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 5-80-50 through -720
Secondary Action(s):	9 VAC 5-60-120- through -180
Action Title:	Federal Operating Permits for Stationary Sources (Rev. K97)
Date:	October 11, 2000

Please refer to the Administrative Process Act (§ 9-6.14:9.1 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Please provide a brief summary of the new regulation, amendments to an existing regulation, or the regulation being repealed.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 amendments concern provisions covering federal operating permits and can be summarized as falling primarily into seven categories: (1) amendments proposed to remove deficiencies that prevent full federal approval for Virginia's Title V program; (2) amendments proposed to support commitments made in a letter of February 27, 1997, from the DEQ director to EPA's Region III administrator amending previous program submittals; (3) amendments proposed to incorporate guidance from EPA's White Papers of July 1995 and March 1996; (4) amendments proposed to clarify applicable state requirements; (5) amendments proposed to bring the acid rain program into conformity with federal regulations; (6) amendments proposed to incorporate provisions relating to the new federal Compliance Assurance Monitoring (CAM) rule; and (7) amendments proposed to incorporate provisions relating to § 112(j) of the federal Clean Air Act.

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.

No substantial changes were made since the proposed action was published.

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 September 28, 2000, the State Air Pollution Control Board adopted final amendments to regulations entitled "Regulations for the Control and Abatement of Air Pollution," specifically Federal Operating Permits for Stationary Sources (9 VAC Chapter 60, Article 3; and 9 VAC Chapter 80, Articles 1-4). The regulation amendments are to be effective on January 1, 2001.

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 regulations is to establish a federally approved operating permit program for stationary sources of air pollution. The goal of this program is the issuance of a comprehensive permit specifying all applicable state and federal requirements for all pertinent emissions units in each covered facility. The consolidation of these requirements into one permit will assist the source in compliance and the department in enforcement, thus protecting and enhancing the public health and welfare of the citizens of Virginia. The

proposed amendments are being made to bring the regulations into compliance with federal guidance concerning the implementation of Title V of the federal Clean Air Act (42 U.S.C. sections 7661-7661f) and of federal regulations concerning state operating permit programs (40 CFR Part 70).

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. reduction of insignificant activity threshold for carbon monoxide [9 VAC 5-80-720 B 3]

2. requirement that sources included in permit applications sufficient information regarding insignificant emissions units to enable applicable requirements for those units to be identified [9 VAC 5-80-50 F, -360 E]

3. requirement that applicable requirements for insignificant emission units be included in permits [9 VAC 5-80-110 A 1, -490 A 1]

4. correction of definition of insignificant emergency or standby compressors, pumps, and generators [9 VAC 5-80 720 C 4]

5. prohibition of off-permit changes pertaining to acid rain provisions of Title IV [9 VAC 5-80-280 C 1, -680 B 1 a (1) & C 1]

6. correction of affirmative defense provisions [9 VAC 5-80-250 B 4, -650 B 4]

7. correction of applicability deferral provisions [9 VAC 5-80-50 D b]

8. correction of definitions of "malfunction" and "research and development facility" [9 VAC 5-80-60, -370]

9. requirement of applicable requirements citation for insignificant activities [9 VAC 5-80-90 E 1, -440]

10. correction of administrative amendments provisions [9 VAC 5-80-200 A 1, -560 A 1]

11. correction of malfunction notification provisions [9 VAC 5-80-250 B 4 a & b, -650 B 4 a & b]

12. clarification of fee payment schedule provisions [9 VAC 5-80-350 B & C]

13. elimination of reference to de minimis emissions rates table in 40 CFR 63.44 [9 VAC 5-80-720 B 5 & 6]

14. clarification of applicable state requirements [9 VAC 5-80-60 C, -110 C, -300 A, -370, -490 C, -700 A]

15. amendments to comply with federal Compliance Assurance Monitoring rule in 40 CFR Part 64 [9 VAC 5-80-110 E 1, -110 K 5 c, -110 K 5 e, -490 E 1, -490 K 5 c, -490 K 5 e]

16. amendments to comply with updated federal federal acid rain provisions in 40 CFR 72.2 et seq. [9 VAC 5-80-370, -380, -400, -420, -450, -460, -610, -620]

17. integration of EPA's list of trivial activities with current insignificant activities [9 VAC 5-80-720 A]

18. new regulation to comply with requirements of ?112(j) of the federal Clean Air Act [9 VAC 5-60-120 et seq.]

