**Form: TH- 03**

# *Virginia Regulatory Town Hall*

## Final Regulation
## Agency Background Document

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| **Agency Name:** | State Air Pollution Control Board |
| **Regulation Title:** | Regulations for the Control and Abatement of Air Pollution |
| **Primary Action:** | Article 9 (9 VAC 5-80-2000 et seq.) of 9 VAC 5 Chapter 80 |
| **Secondary Action(s):** | None. |
| **Action Title:** | Permits for Major Stationary Sources and Major Modifications Locating in Nonattainment Areas (Rev. D00) |
| **Date:** | March 1, 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*Please provide a brief summary of the new regulation, amendments to an existing regulation, or the regulation being repealed.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 major stationary sources or major modifications to existing ones. The owner must obtain a permit from the board prior to the construction or modification of the source. The owner of the proposed new or modified source must provide information as may be needed to enable the board 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 board's final action (approval or disapproval) on the permit depending on the results of the preconstruction review. One of the program requirements requires a facility owner to obtain emission reductions from existing sources. The emission reductions must offset the increases from the proposed facility.

The proposed amendments (i) revise the emission reduction offset ratio; (ii) provide for state-only permit terms and conditions; (iii) clarify the regulation's applicability; and (iv) make the regulation consistent with the other new source review regulations.

## 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. The definition of "fugitive emissions" has been amended to remove language that would leave the impression that a functionally equivalent opening must already exist. [9 VAC 5-80-2010 C]

2. Provisions that would allow the designation of state-only conditions have been amended to limit the designated conditions to those relating to state toxics or odor control programs. [9 VAC 5-80-2020 E 1 (ii) and E 2]

## 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 February 27, 2002, the State Air Pollution Control Board adopted final amendments to regulations entitled "Regulations for the Control and Abatement of Air Pollution", specifically, Permits for Major Stationary Sources and Major Modifications Locating in Nonattainment Areas (9 VAC Chapter 80, Article 9). The regulation amendments are to be effective on May 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 require the owner of the proposed new or expanded facility to provide such information as may be 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 in order to protect public health and welfare. 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 proposed amendments are being made to bring the regulation into compliance with federal regulations and policies with regard to designation of nonattainment areas for the 8-hour ozone air quality standard.

## 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 regulation has been revised to include a new offset ratio in response to imposition of the new 8-hour ozone standard. One of the requirements of the new source review program for nonattainment areas is that a facility owner obtain emission reductions from existing sources. The emission reductions must offset the increases from the proposed facility by the ratio specified in the Clean Air Act for that particular nonattainment classification. The current offset ratio specifications are 1.1 to 1 for areas classified as marginal, 1.15 to 1 for moderate areas, 1.2 to 1 for serious areas, and 1.3 to 1 for severe areas. For the new 8-hour ozone standard, the existing offset ratios based on the above classification system are likely to be retained, and possibly an offset ratio of 1 to 1 will be added. The 1-to-1 ratio will also apply to areas designated nonattainment for pollutants other than ozone (such as $PM_{2.5}$) for which there is no classification system.

2. The regulation has been revised to remove federal enforceability of certain provisions that should be enforceable only by the state. This will prevent terms and conditions that are state-only enforceable from being designated as federally enforceable in the permit, thus preventing them from being enforced by EPA or citizens through the federal Clean Air Act.

3. The regulation has been revised to clarify that the regulation applies to the construction or reconstruction of a new major stationary source or a major modification to a major stationary source, if the source or modification would be major for the pollutant for which the area is designated as nonattainment. In order to achieve this distinction, all references to hazardous air pollutants--which are regulated elsewhere--have been eliminated.

4. The regulation has been revised to add or modify definitions for "applicable federal requirement," "complete application," "emissions cap," "enforceable as a practical matter," "federally enforceable," "fugitive emissions," "major new source review," "minor

new source review," "new source review program" "public comment period," "state enforceable," "state operating permit program," and "synthetic minor" in order to be consistent with other new source review regulations.

5. The regulation has been revised in order to make the following provisions consistent with other new source review regulations: general, applications, application information required, and standards and conditions for granting permits.

6. The regulation has been revised to delete the following provisions in order to be consistent with other new source review regulations: circumvention, and reactivation and permanent shutdown.

7. The regulation has been revised to add the following sections in order to be consistent with other new source review regulations: changes to permits, administrative permit amendments, minor permit amendments, significant amendment procedures, and reopening for cause.

8. The regulation has been revised to make minor administrative revisions and corrections elsewhere in the regulation as necessary.

