60-300.C contains expanded exemption provisions that will also have to be reiterated in the exemption provisions of the minor NSR regulations at 9 VAC 5-80-1320.E (as correctly redesignated) once the Board adopts the proposed revisions to the state air toxics rules.

VMA advocates a simplified approach to the NSR exemption for sources of air toxics. Rather than reiterate the exemption provisions of 9 VAC 5-50-160.1) in proposed 9 VAC 5-801320.17 (as correctly redesignated), we recommend simply referring to the exemption provisions in the state air toxics regulations. We suggest deleting the proposed wording of subsection F in its entirety and substituting the following: "F. Exemptions for sources of toxic pollutants shall be as specified in 9 VAC 5-50-160 et seq." (Once the Board adopts the recently proposed changes to the state air toxics rules, subsection F could be revised to read: "F. Exemptions for sources of toxic pollutants shall be as specified in 9 VAC 5, Chapter 60, Article 5.") Thereafter, whenever the Board changes the exemption provisions in the underlying state air toxics regulations, the permitting exemptions in 9 VAC 5-80-1320 would also change automatically.

In short, VMA advocates that 9 VAC 5-80-1320.E (as correctly redesignated) simply refer to the exemptions set forth in the state air toxics regulations applicable to new and modified sources.

We recommend the following rewording to subsection G for additional clarity:

Any source category or portion of a source category specifically exempted from the federal hazardous air pollutant new source review program by 40 CFR Part 61 or Part 63 shall be exempt from the provisions of this article.

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

39. **SUBJECT:** Permit exemption levels (9 VAC-5-80-1320)

COMMENTER: United States Department of Agriculture, Forest Service, George Washington & Jefferson National Forests and United States Department of the Interior, National Park Service, Shenandoah National Park

TEXT: In 9VAC-5-80-1320 l.b., exemption from New Source Review (NSR) of any reconstructed source with no increase in uncontrolled emissions is proposed. And, under section C.1, DEQ proposes to delete inclusion of reconstructed sources from the same category as new sources that trigger new source review, if uncontrolled emissions exceed specified thresholds. Instead, "reconstructed" sources would be moved to D.1. where NSR is triggered only if the change in uncontrolled emissions ("net emissions increase") exceeds a specified threshold. This has the effect of exempting certain reconstructed sources from NSR that previously would have been subject to such review. Thus, if an existing emissions unit is reconstructed and there would be no "net emissions increase" of uncontrolled emissions; no permit would be required under the proposed revision. Current regulations would subject such a reconstructed source to minor NSR based solely on its gross uncontrolled emissions. DEQ should reconsider this approach, and also evaluate the impact of such a change on National Ambient Air Quality Standards attainment.

RESPONSE: Moving reconstructions from the emissions rate table in subsection C to the one in subsection D is appropriate considering the overall restructuring of the regulation. In addition, the emission rate thresholds in subsection D are lower than subsection C. The provisions have been revised to allow reconstructions only if the potential to emit does not increase.

40. **SUBJECT:** Permit exemption levels (9 VAC-5-80-1320)

COMMENTER: Piedmont Environmental Council

TEXT: If the proposed regulations are adopted, a reconstructed emissions unit will need a permit only if a net emissions increase of uncontrolled emissions occurs. However, existing regulations require minor new source review for reconstructed sources based on their gross uncontrolled emissions. Thus, this proposed regulation is a step backward for the Commonwealth's air quality.

RESPONSE: See response to comment #39.

41. **SUBJECT:** Permit Exemption Levels (9 VAC 5-80-1320)

COMMENTER: Dominion

TEXT: We support the changes in the exemption determination levels contained in 9 VAC 5-80-1320. We strongly support the change from a “potential to emit” basis to an “uncontrolled emissions rate” basis for the determination of exemption. In addition, since EPA has yet to promulgate a revised definition of “potential to emit” that meets with court approval, Virginia is wise to avoid this issue altogether.

Although we support these changes to the exemption criteria as outlined above, we believe there is further opportunity for clarification. For example, the board's regulations are unclear regarding the permit applicability of temporary and portable units, such as pumps, compressors, stationary (but temporary) on-site construction equipment (such as cranes), and power equipment. We believe that the board should promulgate specific permit exemptions from temporary source categories that are unrelated to a facility's primary business. As the regulations stand now, and as they are proposed, potential confusion regarding the permitting applicability of these activities exists.

RESPONSE: Such exemptions are unnecessary given the historical application of the regulation and the exemption levels. Historically, permits have not been required for temporary activities and such activities would, in any case, fall within the exemption levels already in the regulation. Also, some of the activities would fall under the definition of secondary emissions which are specifically excluded.

No changes have been made to the proposal based on this comment.

42. **SUBJECT:** Standard for stationary sources (9 VAC 5-50-260)

COMMENTER: Virginia Manufacturers Association

TEXT: The Board proposes to delete the term "major" in subsection B. VMA believes the Board should substitute the term "new or reconstructed" to make it clear that the BACT requirement in subsection B applies only to newly constructed or reconstructed sources and not to existing sources (absent a modification as addressed in subsection C). Subsection A states that BACT applies to sources "as reflected in any condition that may be placed upon the permit approval for the facility," indicating the BACT requirement applies to newly constructed, reconstructed, or modified sources requiring an NSR permit. However, VMA believes the wording change we advocate would clarify and reinforce this principle.

We note that subsection B refers to "potential to emit" whereas the Board's new proposal for 9 VAC 5-80-1320.D (not C as indicated in proposed subsection B) is based on uncontrolled emission rates. Also, the reference in proposed 9 VAC 5-50-260.C to 9 VAC 5-80-1320.D should be 5-80-1320.E. There are many similar cross-citation errors throughout the markup of the proposed regulations and we have not commented on all of them. We assume the DEQ will pick up these errors during final editing of the regulations before adoption by the Board.

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

43. **SUBJECT:** Standard for stationary sources (9 VAC 5-50-260)

COMMENTER: International Paper

TEXT: International Paper believes the proposed regulation should in subsection B include the term "new or reconstructed" to make it clear that the BACT requirement applies only to newly constructed or reconstructed sources and not to existing sources (absent a modification as addressed in subsection C). Subsection A states that BACT applies to sources "as reflected in any condition that may be placed upon the permit approval for the facility," indicating the BACT requirement applies to newly constructed, reconstructed, or modified sources requiring an NSR permit.

RESPONSE: See response to comment #42.