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.

Primary advantages to the public: The public participation requirements of the program provide an opportunity for citizens to provide comments to the department about the compliance of facilities emitting air pollutants. Sources, not the public, pay for the cost of controlling their air emissions. Periodic reviews of polluting activities are conducted to ensure that effective emission reductions are taking place.

Primary disadvantage to the public: Sources may pass on their increased costs under the program to the consumer.

Primary advantages to the department: The program enhances the department's ability to enforce the requirements mandated by the federal Clean Air Act by clarifying for sources exactly which air quality requirements apply. The program obviates the need for consent orders under certain conditions, avoiding their negative connotations. It enables the department to permit facilities at emission levels closer to actual emission levels with a reasonable margin for normal operation. It also provides an enforcement mechanism for the department to determine a facility's compliance with applicable regulations (enforcement of the regulations without the permit is more difficult because specific conditions for the individual facility have not been derived from those regulations).

Primary disadvantage to the department: Implementation of the program requires large increases in staffing and funding.

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.

No changes other than strictly editorial changes were made since the publication of the proposed regulation.

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 fertility disorders, fetal mutation and deformity, chronic and acute illness, premature death, and property damage.

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COMMONWEALTH OF VIRGINIA

STATE AIR POLLUTION CONTROL BOARD
SUMMARY AND ANALYSIS OF PUBLIC TESTIMONY FOR REGULATION REVISION K97 CONCERNING

FEDERAL OPERATING PERMITS FOR STATIONARY SOURCES (9 VAC 5 CHAPTERS 60 AND 80)

INTRODUCTION

At its meeting on May 11, 1999, the board authorized the department to promulgate for public comment a proposed regulation revision concerning federal operating permits for stationary sources.

A public hearing was advertised accordingly and held in Richmond on June 14, 2000. The public comment period closed on July 7, 2000. 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 federal operating permits for stationary sources. A summary of the amendments follows:

1. Some of the proposed amendments are intended to remove deficiencies which prevent full federal approval for Virginia's Title V program:

   9 VAC 5-80-50 F (correction of deficiency 2)
   9 VAC 5-80-110 A 1 (correction of deficiency 3)
   9 VAC 5-80-250 B 4 (correction of deficiency 6)
   9 VAC 5-80-280 C 1 (correction of deficiency 5)
   9 VAC 5-80-360 E (correction of deficiency 2)
   9 VAC 5-80-490 A 1 (correction of deficiency 3)
   9 VAC 5-80-650 B 4 (correction of deficiency 6)
   9 VAC 5-80-680 B i a (1) (correction of deficiency 5)
   9 VAC 5-80-680 C 1 (correction of deficiency 5)
   9 VAC 5-80-720 B 3 (correction of deficiency 1)
   9 VAC 5-80-720 C (correction of deficiency 4)

2. Some of the proposed amendments are intended to support commitments made in a letter of February 27, 1997, from the DEQ director to EPA's Region III administrator amending previous program submittals:

9 VAC 5-80-50 D 1 b (commitment 4a)
9 VAC 5-80-60 C "Malfunction" (commitment 4b)
9 VAC 5-80-60 C "Research and development facility" c (commitment 4c)
9 VAC 5-80-90 E 1 (commitment 4d)
9 VAC 5-80-200 A 1 (commitment 4f)
9 VAC 5-80-250 B 4 (commitment 4g)
9 VAC 5-80-320 C "Research and development facility" c (commitment 4c)
9 VAC 5-80-370 "Malfunction" (commitment 4b)
9 VAC 5-80-440 E 1 (commitment 4d)
9 VAC 5-80-560 (commitment 4f)
9 VAC 5-80-650 B 4 (commitment 4g)