## 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: There are no disadvantages to the public associated with the proposed action. Advantages to the public include a clearer understanding of what is required of a permit applicant, and thereby more efficient issuance of more accurate permits. It will also reduce the possibility of implementation of unnecessarily restrictive requirements.

2. Department: There are no disadvantages to the Department associated with the proposed action. Advantages to the Department include a clearer understanding of what is required of a permit applicant, and thereby more efficient issuance of more accurate permits.

## 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.*

The changes made to the proposed regulation are strictly editorial.

## 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 D00 CONCERNING

## PERMITS FOR MAJOR STATIONARY SOURCES AND MAJOR MODIFICATIONS LOCATING IN NONATTAINMENT AREAS (9 VAC 5 CHAPTER 80)

## INTRODUCTION

At the May 2001 meeting, the Board authorized the Department to promulgate for public comment a proposed regulation revision concerning Permits for Major Stationary Sources and Major Modifications Locating in Nonattainment Areas.

A public hearing was advertised accordingly and held in Richmond on November 27, 2001 and the public comment period closed on December 21, 2001. The proposed regulation amendments subject to the hearing are summarized below followed by a summary of the public participation process and an analysis of the public testimony, along with the basis for the decision of the Board.

## SUMMARY OF PROPOSED AMENDMENTS

The proposed regulation amendments concerned provisions covering permits for major stationary sources and major modifications locating in nonattainment areas. A summary of the amendments follows:

1. Provisions concerning applicability have been revised in order to clarify which new source review activities are covered by this article. [9 VAC 5-80-2000 A]

2. Provisions relating to new source review of hazardous air pollutants have been deleted. [throughout]

3. The applicability of the regulation has been revised to provide that any pollutants not subject to this article may be subject to other provisions of the new source review program, and to update the reference to other potentially applicable regulations. [9 VAC 5-80-2000 E 2]

4. Provisions have been added to allow permit terms and conditions that are state-only enforceable to be designated as such in the permit, thus preventing their ability to be enforced by EPA or citizens through the federal Clean Air Act. [9 VAC 5-80-2000 E 3 and 9 VAC 5-80-2020 E]

5. The provision regarding relocation of emissions units has been revised to clarify that no relocation of an emissions unit from one stationary source to another is allowed without a permit. [9 VAC 5-80-2020 B]

6. A provision enabling the board to incorporate the terms and conditions of a state operating permit into a permit issued by this article has been added. This permit may supercede the state operating permit if the public participation provisions of the state operating permit program are followed. [9 VAC 5-2020 D]

7. A provision has been added to allow for permits to be granted for programs of construction or modification in planned incremental phases. [9 VAC 5-80-2020 F]

8. The provisions regarding applications have been revised to specify that a separate application is required for each stationary source. [9 VAC-5-80-2030]

9. Provisions have been added to clearly identify the information needed in the application in order for the board to determine impact on air quality and compliance with emission standards. [9 VAC 5-80-2040]

10. Provisions have been revised in order to require that a permit may not be granted unless it is shown that the source will comply with certain specified standards. Provisions have been added to allow for permits to 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 5-80-2050 and 9 VAC 5-80-2010 C, definition of “enforceable as a practical matter”]

11. The processing time for a complete application has been extended from 90 to 180 days. The time may be extended if additional information is required. [9 VAC 5-80-2060 B]

12. A provision has been added to enable the permit applications to be processed, upon request of the applicant, using the public participation procedures of the federal operating permit program. [9 VAC 5-80-2070 G]

13. A provision has been added to clarify that granting of a waiver from testing requirements does not shield the source from the enforcement of other applicable requirements. [9 VAC 5-80-2080 E]

14. A provision has been added to indicate that the ratio of total emissions reductions of the nonattainment pollutant to total increased emissions of the nonattainment pollutant

in nonattainment areas (other than ozone nonattainment areas) is at least 1 to one. [9 VAC 5-80-2120 B]

15. A provision clarifying that noncompliance of any provision of the permit is grounds for enforcement action or revocation has been added. [9 VAC 5-80-2180]

16. Provisions have been added to allow permit changes in a manner similar to that under the Title V permit program. These procedures allow a permittee to 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 5-80-2200]

17. Provisions governing administrative permit amendments have been added. These procedures 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 5-80-2210]

18. Provisions governing minor permit amendment procedures have been added. These 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 the owner seeks to modify, but if the owner fails to comply with the proposed

permit terms and conditions during this time, the existing permit terms and conditions the owner seeks to modify may be enforced against the owner. [9 VAC 5-80-2220]

19. Provisions governing significant amendment procedures have been added. These 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 5-80-2230]

20. A provision has been added to allow for a permit to 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 5-80-2240]

## SUMMARY OF PUBLIC PARTICIPATION PROCESS

A public hearing was held in Richmond, Virginia on November 27, 2001. Three persons attended the hearing, none of whom offered testimony; and five 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 October 22, 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.