44. **SUBJECT:** Major New Source Review (PSD)

COMMENTER: Dominion

TEXT: We are disappointed that Virginia has yet to propose or incorporate the current federal rules regarding the applicability of new source review to changes at electric utility steam generating units, also known as the “WEPCo” provisions. Since Virginia has not incorporated the WEPCo provisions in its State Implementation Plan (SIP), operators of electric utility steam generating units in Virginia cannot benefit from this important improvement to the federal NSR program. Not having WEPCo provisions has the undesired side effect of making the existing Virginia SIP-approved rules more stringent than their federal counterparts without benefit to the environment. The changes that are proposed in Revision YY do not go far enough to reduce the NSR regulatory barriers that discourage and delay installation of pollution control equipment. We urge the DEQ to consider promptly finalizing the WEPCo provisions as part of Virginia’s SIP.

RESPONSE: The federal WEPCo provisions are applicable to major NSR, not this regulation, which covers minor NSR. This is the first comment of this nature that has been received relevant to a regulatory action. As recently as January 1, 2001, the PSD major NSR regulation was the subject of periodic review that included a notice to the public to comment on the regulation. No comments were submitted relative to this issue.

No changes have been made to the proposal based on this comment.

45. **SUBJECT:** Promulgation of Revised Proposal

COMMENTER: Virginia Manufacturers Association

TEXT: The Board did not publish the newly proposed regulations in the Virginia Register. Instead, upon request, DEQ supplied VMA with a markup of the proposed regulations containing strikeouts, underlines, and brackets in an attempt to indicate both changes from the current version of the regulations and changes from the previous (1999) proposal to amend the regulations. Although well intentioned, this format made it difficult to review the newly proposed regulations. There are also errors in the bracketing that add to the confusion. This is important because the DEQ indicated in the

notice announcing the recent proposal that the Board would accept comment only on the changes made to the 1999 proposal as shown in the brackets in the 2001 proposal.

RESPONSE: The Commonwealth of Virginia has specific requirements relative to the process of adopting regulations, including when they are to be published in the Virginia Register and the format for making changes. These procedures were followed in the adoption of this regulation.

No changes have been made to the proposal based on this comment.

ANALYSIS OF TESTIMONY FOR PUBLIC COMMENT PERIOD FEBRUARY 15,1999 THROUGH MARCH 18, 1999

46. **SUBJECT:** Public Participation (9 VAC 5-80-1170)

COMMENTER: Kathleen Henry, Chief, Permitting & Technology Assessment Branch, United States Environmental Protection Agency, Region III

TEXT: EPA disapproved the public participation provisions of Virginia's minor NSR program on July 24, 1996 because the regulations exempted major modifications of less than 100 tons per year from the public participation requirements of §51.161. These new proposed changes to Virginia's regulations are substantially more inclusive than the original regulation but may still fail to meet the requirement of §51.161.

EPA recognizes that, in some cases, states should have the ability to limit the public participation for certain minor source permitting actions. Since states can exempt certain activities from minor NSR based on de minimis or administrative necessity grounds in accordance with the criteria set forth in Alabama Power V. Costle, 636 F.2d 323 (D.C. Cir. 1979), it follows that states should also be able to provide partial or full exemption from the full public process requirements of §51.160(e). Any such limitation on the full public participation requirements of §51.160(e), however, should be applied consistent with the environmental significance of the activity. On August 31, 1995, EPA proposed a new paragraph (c) in § 51.161 to clarify that, except for certain specified activities, state programs may vary procedures for, and timing of, public review in light of the environmental significance of the activity (60 FR 45564). The Commonwealth needs to demonstrate that, in fact, the revised public participation requirements address the environmental significance of the changes that will be exempted from the 30-day public comment period not required in 40 CFR 51.161.

RESPONSE: See response to comment #3.

47. **SUBJECT**: Applicability (9 VAC 5-80-1100)

COMMENTER: Kathleen Henry, Chief, Permitting & Technology Assessment Branch, United States Environmental Protection Agency, Region III

TEXT: Virginia is proposing to adopt elements from EPA's July 23, 1996 proposed reform of the federal new source review requirements into the minor new source review regulations in advance of these changes being made to the Commonwealth's major new source review requirements in 9 VAC 5-80-30 and 9 VAC 5-80-1700 of Article 8. This means that critical terms such as "actual emissions" will have different meanings for minor sources and minor modifications at major sources than for major sources subject to major NSR provisions, or for sources that choose to net out of major NSR altogether. EPA foresees sources, particularly major sources, having to calculate two different actual to potential emissions tests to determine the type of permit they will have to obtain. We are very concerned that sources may stop at the applicability of the minor NSR regulation without realizing that they may, in fact, have triggered major NSR provisions.

Examples of terms and conditions that are particularly troublesome in terms of potentially misleading the source in terms of its applicability to major NSR include but are not limited to:

a) The exemption from considering fugitive emissions in calculating potential to emit. A source in one of the 28 categories required to consider fugitives may be exempt from minor NSR but subject to the major NSR provisions.

b) The potential to emit of source categories exempted under 9 VAC 5-80-1320 is not considered when calculating the PTE of the stationary source. No such exemption is allowed under major NSR regulations such that a source or a modification could be minor or exempted entirely under the minor source regulations but still be subject to major NSR requirements.

c) Inconsistent definitions for terms such as actual emissions, major modification and net emissions increase will require an applicability determination under both the minor and major NSR provisions. This will substantially increase the burden on the source and the Commonwealth in making applicability determinations.

RESPONSE: See response to comment #33.

48. **SUBJECT:** Applicability: Air Toxics (9 VAC 5-80-1100)

COMMENTER: Kathleen Henry, Chief, Permitting & Technology Assessment Branch, United States Environmental Protection Agency, Region III

TEXT: 9 VAC 5-80-1100 C: This section states that sources exempt from this article include those sources listed in 9 VAC 5-80-1320. Under 9 VAC 5-80-1320 E., Virginia indicates that sources **not subject to the federal hazardous air pollutant new source review program** shall be exempt from this permitting program if their potential to emit of toxic pollutants is less than 100 tons per year. As indicated below, it appears that Virginia intends to use this permitting program to meet the requirements of the federal hazardous air pollutant new source review program. Therefore, it is unclear as to when a source of toxics is exempt from permitting under this regulation. In 9 VAC 5-80-1120 H., Virginia indicates that the most stringent of its permitting programs shall apply. For clarity, EPA requests that Virginia indicate when this permitting program would override the federal hazardous air pollutant new source review program.