3. Some of the proposed amendments are intended to incorporate guidance from EPA's White Papers of July 1995 and March 1996:

9 VAC 5-80-720 A (integration of federal trivial activities list with state's insignificant activities list)

4. Some of the proposed amendments are intended to clarify applicable state requirements:

9 VAC 5-80-60 C "Applicable requirement"
9 VAC 5-80-60 C "Applicable state requirement" a
9 VAC 5-80-110 C
9 VAC 5-80-300 A
9 VAC 5-80-370 "Applicable requirement"
9 VAC 5-80-370 "Applicable state requirement"
9 VAC 5-80-490 C
9 VAC 5-80-700 A

5. Some of the proposed amendments are intended to bring the acid rain program into conformity with federal regulations:

9 VAC 5-80-370, "Acid rain emissions limitation" (40 CFR 72.2)
9 VAC 5-80-370, "Acid rain program" and "Acid rain program regulations" (40 CFR 72.2)
9 VAC 5-80-370, "Affected states" (40 CFR 72.2)
9 VAC 5-80-370, "Allowance deduction" or "deduct" (when referring to allowances) (40 CFR 72.2)
9 VAC 5-80-370, "Applicable federal requirement" (40 CFR 70.2)
9 VAC 5-80-370, "Coal-fired" (40 CFR 72.2)
9 VAC 5-80-370, "Compliance certification" (40 CFR 72.2)
9 VAC 5-80-370, "Customer" (40 CFR 72.2)
9 VAC 5-80-370, "Designated representative" (40 CFR 72.2)
9 VAC 5-80-370, "Diesel fuel" (40 CFR 72.2)
9 VAC 5-80-370, "Permit" or "acid rain permit" (40 CFR 72.2)
9 VAC 5-80-370, "Eligible Indian tribe" (40 CFR 72.2)
9 VAC 5-80-370, "Emissions unit" (40 CFR 70.2)
9 VAC 5-80-370, "Excess emissions" (40 CFR 72.2)

9 VAC 5-80-370, "Existing unit" (40 CFR 72.2)
9 VAC 5-80-370, "Fossil-fuel fired" (40 CFR 72.2)
9 VAC 5-80-370, "Fuel oil" (40 CFR 72.2)
9 VAC 5-80-370, "Gas-fired" (40 CFR 72.2)
9 VAC 5-80-370, "Independent power production facility" (40 CFR 72.2)
9 VAC 5-80-370, "Natural gas" (40 CFR 72.2)
9 VAC 5-80-370, "Oil-fired" (40 CFR 72.2)
9 VAC 5-80-370, "Owner" (40 CFR 72.2)
9 VAC 5-80-370, "Owner or operator" (40 CFR 72.2)
9 VAC 5-80-370, "Permit revision" (40 CFR 70.2)
9 VAC 5-80-370, "Power purchase commitment" (40 CFR 72.2)
9 VAC 5-80-370, "Qualifying power purchase commitment" (40 CFR 72.2)
9 VAC 5-80-370, "Regulated air pollutant" (40 CFR 70.2)
9 VAC 5-80-370, "State" and "state operating permit program" (40 CFR 72.2)
9 VAC 5-80-370, "Submit" or "serve" (40 CFR 72.2)
9 VAC 5-80-370, "Utility competitive bid solicitation" (40 CFR 72.2)
9 VAC 5-80-370, "Utility unit" (40 CFR 72.2)
9 VAC 5-80-380 (40 CFR 72.6)
9 VAC 5-80-380 (40 CFR 72.6)
9 VAC 5-80-400 (40 CFR 72.8)
9 VAC 5-80-420 (40 CFR 72.9)
9 VAC 5-80-450 (40 CFR 72.40)
9 VAC 5-80-460 (40 CFR 72.44)
9 VAC 5-80-610 (40 CFR 72.82)
9 VAC 5-80-620 (40 CFR 72.83)