1. **SUBJECT:** Definition of fugitive emissions.

   **COMMENTER:** U.S. Environmental Protection Agency

   **TEXT:** Under 9 VAC 5-80-2010 C, in the definition of "fugitive emissions," delete the following language: "designed for eliminating emissions from the structure." This language is not contained in any other Virginia permitting program regulations and may leave open the interpretation the issue that a stack, chimney, vent, etc., must already exist.

   **RESPONSE:** This comment is acceptable, and the regulation has been revised accordingly.

2. **SUBJECT:** Definition of public comment period.

   **COMMENTER:** U.S. Environmental Protection Agency

   **TEXT:** Under 9 VAC 5-80-2010 C, a definition of “public comment period” was added. It defines the public comment period as a time during which the public shall have the opportunity to comment on the new or modified source permit application information (exclusive of confidential information). In order for EPA and the public to be able to adequately review and evaluate this new definition, Virginia would need to be very clear on the criteria that would have to be met for information to be considered confidential.

   **RESPONSE:** 9 VAC 5-170-20 of the Regulation for General Administration (9 VAC 5-170-10 et seq.) defines confidential information in considerable detail; 9 VAC 5-170-60 also provides detailed information on what constitutes confidential information and how it is to be handled. We believe these provisions are suitably specific.

   No change has been made to the proposal as a result of this comment.

3. **SUBJECT:** State-only enforceable provisions.

   **COMMENTER:** U.S. Environmental Protection Agency

**TEXT:** Under 9 VAC 5-80-2020 E 1 (ii), delete the following: ". . . 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 5-80-2070." Also, under E 2, delete the word "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 in 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 the regulation has been revised accordingly.

4. **SUBJECT:** Offsets and reasonable further progress.

**COMMENTER:** National Park Service

**TEXT:** Considering § 173 of the Clean Air Act and the emission offset interpretive ruling in appendix S to 40 CFR part 51, a state may be able to allow an even offset of new emissions but only if certain conditions are met by the state and the applicant. Among these conditions are requirements that emission reductions from existing sources in the area of the proposed source result in reasonable progress toward attainment of the applicable standard and that the emission offsets will provide a positive net air quality benefit in the area. DEQ needs to ensure that these and all other conditions applicable to its proposed nonattainment permitting program are clearly stated, implemented, and provide for federal enforceability.

**RESPONSE**: We agree with the commenter that § 173 of the Clean Air Act as well as the requirements of Subpart S must be met, and we believe that the state regulation is consistent with these requirements. 9 VAC 5-80-2050 A 3 states, “By the time the source is to commence operation, sufficient offsetting emissions reductions shall have been obtained in accordance with 9 VAC 5-80-2120 such that total allowable emissions of qualifying nonattainment pollutants from existing sources in the region, from new or modified sources which are not major emitting facilities, and from the proposed source will be sufficiently less than total emissions from existing sources, as determined in accordance with the requirements of this article, prior to the application for such permit to construct or modify **so as to represent (when considered together with any applicable control measures in the Implementation Plan) reasonable further progress** . . .” (Emphasis added.)

Note that the current version of Article 9 has been approved by EPA as part of the SIP, and that the revisions being made to the regulation are made to ensure that the regulation is flexible enough to meet new federal

requirements; we anticipate that EPA will also approve this revised regulation as a SIP revision.

Section 173 of the Clean Air Act describes how state permitting programs must address new sources locating in nonattainment areas. First, § 173(a) generally describes the overall requirements new source permitting, including the general requirement that emissions from major new sources and major modifications will be less than the total emissions from existing sources. Section 173(c) goes on to generally establish that individual sources must offset increased emissions by obtaining equal or greater emission reductions ("offsets"). The "equal to" provision equates to 1 to 1. Section 182 goes into more specific detail as to what offsets are required in ozone nonattainment areas based on area classification.