9 VAC 5-80-1100 D: Fugitives are not included when determining whether a source is subject to this article, however, inclusion of fugitives is required when determining whether a source is subject to the provisions of 40 CFR Part 63.5 or 40 CFR Part 63.40-44.

9 VAC 5-80-1120 H: It is not clear from this paragraph when and why a source in Virginia would use this regulation in place of Virginia's recently proposed regulation to implement the provisions of 40 CFR Part 63.40-44 (also known as the "112(g) provisions"), located at 9 VAC 5-80-1400 et. seq., to meet the requirements of 40 CFR Part 63.40-44. If Virginia intends to use this regulation in place of its proposed regulations at 9 VAC 5-80-1400, et. seq., it will need to include this regulation in its 112(g) program certification, as required in 40 CFR Part 63.4. Virginia should be aware that, in order to meet the requirements of Title V, its 112(g) program will need to be as stringent as EPA's requirements (outlined in 40 CFR Part 63.40-44). [Would it be more appropriate to refer a source to the requirements of 9 VAC 5-80-1400 et. seq. if it is constructing or reconstructing a major source (as defined in 40 CFR 63.2) of hazardous air pollutants?]

In addition, it is not clear from this paragraph when and why a source in Virginia would use this regulation to meet the requirements of 40 CFR 61.05, 40 CFR 61.06, 40 CFR 61.07, 40 CFR 61.08 and 40 CFR 63.5. As EPA stated in its comments to Virginia's proposed regulations, 9 VAC 5-80-1400 et. seq., dated 2/4/99, in order for Virginia (as delegated authority) to use the permit review process described here to implement 40 CFR 61.05, 40 CFR 61.06, 40 CFR 61.07, 40 CFR 61.08 and 40 CFR 63.5, it will need to request delegation from EPA. This proposed regulation was

not reviewed specifically for purposes of meeting the intent of 40 CFR 61.05, 40 CFR 61.06, 40 CFR 61.07, 40 CFR 61.08 and 40 CFR 63.5.

RESPONSE: In several programmatic regulations under the Clean Air Act, EPA requires states to conduct preconstruction reviews of proposed new facilities and expansions to existing ones and to issue legally enforceable documents that require the facilities to reduce emissions in accordance with the results of the reviews. Virginia has only three administrative mechanisms it can use to issue legally enforceable emission reduction requirements: orders, permits and regulations. Of the three, the most practical and appropriate mechanism for enforcing preconstruction review requirements is the permit. Thus, to meet EPA's requirements that the emission reductions be legally enforceable, the procedures for implementing the preconstruction review requirements must be included in a permit regulation. For sources subject to federal hazardous air pollutant requirements, the Clean Air Act and EPA regulations provide for four different preconstruction review requirements as follows:

40 CFR 61.05 through 61.08 for preconstruction review requirements under § 112(c)(1) of the Clean Air Act in existence prior to the 1990 Amendments to the Clean Air Act.

40 CFR 63.5 for preconstruction review requirements under § 112(i)(1) of the 1990 Amendments to the Clean Air Act.

40 CFR 63.54 for preconstruction review requirements under § 112(j)(1) of the 1990 Amendments to the Clean Air Act.

40 CFR 63.40 through 63.44 for preconstruction review requirements under § 112(g)(2)(B) of the 1990 Amendments to the Clean Air Act.

The Board has adopted a specific permit regulation to implement the preconstruction review requirements specified in the last item. However, for the three remaining items, it is more practical and expedient to use this regulation to implement the preconstruction requirements than to develop specific stand-alone regulations.

Changes have been made to this regulation to clarify the above as well as identify those provisions of this regulation which are not applicable to the preconstruction review requirements for the first three items.

49. **SUBJECT:** Definitions (9 VAC 5-80-1110)

COMMENTER: Kathleen Henry, Chief, Permitting & Technology Assessment Branch, United States Environmental Protection Agency, Region III

TEXT: Definition of "federally enforceable". Item No. 6 states that limitations and conditions of an operating permit issued pursuant to a SIP approved permitting program that meet EPA's criteria for federal enforceability are federally enforceable. EPA would like to clarify that all terms and conditions of such permits are federally enforceable, regardless of whether they meet the criteria set out in EPA's Federal Register notice on June 28, 1989 (54 FR 27274). However, terms and conditions intended to limit potential to emit for the purpose of avoiding a CAA or SIP requirement must meet those minimum criteria in order to be considered federally enforceable for the purpose of limiting potential to emit.

RESPONSE: The definition in question was taken from a federal regulation and does not make the distinction identified by the commenter. In fact 40 CFR 52.23 specifically provides:

"Failure to comply with any provisions of this part, or with any approved regulatory provision of a State implementation plan, or with any permit condition or permit denial issued pursuant to approved or promulgated regulations for the review of new or modified stationary or indirect sources, or with any permit limitation or condition contained within an operating permit issued under an EPA-approved program that is incorporated into the State implementation plan, shall render the person or governmental entity so failing to comply in violation of a requirement of an applicable implementation plan and subject to enforcement action under section 113 of the Clean Air Act. With regard to compliance schedules, a person or Governmental entity will be considered to have failed to comply with the requirements of this part if it fails to timely submit any required compliance schedule, if the compliance schedule when submitted does not contain each of the elements it is required to contain, or if the person or Governmental entity fails to comply with such schedule."

No changes have been made to the proposal based on this comment.

50. **SUBJECT**: Enforceability (9 VAC 5-80-1100 I 4)

COMMENTER: Carol C. Wampler, Vice President/General Counsel, Virginia Manufacturers Association

TEXT: This is a new section not included in the original proposal. It is the first place where the issue of state and federal enforceability comes up in the reproposed regulations. During its deliberations, the Advisory Group decided that throughout the regulations the phrase "federally and state

enforceable" should be replaced with the term "federally or state enforceable." This change was incorporated into the Board's original proposal of revised regulations. Now, however, the reproposal reverts back to the use of the phrase "federally and state enforceable." We believe the relevant federal case law on this issue supports the Advisory Group's recommendation. *See* Chemical Manufacturers Ass'n v. EPA, 70 F.3d 637 (D.C. Cir. Sept. 15, 1995)(unpublished disposition). Therefore, we believe the phrase "federally or state enforceable" should be used throughout the revised regulations.