6. Some of the proposed amendments are intended to incorporate provisions relating to the new federal Compliance Assurance Monitoring (CAM) rule:
9 VAC 5-80-110 E 1 (CAM § 70.6(a)(3)(i)(A))
9 VAC 5-80-110 K 5 c (CAM § 70.6(c)(5)(iii))
9 VAC 5-80-110 K 5 e (CAM § 70.6(c)(5)(v))
9 VAC 5-80-490 E 1 (CAM § 70.6(a)(3)(i)(A))
9 VAC 5-80-490 N 5 c (CAM § 70.6(c)(5)(iii))
9 VAC 5-80-490 N 5 e (CAM § 70.6(c)(5)(v))

7. Some of the proposed amendments are intended to incorporate provisions relating to § 112(j) of the federal Clean Air Act:
9 VAC 5-60-120 et seq. (new rule)

8. Some of the proposed changes were made for other reasons:
9 VAC 5-80-60 C "Insignificant activity" (new definition needed)
9 VAC 5-80-60 C "State enforceable" (to conform to general administration regulation)
9 VAC 5-80-350 B and C (to clarify fee payment provisions)
9 VAC 5-80-370 "Insignificant activity" (new definition needed)

9 VAC 5-80-720 B 5 and 6 (to correct updated citation)

SUMMARY OF PUBLIC PARTICIPATION PROCESS

A public hearing was held in Richmond, Virginia on June 14, 2000. Two people attended the hearing, with neither of them offering testimony. Two 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 May 8, 2000, in the Virginia Register and in seven major newspapers (one in each Air Quality Control Region) throughout the Commonwealth. In addition, individual notice of this hearing and the opportunity to comment was given by mail to those on the department's list to receive notices of proposed regulation revisions. A list of hearing attendees and the complete text of the comments received 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:** General

COMMENTER: Kathleen Henry, Chief, Permits and Technical Assessment Branch, United State Environmental Protection Agency, Region III

TEXT: EPA has no comments to offer on any of the proposed regulations.

RESPONSE: Review of the proposal is appreciated.

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

2. **SUBJECT:** State-only requirements should not be federally enforceable applicable requirements that must be included in a source's Title V application or permit.

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

<u>TEXT</u>: Perhaps the most important issue to the VMA's members raised by the proposed revisions concerns what "applicable requirements" must be included in a source's Title V permit application and permit. Under Virginia's current Title V regulations the answer is fairly clear. First, with one exception for facilities subject to the Board's medical waste incinerator rule, Rule 5-6, only "federal applicable requirements" must be included in a source's Title V application and permit. Second, the term "federal applicable requirement" does not include (1) the Board's regulations that have not been approved by EPA into the Virginia state implementation plan ("SIP") or (2) terms and conditions of any new source review ("NSR") or state operating permit issued to a source that are based on or derived from any of the Board's regulations that are not part of the Virginia SIP. The VMA and its members strongly endorse this clear cut approach and urge the Board to retain it. Unfortunately, the revised regulations, if adopted, would significantly alter this approach in the current regulations with respect to terms and conditions in a Title V source's NSR and state operating permits.

a. <u>The requirement to include all "applicable requirements" in Title V applications and permits.</u> Section 9 VAC 5-80-90 specifies the information an applicant must include in the source's Title V permit application, and 9 VAC 5-80-110 specifies the requirements that must be included in the source's Title V permit. These provisions require the applicant to supply information with respect to all applicable requirements and the DEQ to include in the permit all applicable requirements to which the source is subject. See, e.g., 9 VAC 5-80-110.A.1.