At this time, EPA's implementation approach for the 8-hour ozone standard has not been finalized. The regulation is being revised in order to provide the flexibility needed to meet whatever implementation plan EPA issues. The Clean Air Act only allows for 1 to 1 offsets or the offsets tied to area classifications. If EPA proceeds with its original plan and imposes a standard 1 to 1 offset for new ozone nonattainment areas without further classifying the areas, then the addition of the 1 to 1 ratio in 9 VAC 5-80-2120 B 5 will meet this requirement. If EPA changes its approach and imposes a classification system on the new nonattainment areas, then the existing ratios in 9 VAC 5-80-2120 B 1 through 4 will meet this requirement.

"Reasonable further progress" is but a single component of an overall plan for nonattainment areas. Section 172 of the Clean Air Act sets out provisions for nonattainment plans in general; § 172(c) lists specific nonattainment plan provisions, including a demonstration of reasonable further progress. Reasonable further progress is the result of implementing many measures, including permitting regulations, and is not the product of an individual regulation (such as Article 9). When EPA issues its implementation plans for the new ozone nonattainment areas (including classifications, if any) then the state will prepare and submit nonattainment plans for these areas. These plans will include a demonstration of reasonable further progress, as well as all other Clean Air Act requirements for nonattainment plans.

No change has been made to the proposal as a result of this comment.

5. **SUBJECT:** Public participation.

**COMMENTER:** National Park Service

**TEXT:** We wish to ensure that the process for public participation in this permitting program is open and provide timely notification to potentially affected parties and opportunities for involvement.

**RESPONSE:** Virginia's permitting program is open and provides timely notification to potentially affected parties and opportunities for involvement. 9 VAC 5-80-2070 requires public notice and participation, including an informational briefing and hearing. Most of the regulatory language has already been approved by EPA as part of the SIP. The proposed revisions to this section are to clarify extant state legal requirements.

No change has been made to the proposal as a result of this comment.

6. **SUBJECT:** Visibility impact review.

**COMMENTER:** National Park Service

**TEXT:** It would be useful if all requirements applicable to major sources or major modifications in nonattainment areas were detailed in the rule or cross-referenced. For example, there is no mention of the visibility impact review requirement that applies to both the state and the applicant for new major stationery sources or major modifications that may affect the visibility in any federal Class I area.

The omission of specific provisions or references to provisions that may be contained elsewhere in the existing regulations could inadvertently lead to delays in the permitting process or needlessly provide the basis for possible permit suspension or reopening the permit for cause. We note in particular that the public participation procedures in 9 VAC 5-80-2070 are deficient with respect to Federal Land Manager (FLM) notification and involvement in the new source review process for sources that would affect visibility in a Class I area.

An applicant's sole reliance on the procedures contained within the proposed rule will not meet the federally required process for FLM involvement in permit review programs for affected sources locating in nonattainment areas. Provisions found in 40 CFR 51.307 require, in part, direct written notification of all affected FLMs on a schedule that is not entirely consistent with those in 9 VAC 5-80-2070. Opportunity for early involvement by affected FLMs is also required and the standard notification must include a copy of all information relevant to the permit application within 30 days of receipt of and at least 60 days prior to public hearing by the state on the application for permit to construct. An analysis of the anticipated impacts on visibility in any federal Class I area must be included.

There are many sections of 9 VAC 5-80-2070 that are inconsistent with 40 CFR 51.307 with regard to visibility impact analysis and FLM notification. We suggest inclusion of a separate provision that either directs affected applicants to the appropriate state regulations that specify the required FLM involvement process or, in the absence of such regulations, detail these requirements within the proposed rule. It may also be important to note that these FLM notification procedures apply to any federal Class I area, not just mandatory Class I areas or those Class I areas within the state.

**RESPONSE**: The regulation already cross-references other new source review regulations: 9 VAC 5-80-2000 E 2 states, "Any emissions units or pollutants not subject to the provisions of this article may be subject to the provisions of Article 6 (9 VAC 5-80-1100 et seq.), Article 7 (9 VAC 5-80-1400 et seq.), or Article 8 (9 VAC 5-80-1700 et seq.) of this part." Article 8 of Part II of 9 VAC 5 Chapter 80 (9 VAC 5-80-1700 et seq.), Permits for Major Stationary Sources and Modifications Locating in Prevention of Significant Deterioration Areas, fully addresses sources with impacts on Class I areas regardless of where they locate. EPA has approved this PSD regulation as part of Virginia's SIP, and has authorized the state's implementation of the PSD program. The Clean Air Act and EPA's regulations explicitly distinguish permitting requirements between attainment and nonattainment areas. PSD issues relevant to sources locating in a nonattainment area that have an effect on Class I areas are covered in both federal and state PSD regulations. Virginia's PSD regulation comprehensively addresses all of the subjects of concern to the commenter, including visibility impact review requirements and FLM notification.