RESPONSE: The case in question did not address an issue which existed in Virginia regulations. The issue was whether permits issued by states which were not federally enforceable could be used to impose requirements recognized by EPA. Since Virginia has no permit program that is not recognized by EPA as being an administrative mechanism for issuing federally enforceable permits, the issue is not of concern. To make the changes requested by the commenter would introduce unnecessary confusion and complexity into the regulation that serves no useful purpose.

No changes have been made to the proposal based on this comment.

51. **SUBJECT**: Definitions: "Federally enforceable" (9 VAC 5-80-1110)

COMMENTER: Carol C. Wampler, Vice President/General Counsel, Virginia Manufacturers Association

TEXT: A definition of "federally enforceable" was added to the minor NSR regulations in the Board's original proposal. This definition has been changed from the original proposal. It now contains an enumeration of federally enforceable limitations and conditions. One particular source of concern is subsection 5 of the definition which defines as federally enforceable "[limitations and conditions that are part of ... any construction permit issued under regulations approved by EPA in accordance with 40 CFR Part 5 1." This would, of course, include permits issued under these very regulations after EPA approves them for inclusion into the Virginia state implementation plan ("SIP"). Does this mean that M and all conditions appearing in such permits are federally enforceable, even if the underlying applicable requirement is not itself federally enforceable? For example, if an operational condition based upon Virginia's odor regulations or an emissions limitation based upon Virginia's state air toxics regulations is included in a minor NSR permit issued under these regulations (after their approval by EPA), would such a condition or limitation be federally enforceable even though Virginia's odor and state air toxics regulations are not themselves part of the Virginia SIP and, therefore, not federally enforceable? If the answer is yes, the VMA strenuously objects to this back-door method of

creating federal enforceability that otherwise would not (and should not) exist. We fail to understand why a definition of federal enforceability is included in these regulations in the first place, but if it must be included, we urge the Department and the Board to return to the definition of "federally enforceable" in the original proposal.

RESPONSE: EPA has determined that all terms and conditions in most of our NSR permits intended to implement state-only programs are federally enforceable. The basis of their determination is the violation and enforcement provisions of 40 CFR 52.23 which provides:

"Failure to comply with any provisions of this part, or with any approved regulatory provision of a State implementation plan, or with any permit condition or permit denial issued pursuant to approved or promulgated regulations for the review of new or modified stationary or indirect sources, or with any permit limitation or condition contained within an operating permit issued under an EPA-approved program that is incorporated into the State implementation plan, shall render the person or governmental entity so failing to comply in violation of a requirement of an applicable implementation plan and subject to enforcement action under section 113 of the Clean Air Act. With regard to compliance schedules, a person or Governmental entity will be considered to have failed to comply with the requirements of this part if it fails to timely submit any required compliance schedule, if the compliance schedule when submitted does not contain each of the elements it is required to contain, or if the person or Governmental entity fails to comply with such schedule."

However, it is possible to structure the permit program in such a way that terms and conditions based on state-only programs are not federally enforceable. Provisions have been added to accomplish that in this regulation. See commnet #2.

No changes have been made to the proposal based on this comment.

52. **SUBJECT**: Definitions: "Major modification" (9 VAC 5-80-1110)

COMMENTER: Carol C. Wampler, Vice President/General Counsel, Virginia Manufacturers Association

TEXT: The VMA supports the rewording to the definition of "major modification" from the original proposal to include the phrase "in significant amounts." It is critical that this phrase be included in the definition.

RESPONSE: Support for the proposal is appreciated.

53. **SUBJECT**: Definitions: "Regulated air pollutant" and "Significant" (9 VAC 5-80-1110)

COMMENTER: Carol C. Wampler, Vice President/General Counsel, Virginia Manufacturers Association

TEXT: This definition has been changed to include any pollutant subject to a standard under Clean Air Act § 112 or 40 CFR Part 63 -- in other words, hazardous air pollutants ("HAPs"). As we will discuss in more detail later, we understand the Department wants to include in these minor NSR regulations provisions for the preconstruction approval of sources of HAPs. Apparently to do so, the Department wants to expand the definition of "regulated air pollutant" to encompass HAPs.

We have serious concerns with including HAPs as "regulated air pollutants" for minor NSR purposes. We note that the Clean Air Act and EPA's implementing regulations and guidance specifically exclude HAPs from among the regulated air pollutants under the federal **major NSR** regulations. The provisions in the reproposal including HAPs as regulated air pollutants, but not for purposes of the definition of "significant" (used in the phrase "significant net emissions increase"), are likely to create considerable confusion. For these and additional reasons we discuss later, the VMA believes HAPs should not be the subject of minor NSR review under these regulations. Therefore, we recommend references to HAPs, such as in the definition of "regulated air pollutant" be deleted from these regulations.

RESPONSE: See response to comment #48.

54. **SUBJECT**: Federal Hazardous Air Pollutant New Source Review Program, FHAPNSR (9 VAC 5-80-1120 H)

COMMENTER: Carol C. Wampler, Vice President/General Counsel, Virginia Manufacturers Association

TEXT: This new subsection, which did not appear on the original proposal, states:

"For sources subject to the federal hazardous air pollutant new source review program [FHAPNSR program], the provisions of the [FHAPNSR program] shall be implemented through this article ... only to the extent that the provisions of the [FHAPNSR program] are not being implemented by other new source review program regulations by the board."

"Federal hazardous air pollutant new source review program" is defined in 9 VAC 5-80-1110.C as one of three specified categories of programs "promulgated to implement the requirements of § 112 (relating to permits for hazardous air pollutants) of the federal Clean Air Act." The three program categories include (1) preconstruction approval required for sources subject to 40 CFR Part 61; (2) preconstruction approval for sources pursuant to 40 CFR § 63.5 for "a source subject to the provisions of 40 CFR Part 63, except for Subparts B, C, D, and E;" and (3) preconstruction approval pursuant to 40 CFR §§ 63.40 through 63.44.

We do not understand why the reproposal addresses any FHAPNSR program requirements in the second and third categories listed in the definition above. These requirements should be fully addressed by new HAP NSR regulations, 9 VAC 5, ch. 80, art, 7 ("Article 7"), recently proposed by the Board. 15 *Va. Reg.* 793-809 (Dec. 7, 1998). Article 7 would implement the preconstruction approval requirements of CAA § 112 and 40 CFR Part 63, Subpart A (§ 63.5) and Subpart B (§ 63.40 through 63.44). Thus, we fail to see why the reproposed minor NSR regulations attempt to implement any aspect of these preconstruction approval programs.