b. <u>Definitions of "applicable requirement" and "applicable state requirement."</u> VMA's concern arises out of proposed revisions to the definitions of "applicable requirement" and "applicable state requirement." The current definition says "'applicable requirement' means any applicable federal requirement or applicable state requirement." The current definition of "applicable state requirement" is obtuse, but its effect is to restrict the definition to Rule 5-6 governing medical waste incinerators. Thus, under Virginia's current Title V regulations, all sources but medical waste incinerators have no applicable state requirements. This means that except for medical waste incinerators, sources in Virginia currently must identify only applicable federal requirements in their Title V applications and DEQ currently must include only applicable federal requirements in those sources' Title V permits. The proposed definition says "'applicable requirement' means any applicable federal requirement or <u>any</u> applicable state requirement <u>included in a permit issued under this article as provided for in 9 VAC 5-80-300</u>" (revisions underlined). The section cited in the definition, 9 VAC 5-80-300, says essentially that any Board regulation, other than one that is a federal applicable requirement (because EPA has approved it as part of the Virginia SIP), may be included in the source's Title V permit only upon the voluntary request of the applicant. In addition, 9 VAC 5-80-110.N.2 requires the Board (DEQ) to designate as "only state-enforceable" (i.e., not a federal applicable requirement) "any terms or conditions included in the [Title V] permit that are not required under the federal Clean Air Act or under any of its applicable requirements." Together with the revised definition of "applicable requirement," 9 VAC 5-80-110.N.2 and 5-80-300 indicate that unless an applicant voluntarily requests the inclusion of a state-only

enforceable regulation, standard or limitation, there will be **no** "applicable state requirements" that must be included in the source's Title V application or permit. While the proposed revised definition of "applicable state requirement" encompasses **all** of the Board's regulations, the proposed revised definition of "applicable requirement" encompasses only those Board regulations that the applicant wishes to include in the Title V permit voluntarily pursuant to 9 VAC 5-80-300. In short, the way we read these proposed revisions, by definition,"applicable requirement" would not include **any** state-only enforceable requirement unless the applicant asks that a state-only requirement be included in the source's Title V permit. Thus, if an applicant does not request the inclusion of any "only state-enforceable" requirements in the Title V permit, the only "applicable requirements" that would be included in the Title V permit would be the source's "applicable federal requirements." The VMA does not object to the proposed revisions because they preserve the approach to state-only enforceable regulations (i.e., Board regulations that are not part of the Virginia SIP) taken in Virginia's current Title V regulations.

c. Definition of "applicable federal requirement." The key to understanding what "applicable requirements" **must** be included in a source's Title V permit comes down to understanding the meaning of the term "applicable federal requirement" and the correlative term "federally enforceable" in the proposed revisions. The proposed revisions would significantly change these definitions. First, the proposed revisions to the definition of "applicable federal requirement" would preserve the approach taken from the beginning in Virginia's Title V regulations that any of the Board's regulations approved by EPA as part of the Virginia SIP are federally enforceable applicable requirements. Conversely, Board regulations that EPA has not approved into the Virginia SIP are not federally enforceable applicable requirements. Second, as to NSR and state operating permit terms and conditions, the proposed definition of "applicable federal requirement" encompasses "any term or condition of any preconstruction permit issued pursuant to the new source review program or any operating permit issued pursuant to the state operating permit program, **except for terms or conditions derived from applicable state requirements** *or from any requirement of Regulations for the Control and Abatement of Air Pollution not included in the definition of applicable requirement*." (Emphasis added.) The bolded portion of this definition appears to create a blanket exclusion for any and all permit terms and conditions "derived from applicable state requirements." Since "applicable state requirement" means "any standard or other requirement prescribed by any regulation of the board," this exclusion would appear to encompass all permit terms and conditions based on any of the Board's regulations, whether part of the Virginia SIP or not. Certainly this does not seem to have been the Board's intent in revising the definitions of "applicable requirement," "applicable state requirement," and "applicable federal requirement." Also, the italicized portion of the definition quoted above does not seem to make any sense. We believe this language may have made sense before the definition of "applicable state requirement" was changed to mean not just Rule 5-6, but "any regulation of the board." Although the wording of the definition needs clarification, VMA strongly supports the basic concept behind the definition, i.e., that NSR and state operating permit terms and conditions derived from state-only enforceable regulations

(i.e., non-SIP regulations) are **not** "applicable federal requirements" that must be included in Title V applications or permits.