No change has been made to the proposal as a result of this comment.

7. **SUBJECT:** Application review and analysis.

**COMMENTER:** National Park Service

**TEXT:** The air quality analysis required of applicants under 9 VAC 5-80-2090 2 appears to limit any air quality analysis to only those conditions of the "qualifying nonattainment pollutant." Reliance on this provision alone would be inconsistent with procedures required of permit applicants to analyze potential impacts on visibility in any federal Class I area. An analysis of the anticipated impacts on visibility must include all relevant emissions from the source or modification that may have an effect on visibility. We suggest that clarifying language be added to the proposal to make it consistent with federal requirements for an approvable state implementation plan.

**RESPONSE**: As discussed in the response to comment 6, visibility impacts on Class I areas are covered in the state PSD regulation. The specific purpose of Article 9 is to control pollutants contributing to nonattainment in a nonattainment area. We do not see how this can be construed to be inconsistent with federal requirements for nonattainment areas.

No change has been made to the proposal as a result of this comment.

8. **SUBJECT:** Offsets.

**COMMENTER:** National Park Service

**TEXT:** In 9 VAC 5-80-2120 J, the reference to appendix S of 40 CFR part 51 may be sufficient to assure that EPA's Emission Offset Interpretive Ruling applies in cases where the proposed rule is inconsistent with federal rules or policy. However, we suggest the addition of language to this provision so that it reads, "where this article **or actions of the Board** do not adequately address a particular issue, the provisions of appendix S to 40 CFR Part 51 shall be followed to the extent that they do not conflict with this article." The inclusion of "or actions of the Board" will help ensure the least delay in the permitting process should any problems of the nature addressed by this provision be encountered.

**RESPONSE**: The purpose of 9 VAC 5-80-2120 J is to allow use of Appendix S to address any issue not otherwise covered by this article that may emerge; it is not intended to use Appendix S to govern actions relevant to this article in general. Permits issued under this regulation are done so under the board's auspices, and are thus actions of the board; no additional language to this effect is necessary.

No change has been made to the proposal as a result of this comment.

9. **SUBJECT:** Clarification.

**COMMENTER:** National Park Service

**TEXT:** Although related to existing language, we do not understand the meaning of 9 VAC 5-80-2120 E 1 and 2 and would appreciate a clarification.

**RESPONSE**: The purpose of this section is to specify how sources are to determine credit for emissions reduction. The **baseline for determining the emissions reduction credit** (where you start to figure out how much you've reduced) is the emissions limit under the SIP in the effect at the time you file an application to construct. This effectively sets a base

from which to work from. The **offset baseline** is the actual emissions of the source from which you obtain the offset credit—that is, you need to determine what the actual emissions are from the source from which you are getting an offset. Normally, the baseline is the emission limit. However, if one of the two scenarios in subdivisions 1 and 2 exist, then the offset baseline is used. We agree that this section is complex, but it is based on federal requirements, and has been previously approved by EPA.

10. **SUBJECT:** Administrative, minor, and significant permit amendments.

**COMMENTER:** National Park Service

**TEXT:** The process proposed with respect to making changes to permits previously issued would allow affected sources and modifications to immediately operate according to the applicant's requested amendments before any action by the board in certain cases (i.e., administrative and minor permit amendments). Actions by the applicants and the board would also occur without any public participation process, including the absence of any public notification that such activities are taking place. While the types of changes contemplated under administrative and minor amendments may not justify a rigorous public participation process, there is a potential for willful abuse or innocent misinterpretation of the amendment process that might be minimized by a requirement to at least provide notice to the affected public that such amendments are being requested. To further ensure implementation of this provision, the state should also consider adding an enforcement provision imposing penalties on applicants who knowingly misuse the process for economic gain.

**RESPONSE**: It is unclear how additional public notice of administrative or minor permit amendments would forestall any willful legal violation. §10.1-1316 (enforcement and civil penalties) of the Code of Virginia imposes stringent penalties against anyone "violating or failing, neglecting or refusing to obey any provision of this chapter, ***any* Board regulation** or order, or ***any* permit condition**." (Emphasis added.)

No change has been made to the proposal as a result of this comment.

11. **SUBJECT:** Visibility impact analysis.

**COMMENTER:** National Park Service

**TEXT:** To the extent that any permit amendments would result in increases in emissions that may affect the visibility of any federal Class I area, there should be a process that requires a re-analysis of these impacts and involvement of the affected FLMs.