We understand the Department is concerned that there might be some minor sources of HAPs for which a preconstruction approval is necessary that would not fall under the jurisdiction of Article 7. We are not sure how such a situation would arise. By its own terms the CAA § 112 (i) preconstruction approval requirement applies to the construction of "any new major source" or the reconstruction of "any existing major source." Thus, 40 CFR § 63.5, which establishes the FHAPNSR program for such sources, applies to major sources. *See* 40 CFR § 63.5(b)(3). Proposed Article 7 fully covers any such preconstruction approval program and no such preapproval program is required under § 63.5 for the construction or reconstruction of minor HAP sources. Thus, this category of FHAPNSR program need not be addressed in these minor NSR regulations.

Likewise, the preconstruction approval for HAP sources subject to 40 CFR Part 63, Subpart B, is adequately addressed by proposed Article 7. By its terms, CAA § 112(g) applies to major sources. The preconstruction approval requirements in Subpart B apply to "any owner or operator who constructs or reconstructs a major source of [HAPs]... " 40 CFR § 63.40(b). Article 7 deals specifically with preconstruction approval of sources subject to Subpart B. Thus, this category of FHAPNSR program need not be addressed in these minor NSR regulations. Because the provisions addressing these two FHAPNSR programs are unnecessary and would only engender confusion, the VMA strongly urges the Board to eliminate them from the revised minor NSR regulations. (Virginia has historically relied upon its minor NSR regulations to issue preconstruction approvals pursuant to 40 CFR Part 61, Subpart A, for minor sources subject to National

Emission Standards for Hazardous Air Pollutants ("NESHAPs") promulgated under 40 CFR Part 61. The VMA believes this reliance is reasonable and should continue).

A much less acceptable alternative would be to reword any provisions dealing with FHAPNSR requirements to make it perfectly clear that these minor NSR regulations apply only in situations where federal requirements mandate preconstruction approval of the construction or reconstruction of minor HAP sources and Article 7 is inapplicable (although we cannot envision such a circumstance). This was apparently attempted in 9 VAC 5-80-1320.F, which states: "Any source subject to the [FHAPNSR] program shall be exempt from the provisions of this article if specifically exempted from that program by 40 CFR Part 61 or 63." However, this language is confusing. How can a source both be "subject to" the FHAPNSR program and "specifically exempted from" the FHAPNSR program? We recommend 9 VAC 5-80-1320.F be revised as follows: "Any source subject to the FHAPNSR program promulgated to implement the requirements of 40 CFR Part 63 shall be exempt from the provisions of this article."

Also, the first and last sentences of subsection 1120.H seem to conflict with one another and with Article 7. The first sentence says for sources subject to the FHAPNSR program, that program shall be implemented through these minor NSR regulations. This conflicts not only with the provisions of Article 7, which implements the FHAPNSR program mandated by 40 CFR Part 63, it also contradicts the last sentence in subsection 1120.H, which says this subsection applies only to the extent the FHAPNSR program is not being implemented by another NSR program, presumably meaning Article 7. This is very confusing. Why not simply say clearly that these minor NSR regulations do not apply to sources subject to the NSR requirements of Article 7. But again, if 40 CFR Part 63, Subparts A and B, only require preconstruction approval for major sources, and Article 7 implements those requirements, we don't see what is left (other than minor Part 61 sources) that would necessitate the inclusion of the new FHAPNSR provisions in these minor NSR regulations.

If the Department and Board do not agree with the solution we advocate, i.e., eliminate FHAPNSR provisions (except for Part 61 sources) from these minor NSR regulations, the VMA believes subsection 1120.H should be reworded as follows to clarify the intended applicability of the minor NSR regulations to the construction or reconstruction of HAP sources:

For sources subject to the federal hazardous air pollutant new source review program, and not subject to the requirements of Article 7 of this chapter, the preconstruction approval requirements of the federal hazardous air pollutant new source review program shall be implemented through this

article. Permits issued under this article, or Article 7 as appropriate, shall be the administrative mechanisms for issuing preconstruction approvals under the provisions of the federal hazardous air pollutant new source review program. In cases where there are differences between applicable provisions of this article and the provisions of the applicable federal hazardous air pollutant new source review program, the more restrictive provisions shall apply.

Note the deletion of the last sentence in reproposed subsection 1120.H. These changes in subsection 1120.H together with our suggested rewording of 9 VAC 5-80-1320.F should eliminate any confusion about the applicability of these minor NSR regulations vis a vis Article 7. (On February 5, 1999, the VMA submitted extensive comments on proposed Article 7 which highlighted many inconsistencies between the proposed provisions and the underlying federal requirements. We noted that without the changes we recommended to address these inconsistencies, we could not support the proposed Article 7 regulations. When we refer in these comments to Article 7 as a more appropriate mechanism to implement the preconstruction approval requirements of CAA § 112, we mean Article 7 revised as recommended in our comments on proposed Article 7. Should the Department decide not to exempt sources subject to Article 7 from the reproposed minor NSR requirements, many of the changes we recommended to proposed Article 7 become applicable to the corresponding provisions of these reproposed regulations as well.)

RESPONSE: See response to comment #48. The provisions in question have been amended to improve their clarity.

55. **SUBJECT**: Concurrent Construction (9 VAC 5-80-1130)

COMMENTER: Carol C. Wampler, Vice President/General Counsel, Virginia Manufacturers Association

TEXT: In prior comments, the VMA strongly advocated and supported the "concurrent construction" provisions that appeared in the Board's original proposal of the minor NSR regulations. In its reproposal, the Board altered the concurrent construction provisions, as we understand, in large part because of comments by Region III of the U.S. Environmental Protection Agency ("Region III"). We realize Region III's comments must be taken very seriously because the revised minor NSR regulations must ultimately meet with Region III's approval for inclusion in the Virginia SIP. Nevertheless, it is unfortunate that Region III cannot leave it to Virginia to fashion a minor NSR program for Virginia.

Apparently Region III objected to several aspects of the reproposed concurrent construction provisions, pressuring the Department and Board to

change them. The VMA believes the concurrent construction provisions, even as changed, still provide Virginia businesses with much needed flexibility to make facility changes in today's fast-paced marketplace. Therefore, while we are disappointed that the original concurrent construction provisions have been pared back in response to Region III's criticism, we, nevertheless, support the inclusion of the revised concurrent provisions in the minor NSR regulations.

RESPONSE: See response to comment #17.