**RESPONSE**: Emissions and impacts on the visibility of any federal Class I area are addressed the state PSD regulation (Article 8). However, Article 9 does not allow increases in emissions (hence the requirement for offsets).

No change has been made to the proposal as a result of this comment.

12. **SUBJECT:** General support for the proposal.

**COMMENTER:** Dominion Virginia Power

**TEXT:** In general, we support these proposed revisions because they provide needed clarification and consistency with other portions of the Virginia regulations and EPA requirements.

**RESPONSE**: Support for the proposal is appreciated.

13. **SUBJECT:** Ambient impact analysis.

**COMMENTER:** Dominion Virginia Power

**TEXT:** The proposed text of the second paragraph of 9 VAC 5-80-2090 states that "[a]pplications shall be subject to an air quality analysis to determine the impact of qualifying nonattainment pollutant emissions." We believe that this requirement is unnecessary. First, there is no such requirement in the federal regulations governing implementation plan approvals that would require an air quality analysis for nonattainment pollutant emissions from sources affected by this rule. We believe that this was an intentional omission on the part of EPA when these requirements were originally promulgated. We believe that EPA's reasoning was that new sources and major modifications would have to apply LAER and obtain offsets for the new emissions. Therefore, air quality in the nonattainment area would not degrade as a direct result of the new facility. In most cases, when a greater than 1 to 1 offset ratio is required, overall air quality would improve, rendering an air quality analysis of the source in question not useful. Furthermore, there is no discussion of an ambient impact analysis for nonattainment areas in EPA's 1990 draft New Source Review Workshop Manual, which is used as guidance nationwide as the basis for applying for and writing major new source review permits. For these reasons, 9 VAC 5-80-2090 2 should be deleted.

**RESPONSE:** EPA's regulations governing new source review for nonattainment areas are contained in 40 CFR 51.160, 51.161, 51.162, 51.163, and 51.165. 40 CFR 51.160 (a) and (b) state:

(a) Each plan must set forth legally enforceable procedures that enable the State or local agency to determine whether the construction or modification of a facility, building, structure or installation, or combination of these will result in -- (1) A violation of applicable portions of the control strategy; or (2) Interference with attainment or maintenance of a national standard in the State in which the proposed source (or modification) is located or in a neighboring State. (b) **Such procedures must include means by which the State or local agency responsible for final decisionmaking on an application for approval to construct or modify will prevent such construction or modification if -- (1) It will result in a violation of applicable portions of the control strategy; or (2) It will interfere with the attainment or maintenance of a national standard.** (Emphasis added.)

40 CFR 51.160(f) further states: "(f) The procedures **must discuss the air quality data and the dispersion or other air quality modeling** used to meet the requirements of this subpart." (Emphasis added.)

Thus, an air quality analysis to determine the impact of qualifying nonattainment pollutant emissions is indeed required by federal regulation.

No change has been made to the proposal as a result of this comment.

14. **SUBJECT:** Offsets and reasonable further progress.

**COMMENTER:** American Lung Association, Sierra Club

**TEXT:** It is unlikely that EPA will likely only require a 1 for 1 offset in newly designated nonattainment areas for ozone pollution under the 8-hour health-based standard. In addition, the Clean Air Act requires that plans in nonattainment areas not meeting the national ambient air quality standards must provide "reasonable further progress." The proposal would only prevent further deterioration, not demonstrate "reasonable further progress." A more restrictive offset than 1 to 1 is recommended.

**RESPONSE:** As discussed in the response to comment 6, the regulation is being revised in order to provide the flexibility needed to meet whatever implementation plan EPA issues, whether a standard 1 to 1 offset or a schedule of ratios based on a classification system. Reasonable further progress is the result of implementing many measures, including permitting regulations, and is not the product of an individual regulation. When EPA issues its implementation plans for the new ozone nonattainment areas (including classifications, if any) then the state will prepare and submit nonattainment plans, including a demonstration of

reasonable further progress, for these areas.

No change has been made to the proposal as a result of this comment.

15. **SUBJECT:** Nonattainment area designations.

**COMMENTER:** American Lung Association

**TEXT:** The proposal expresses concern related to industry locating only in areas that are unlikely to be designated as nonattainment. This problem could be mitigated if the entire state is declared to be nonattainment.

**RESPONSE:** The department has not expressed, in the regulation or elsewhere, concerns relevant to the location of industry "only in areas that are unlikely to be designated as nonattainment"; the source of this statement is the Department of Planning and Budget's economic analysis, which must estimate potential economic effects. Moreover, the designation of nonattainment areas is made by EPA, not through state regulation.

No change has been made to the proposal as a result of this comment.

16. **SUBJECT:** PM 2.5 nonattainment.

**COMMENTER:** American Lung Association

**TEXT:** The Association challenges the assumption that Virginia will not be designated nonattainment for any criteria pollutant except ozone. PM 2.5 data being collected by DEQ suggests that several areas of the state may not meet the standard. We do not support the removal of air quality standards from the proposed regulations.

**RESPONSE:** Nowhere in the regulation or supporting documentation does the Department assume that Virginia will not be designated nonattainment for any criteria pollutant except ozone. If the data show that areas of the state are nonattainment for PM 2.5, then offsets will become necessary, which is why the regulation is being revised to include a 1 to 1 offset for criteria pollutants other than ozone. No air quality standards exist in the regulation and, thus, cannot be removed.

No change has been made to the proposal as a result of this comment.

17. **SUBJECT:** General opposition to the proposal.

**COMMENTER:** Sierra Club

**TEXT:** While we recognize that the current regulatory regime for air pollution is complex, Sierra Club believes that general descriptions of proposed regulations that are provided in the Virginia Register of Regulations and on the web, presumably provided to facilitate public comment, do not go far enough to communicate what is really going on. Further, we believe this obfuscation may not be unintentional as many of the regulations proposed appear to be relaxing environmental standards--an action that is clearly contrary to the public's desires. In light of the generally poor quality of Virginia's air as a result of ozone pollution, the first question that should be asked and answered is whether the proposed regulations will reduce ozone air pollution. This question is never addressed in the proposed regulations for permits of major sources and major modifications in non-attainment areas.

**RESPONSE:** The fact that the proposed regulation revisions will reduce ozone air pollution is prominently addressed in all agency documentation. The commenter cannot provide a single instance of the Department's failure to fully and openly meet its state and federal legal requirements for the regulation's content or preparation.

No change has been made to the proposal as a result of this comment.

18. **SUBJECT:** General opposition to the proposal.

**COMMENTER:** Sierra Club

**TEXT:** It appears that these regulations have been drafted to create various ambiguities and loop holes that benefit polluters. Our basis for this conclusion is not just DEQ's history under the current and past Administration of challenging U.S. EPA air regulations in court. In reviewing the scant record in the file under a FOIA request related to this action, we found an e-mail from DEQ staff to Department of Planning and Budget staff stating, in reference to the proposed 1:1 offset ratio, "The imposition of an offset ratio of any size will discourage, not encourage development. No source wants to obtain offsets of any kind. The point of the regulatory action is to prevent what is already a mandatory extra expense [referring to existing offset ratios] from being unnecessarily more so." The expenses that should be at issue are the very real health costs attributable to Virginia's poor air quality, not the costs to industry sources to simply comply with existing law and regulations.

**RESPONSE:** The purpose of the proposed regulation revisions, as explicitly stated throughout the regulatory development process for this action, is to protect the public health and welfare. The quotation is a factual statement found in an overall discussion of fiscal impacts, which is required by state law. Both the Department of Planning and Budget's economic analysis as well as the Department of Environmental Quality's agency background document address public health and welfare issues in addition to potential fiscal impacts. The commenter fails to identify any specific regulatory ambiguity or "loop hole."

No change has been made to the proposal as a result of this comment.

19. **SUBJECT:** General opposition to the proposal.

**COMMENTER:** Sierra Club

**TEXT:** Additionally, in the Agency Background Document, DEQ indicates that the regulations "will also reduce the possibility of implementation of unnecessarily restrictive requirements." To the contrary, these regulations may delay or interfere with EPA regulations adopted under the federal Clean Air Act that would result in cleaner air for Virginia citizens.

**RESPONSE:** The explicitly stated purpose of this regulatory action is to ensure that Virginia can quickly and effectively meet its federal legal obligations. The commenter fails to identify any specific regulatory provisions that would delay or interfere with any federal requirement.

No change has been made to the proposal as a result of this comment.

20. **SUBJECT:** Ozone and other criteria pollutant offsets.