56. **SUBJECT**: Public Participation (9 VAC 5-80-1170)

COMMENTER: Carol C. Wampler, Vice President/General Counsel, Virginia Manufacturers Association

TEXT: We also understand Region III commented adversely to the Department on the revised public participation provisions in the Board's original proposal. The VMA believes the public participation provisions in the reproposal strike the appropriate balance between the legitimate interests of the public in participating in the review of significant new or modified sources of air pollutants and the legitimate interests of Virginia's businesses that they not be subjected to unwarranted costs and delays for the review of construction or modification that involves relatively small *(de minimis)* emissions. Therefore, we support the public participation provisions in the reproposal. (Our support for these provisions is qualified by our continuing belief that, except for minor Part 61 NESHAP sources, the minor NSR regulations should leave HAPs source NSR to Article 7. If the Board took our favored approach, there would be no need for subsection D. 1 dealing with public participation for HAP sources subject to case-by-case MACT determinations.)

RESPONSE: Support for the proposal is appreciated.

57. **SUBJECT**: Plantwide Applicability Limit, PAL (9 VAC 5-80-1310)

COMMENTER: Carol C. Wampler, Vice President/General Counsel, Virginia Manufacturers Association

TEXT: The PAL provisions in the reproposal are vastly different from the Board's original proposal. We understand that once again the heavy hand of Region III forced the Department and Board to make these changes to the PAL provisions. We consider this unfortunate because the original PAL provisions were truly innovative and would have afforded Virginia businesses tremendous flexibility to respond to business demands while at the same time fully protecting Virginia's environment. Both business and the public would have benefitted -- business because under a PAL permit it

could rapidly make facility changes without minor NSR delays, and the public because facilities would voluntarily cap their emissions. For these reasons, the Advisory Group strongly endorsed the PAL concept.

It is also a little mystifying to us why Region III lodged such strong objections to the proposed PAL provisions when they were lifted in large part from EPA's "major NSR Reform proposals." The Advisory Group and Department were essentially trying to mimic in Virginia's minor NSR program the PAL concept EPA developed for its major (PSD) NSR program.

We do not believe the PAL provisions in the reproposal afford Virginia businesses meaningful opportunities to get operational flexibility in exchange for voluntary emissions caps. Chief among the objectionable changes Region III forced is a new provision that requires "advance approval" of any physical or operational changes to the facility in the PAL permit. *See* 9 VAC 5-80-1310.E.5. This limitation essentially guts the entire purpose of PAL permitting. The single most important principle behind PAL permitting is to let a facility owner make changes rapidly in response to new and different business demands. Subsection E.5 negates this by requiring a facility owner to divine far into the future what facility changes might be necessary to respond to new business demands, and if he cannot, the PAL permit will not allow unforeseen changes. Subsection E.5 also destroys the fundamental PAL *quid pro quo.* Why would a company voluntarily accept emissions caps without the flexibility to make necessary (albeit unforeseen) facility changes in the future?

Another crippling Region III alteration eliminates the intended utility of a PAL permit to avoid minor NSR. Under subsection F.1 in the reproposal, a PAL permit would allow a source owner only to avoid major NSR, not minor NSR as originally intended. This perverts the PAL concept as envisioned by the Advisory Group and Department and makes it essentially useless for its intended purpose - to give facility owners flexibility and relief from minor NSR in return for a cap on their emissions.

In short, the PAL provisions in the reproposal are probably worthless to Virginia businesses and it is unlikely they would ever be used. Nevertheless, the Board has nothing to lose by leaving the revised PAL provisions in the minor NSR regulations in the off chance someone, sometime might find them useful for their situation.

RESPONSE: See response to comment #33.

58. **SUBJECT**: Standard for Stationary Sources (9 VAC 5-50-260)

COMMENTER: Carol C. Wampler, Vice President/General Counsel, Virginia Manufacturers Association

TEXT: As part of the rulemaking to revise Virginia's minor NSR regulations, the Board proposed changes to the definition of "best available control technology" ("BACT") in 9 VAC 5-50-250 C. For the reasons enumerated in our comments on the original proposal, the VMA supports the new definition of BACT.

The Board also proposes to amend 9 VAC 5-50-260, "Standard for stationary sources." The VMA is concerned that it is not perfectly clear that the requirement in this section to apply BACT to a stationary source (subsection A) or to a modification (subsection B) is triggered by the issuance of an NSR permit for the construction of a new stationary source or for the reconstruction or modification of an existing stationary source. The requirement in 9 VAC 5-50-260 to apply BACT must never be construed to apply to an existing source or to changes at an existing source unless that source must get an NSR permit for a reconstruction or modification. We advocate rewording 9 VAC 5-50-260 to make this important point perfectly clear because several of our member companies have encountered confusion among Department staff who asserted the BACT requirement for facility changes exempt from minor NSR pursuant to 9 VAC 5-80-11 (proposed 9 VAC 5-80-1320).

RESPONSE: With regard to the definition of "best available control technology", support for the proposal is appreciated. With regard to 9 VAC 5-50-260, this comment is acceptable and appropriate changes reflecting the intent of the comment have been made to the proposal.

59. **SUBJECT:** Exemption for wood sawmills

COMMENTER: J. R. (Randy) Bush, CAE, President, Virginia Forest Products Association; Randy E. Toms, Director, Forest Resources, Mountain Forest Products

TEXT: The Virginia Forest Products Association represents approximately 350 companies with an interest in the Commonwealth's $9.8 billion lumber and forest products industry. The membership is divided into two general classifications: full members (those that produce forest products inn the Commonwealth) and associate members (those that provide goods and services to the industry). The members represent all regions of Virginia and include a diverse sampling of the entire spectrum of the primary forest products industry (i.e. sawmills, planning mills, timber harvesters, pallet plants, etc.) Although the industry has both large and small producers, the typical company can be characterized as small business, with the overwhelming majority being family owned and operated. Because of this small business characteristic, we are always concerned with the cost of compliance of applicable regulations versus the corresponding) benefit

realized by this cost as well as clarifying applicable regulations to insure a minimum of misunderstanding.

Regarding your proposed revision of 9 VAC 5 Chapter 80, dealing with Permits for New and Modified Stationary Sources, we would like to suggest clarifying the item relating to the exemption for "wood sawmills". This is located on page 67, your "new" item 23. Because of the varying nature of what is identified as "wood sawmills" we would suggest using language which would incorporate the SIC classification(s) which include sawmills and similar wood processing facilities.