**COMMENTER:** Sierra Club

**TEXT:** The purpose of 9 VAC 5-80-2120 is to apply a 1 to 1 offset ratio to newly designated, unclassified ozone nonattainment areas under the 8 hour standard and to nonattainment areas for other criteria pollutants such as PM 2.5. However, the parenthetical language of subdivision 9 VAC 5-80-2120 B 5--"(other than ozone nonattainment areas)"--may preclude the application of 1 to 1 offsets in any newly designated, unclassified ozone nonattainment areas. The result could be no offset requirement at all for sources in newly designated, unclassified ozone nonattainment areas. The intent of 9 VAC 5-80-2120 B 5 to extend the 1 to 1 offset ratio to all other criteria pollutants should be set out in a

separate paragraph because the language in B is clearly limited to $NO_X$ and VOCs, and that interpretation would extend to subparagraph 5 except for the parenthetical language.

**RESPONSE:** The commenter misunderstands the proposal. The first sentence of 9 VAC 5-80-2120 B does indeed put forth the VOC and $NO_X$ offsets required for ozone nonattainment areas, including the original schedule in subdivisions 1 through 4, and a new subdivision 5 to accommodate the 1 to 1 ratio for new ozone nonattainment areas. The second sentence of 9 VAC 5-80-2120 B then continues to put forth the offset ratio required for all other criteria pollutants. The fact that these two concepts are contained in the same paragraph does not automatically make them mutually contradictory. It is impossible to interpret the very simple proposed language in the way the commenter suggests.

No change has been made to the proposal as a result of this comment.

21. **SUBJECT:** Offsets in attainment areas.

**COMMENTER:** Sierra Club

**TEXT:** A 1 to1 offset ratio for ozone precursors should be established in all other areas of the state determined to be in attainment. The application of a 1 to 1 offset ratio to areas with "clean" air would prevent the deterioration of air quality in these areas, minimize the current incentive for polluters to locate in areas with clean air to avoid offsets, and improve air quality in nonattainment areas by reducing the transport of ozone precursors.

**RESPONSE:** As discussed in the response to comment 6, Article 8 is the regulation that controls emissions of sources locating in attainment areas. The Clean Air Act and EPA's regulations explicitly distinguish permitting requirements from nonattainment and attainment areas, and Virginia's new source permitting regulations fully meet these federal requirements.

No change has been made to the proposal as a result of this comment.

22. **SUBJECT:** Reactivation and permanent shutdown.

**COMMENTER:** Sierra Club

**TEXT:** 9 VAC 5-80-2160 (reactivation and permanent shutdown) is being repealed for the purpose of consistency with other new source review regulations. However, would this repeal allow sources that have not operated for long periods of time to start up again without a PSD review and

permit? Would this repeal allow for closed sources to claim pollution credits for long expired emissions?

**RESPONSE:** In order to officially shut down, a source must meet the requirements of 9 VAC 5-20-220, shutdown of a stationary source. This entails the formal revocation of any permits and removal of the source from the emissions inventory; it may not recommence operation without a new permit. A source could suspend operation for a long period of time and then recommence normal operations, but their original permit conditions would still be legally enforceable. Any major modification to the operation of a source makes it eligible for PSD review. It is unclear what the commenter means by "pollution credits for long expired emissions."

No change has been made to the proposal as a result of this comment.

23. **SUBJECT:** General opposition to the proposal.

**COMMENTER:** Sierra Club

**TEXT:** The Office of Air Regulatory Development by its words and actions has not earned the trust of Virginians concerned with air pollution and its very real health effects. In reviewing the files associated with this proposed regulation we found no public comment from industry what so ever which only furthers suspicions that these regulations may be weakening current provisions. For these reasons, Sierra Club asks that the adoption of these regulations be delayed indefinitely until representatives of the health and environmental community can meet with the agency staff and get answers to basic questions that have not been addressed in the rule making process thus far.

**RESPONSE:** The Department cannot answer questions that have never been asked. The commenter reviewed all existing documentation relevant to this regulatory action, yet has not identified any specific deficiencies in the regulation or in its processing, and has not asked any questions with respect to either process or content. The FOIA request was the sole contact the commenter has had with the Department regarding this regulatory action. Since the action was publicly initiated on November 6, 2000, the commenter has failed to: attend the public meeting, offer written comment during the initial public comment period, request that an ad hoc group be formed, request to participate in any ad hoc group, or attend the public hearing. In addition to the opportunities for formal public comment, Department staff are available to meet with and discuss any questions or concerns of any member of the public at any time; the commenter has made no attempt to do so. To delay implementation of the regulation indefinitely in order to accommodate the commenter's failure to effectively use readily available public resources would impede the Commonwealth's ability to

meet its federal legal requirements, its ability to efficiently process major source permits, and its primary responsibility to protect public health and welfare.

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