As an example, the Standard Industrial Classification Code (SIC) used for "General Sawmills" is 2421. In this classification, establishments are delineated that produce as their primary product items associated with "wood sawmills". All of these establishments are similar in layout and process similar material and produce primary products from wood that are directly identified as products obtained from "sawmills".

For further clarification, please reference the following SIC information, taken directly from OSHA's Web Page as a description of establishments identified in SIC Industry Group 242 (Sawmills and Planing Mills), subclassification 2421- Sawmills and Planing Mills, General:

"Establishments primarily engaged in sawing rough lumber and timber from logs and bolts, or resawing conts and flitches into lumber, including box lumber and softwood cut stock: planing mills combined with sawmills: and separately operated planing mills which are engaged primarily in producing surfaced lumber and standard workings or patterns of lumber. This industry includes establishments primarily engaged in sawing lath and railroad ties and in producing tobacco hogshead stock, wood chips, and snow fence lath."

chipper mills; custom sawmills; dressed ceiling lumber; dressed lumber siding; flitches (veneer stock), made in sawmills; fuelwood from mill waste; independent planing mills, except millwork; kiln drying of lumber; lath, made in sawmills and lath mills; lumber stacking or sticking; resawed cants; resawing lumber into smaller dimensions; rough, sawed, or planed lumber; sawed railroad ties; sawed silo stock; sawdust and shavings; sawmills, except special product mills; snow fence lath; softwood cut stock; softwood (dressed lumber) flooring; softwood furniture dimension stock; stud mills; tobacco hogshead stock; and wood chips produced at mill.

As is evident from the above, this language would help clarify the intent of the exemption. However, in order to streamline the revised regulation, we would suggest referencing the applicable SIC code(s) rather than incorporating the extensive language written above.

In addition, again to clarify and streamline the proposed regulation, we would like to suggest that the following groups be identified within the exemption. As mentioned above, these operations are similar in nature as to layout, processes, and primary material and would be identified by most individuals as comparable In regards to the intent of the proposed regulation revisions.

Industry Group 242: Sawmills And Planing Mills
2421 Sawmills And Planing Mills, General
2426 Hardwood Dimension And Flooring Mills
2429 Special Product Sawmills, Not Elsewhere Classified

Industry Group 244: Wood Containers
2448 Wood Pallets And Skids
2449 Wood Containers, Not Elsewhere Classified

Industry Group 249: Miscellaneous Wood Products
2499 Wood Products, Not Elsewhere Classified

As a final comment, we are aware that in some instances, rule makers are beginning to incorporate the North American Industrial Classification System (NAICS) instead of the Standard Industrial Classification (SIC) codes. As we are more familiar with the SIC codes, these have been referenced. If you would like us to provide the appropriate listings for the NAICS, please advise and we will be happy to do so.

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

60. **SUBJECT**: General (9 VAC 5-80-1120 H)

COMMENTER: Glen Besa, Director, Sierra Club

TEXT: Several provisions of this rule, and specifically 9 VAC 5-80-1120.H, indicate that this rule will implement the federal HAPs new source review program. We are, therefore, confused about the relationship of this rule and 9 VAC 3-80-1400 et seq. (Article 7, Permits for New and Reconstructed Major Sources of Hazardous Air Pollutants). What distinguishes the sources subject to the two rules? Further, if this implements the federal new source review program, what role is played by the state exemption levels in 9 VAC 5-80-1320.E? This rule should more clearly distinguish the HAPs sources subject to this rule from those subject to other HAPs permit rules.

RESPONSE: See response to comment #48.

61. **SUBJECT**: Public participation (9 VAC 5-80-1170)

COMMENTER: Glen Besa, Director, Sierra Club

TEXT: This rule gives new privileges to sources of criteria pollutants: plantwide applicability limits (PALs), general permits, concurrent construction, and "administrative" and "minor" permit amendment procedures. In each case, public notice and opportunity for public comment is reduced. In some cases, even state review is reduced. Since the rule governs significant new sources of pollution, we oppose reducing the public's role in issuing or changing these permits, whether the changes are administrative, minor or significant.

With the exception of PALs, the new privileges mentioned in the paragraph above are also extended to sources of toxic pollution, general permits, construction prior to getting the preconstruction permit, and removal of the public from permit amendment procedures are NOT appropriate for construction of significant sources of hazardous air pollutants.

RESPONSE: It is both impractical and unnecessarily burdensome to impose public participation requirements upon all permit applications. The public participation requirements in the regulation are designed to strike a balance between the needs of the public and that of the regulated community.

No changes have been made to the proposal based on this comment.

62. **SUBJECT**: Public Participation (9 VAC 5-80-1170.B.2)

COMMENTER: Glen Besa, Director, Sierra Club

TEXT: Language should be added that requires informing the public of the possible human health effects in the case of HAPs since these are health defined pollutants.

RESPONSE: Regulation of HAPs is a federal program which we implement under delegation of authority. The federal program for informing the public of associated health hazards appears to be adequate.

No changes have been made to the proposal based on this comment.

63. **SUBJECT**: Public Participation (9 VAC 5-80-1170 E)

COMMENTER: Glen Besa, Director, Sierra Club

TEXT: Applications for sources of HAPs should be added as a third type of application requiring a public hearing.

RESPONSE: In cases where the permit requires compliance with an EPA promulgated MACT standard, the public hearing is unnecessary since the state cannot change the standard. In cases where the state makes a case-by-case MACT determination, a hearing is required.

No changes have been made to the proposal based on this comment.

64. **SUBJECT**: Federal Hazardous Air Pollutant New Source Review Program, FHAPNSR (9 VAC 5-80-1110)

COMMENTER: Tedd H. Jett, P.E., Manager Environmental Engineering, Merck & Co., Inc.

TEXT: A new term, which did not appear in the original proposal, is introduced in this reproposal. "Federal hazardous air pollutant new source review (FHAPNSR) program" is defined in 9 VAC 5-80-1110.C as one of three specified categories of programs "promulgated to implement the requirements of § 112 (relating to permits for HAPs) of the federal Clean Air Act." The three program categories include (1) preconstruction approval required for sources subject to 40 CFR Part 61; (2) preconstruction approval for sources pursuant to 40 CFR § 63.5 for "a source subject to the provisions of 40 CFR Part 63, except for subparts B, C, D, and E"; and (3) preconstruction approval pursuant to 40 CFR §§ 63.40 through 63.44.

The inclusion of the FHAPNSR program requirements in the second and third categories listed in the definition above is puzzling. First, these federal requirements should be fully addressed by new HAP NSR regulations, 9 VAC 5, ch. 80, art. 7 ("Article 7"), recently proposed by the Board. 15 Va. *Reg.* 793 -809 (Dec. 7, 1998). Article 7 would implement the preconstruction approval requirements of CAA § 112 and 40 CFR part 63, subpart A (§ 63.5) and subpart B (§§ 63.40 through 63.44). Thus, we find the inclusion of these preconstruction approval requirements in the reproposed minor NSR regulations redundant.

Second, the preconstruction approval requirements specified in the second and third categories of the new definition apply only to major sources, and therefore, have no place in the minor NSR regulations. By its own terms the CAA § 112 (i) preconstruction approval requirement applies to the construction of "any new major source" or the reconstruction of "any existing major source." Thus, 40 CFR § 63.5, which establishes the

FHAPNSR program for such sources, applies to major sources. *See* 40 CFR § 63.5(b)(3). Proposed Article 7 fully covers any such preconstruction approval program and no such preapproval program is required under § 63.5 for the construction or reconstruction of minor HAP sources. Thus, this category of FHAPNSR program need not be addressed in these minor NSR regulations.

Similarly, the preconstruction approval for HAP sources subject to 40 CFR Part 63, subpart B, is adequately addressed by proposed Article 7. By its terms, CAA § 112(g) applies to major sources. The preconstruction approval requirements in subpart B apply to "any owner or operator who constructs or reconstructs a major source of [HAPs] 40 CFR § 63.40(b). Article 7 deals specifically with preconstruction approval of sources subject to subpart B. Thus, this category of FHAPNSR program need not be addressed in these minor NSR regulations. Because the proposed provisions addressing these two FHAPNSR programs for major sources are unnecessary and would only confuse the regulated community, Merck strongly urges the Board to eliminate them from the revised minor NSR regulations. (Virginia has historically relied upon its minor NSR regulations to issue preconstruction approvals pursuant to 40 CFR part 61, subpart A, for minor sources subject to National Emission Standards for Hazardous Air Pollutants ("NESHAPs") promulgated under 40 CFR Part 61. Merck believes this reliance is reasonable and should continue.)

A much less acceptable alternative would be to reword all provisions dealing with FHAPNSR requirements to make it perfectly clear that these minor NSR regulations apply only in situations where federal requirements mandate preconstruction approval of the construction or reconstruction of minor HAP sources and Article 7 is inapplicable (although we cannot envision such a circumstance). The DEQ apparently attempted to establish an exemption from minor NSR for Article 7 sources in 9 VAC 5-80-1320.F, which states:

"Any source subject to the [FHAPNSR] program shall be exempt from the provisions of this article if specifically exempted from that program by 40 CFR Part 61 or 63." However, this language is confusing. How can a source both be "subject to" and "specifically exempted from" the FHAPNSR program? A better approach would be to state clearly that these minor NSR regulations do not apply to sources subject to the NSR requirements of Article 7. But again, if 40 CFR Part 63, subparts A and B, only require preconstruction approval for major sources, and Article 7 implements those requirements, we don't see what is left (other than minor Part 61 sources) that would necessitate the inclusion of the new FHAPNSR provisions in these minor NSR regulations. Nevertheless, for clarity we suggest 9 VAC 5-80-13201 be revised as follows: "Any source subject to the FHAPNSR

program promulgated to implement the requirements of 40 CFR Part 63 shall be exempt from the provisions of this article."

Also, the first and last sentences of 9 VAC 5-80-1120.1-1 are in conflict with each other and with Article 7. The first sentence says for sources subject to the FHAPNSR program, that program shall be implemented through these minor NSR regulations. This conflicts not only with the provisions of Article 7, which implements the FHAPNSR program mandated by 40 CFR Part 63, it also contradicts the last sentence in the subsection, which says that it applies only to the extent the FHAPNSR program is not being implemented by another NSR program, presumably meaning Article 7. This is very confusing. Why not simply say clearly that these minor NSR regulations do not apply to sources subject to the NSR requirements of Article 7? For purposes of clarification, we suggest that 9 VAC 5-80-1120.H be revised to read as follows:

"For sources subject to the federal hazardous air pollutant new source review program, and not subject to the requirements of article 7 of this chapter, the preconstruction approval requirements of the federal hazardous air pollutant new source review program shall be implemented through this article. Permits issued under this article, or article 7 as appropriate, shall be the administrative mechanisms for issuing preconstruction approvals under the provisions of the federal hazardous air pollutant new source review program. In cases where there are differences between applicable provisions of this article and the provisions of the applicable federal hazardous air pollutant new source review program, the more restrictive provisions shall apply."

(On February 3, 1999, Merck submitted extensive comments on proposed Article 7 which highlighted many inconsistencies between the proposed provisions and the underlying federal requirements. We note that without the changes we recommended to address these inconsistencies, we cannot support the proposed Article 7 regulations. When we refer in these comments to Article 7 as a more appropriate mechanism to implement the preconstruction approval requirements of CAA § 112, we mean Article 7 revised as recommended in our comments on that proposed Article 7. Should the Department decide not to exempt sources subject to Article 7 from the reproposed minor NSR requirements, many of the changes we recommended to proposed Article 7 become applicable to the corresponding provisions of these reproposed regulations as well.)

Other provisions may require similar rewording.

A particular concern for Merck is assuring that an approval mechanism exists which enables a pharmaceutical manufacturing facility to maximize its operating flexibility by employing the optimum selection of

compliance options available to it in the Pharmaceutical MACT. Among these options is the case where a major new pharmaceutical manufacturing process unit (PMPU) at an existing major source seeks to control its HAP emissions more than otherwise required by the existing source MACT standards, in lieu of being subject to the more stringent new source MACT standards. In such a case, the source would need a federally enforceable limit on the potential to emit (PTE) of the new PMPU to assure that it is below the major source thresholds of 10 TPY for any individual HAP and 25 TPY for all HAPs in combination. We suggest that a state or Title V operating permit condition(s) be used to provide the mechanism to establish the federally enforceable limit on PTE and that the condition(s) be in effect prior to operation of the newly constructed source. Such an approach would be fully consistent with the FHAPNSR program for construction or reconstruction of sources (excluding those subject to 40 CFR Part 61) which requires no preconstruction approval if HAP emissions are below the major source thresholds.

RESPONSE: See response to comment #48.