d. Definition of "federally enforceable." Unfortunately, the foregoing approach to NSR and state operating permit terms derived from state-only enforceable requirements is contradicted by the approach taken in the proposed revised definition of "federally enforceable." The proposed definition of "federally enforceable" would significantly expand the universe of applicable federal requirements to include **any** NSR and state operating permit terms and conditions even if they are derived from or based on state-only enforceable requirements. The current Title V regulations define "federally enforceable" to include "any permit requirements established pursuant to (i) 40 CFR 52.21 [governing EPA's PSD permit program] or (ii) this chapter [governing Virginia's permitting programs], **with the exception of terms and conditions established to address applicable state requirements**." [Emphasis added.] It is our understanding that the intent of this provision as originally adopted was to carve out from the meaning of "federally enforceable" (and also from the meaning of "applicable federal requirement") any terms and conditions in NSR or state operating permits that are derived from or based on requirements in the Board's regulations that are not themselves federally enforceable (because they are not part of the Virginia SIP). The most notable examples of such requirements are Virginia's odor regulations and state air toxics rules (Rules 4-3 and 5-3). We understand this to have been the intent of this wording in the current definition of "federally enforceable," although a literal reading of the current regulations might lead to a different conclusion. Since the current definition of "applicable state requirement" encompasses only one regulation, Rule 5-6, the current wording in the definition of "federally enforceable" quoted above might be interpreted literally to exclude from federal enforceability only permit terms and conditions established to address Rule 5-6 for medical waste incinerators. Again, it has been the understanding of our members that DEQ has interpreted the definition of "federally enforceable," in conjunction with the other definitions discussed above, so as to exclude permit terms and conditions based on Virginia's odor and state air toxics regulations from the universe of federally enforceable applicable requirements under Virginia's Title V program. This conclusion is also strongly supported by the provision in the definition of "applicable federal requirement" excluding NSR and state operating permit "terms or conditions derived from applicable state requirements."

e. EPA "guidance" on federal enforceability of permit terms. We are aware of EPA headquarters and Region III guidance issued last year in which that Agency insists that any and all terms and conditions in state permits issued pursuant to EPA-approved permitting programs are federally enforceable no matter what they are based on or derived from. Letter from John S. Seitz, EPA OAQPS, to Doug Allard, California Air Pollution Control Officers Association, March 31, 1999; Letter from Judith M. Katz, EPA Region III, to John Daniel, DEQ, August 18, 1999. We understand that after the ad hoc Advisory Group concluded its work with the DEQ staff on revising Virginia's Title V regulations, DEQ changed the definitions of "applicable federal requirement" and "federally enforceable" because Region III insisted the definitions comport with the approach taken in EPA's guidance documents. The revisions Region

III demanded, and the Board has proposed, would make NSR and state operating permit terms based on any of the Board's non-SIP regulations federally enforceable applicable requirements that must be included in the federally enforceable portion of the source's Title V permit. This is ironic since the Board's non-SIP regulations, such as the odor or state air toxics rules, do not implement any requirements of the federal Clean Air Act and are not enforceable by the EPA or citizens under the Clean Air Act.

f. State-only requirements should not be federally enforceable applicable requirements. VMA urges the DEQ and the Board to resist the pressure from Region III to change Virginia's Title V rules to comply with EPA guidance. First, this issue was not one of the programmatic deficiencies Region III identified and insisted be changed as a condition for final approval of Virginia's Title V program. EPA gave interim approval to Virginia's program with the current regulatory approach to permit terms derived from "state-only requirements," such as the Virginia state air toxics rules. If EPA now objects to Virginia's Title V approach to NSR and state operating permit terms and conditions, Region III should issue a Federal Register notice explaining how and why this is an additional programmatic deficiency that must be corrected in order for Virginia to receive final Title V program approval. Region III's approach on this issue is but another example of EPA's patently illegal attempts to impose binding regulatory requirements without abiding by the federal Administrative Procedures Act. Region III acts as though its guidance is law, but it is not. The U.S. Court of Appeals for the District of Columbia Circuit recently issued a scathing rebuke of EPA's repeated attempts to issue binding rules by guidance document. See Appalachian Power Co. v. EPA, No. 98-1512 (Apr. 14, 2000) (invalidating EPA's Title V periodic monitoring "guidance" as an illegal rule). EPA's "guidance" on the federal enforceability of NSR and state operating permit terms and conditions is legally suspect on both substantive and procedural grounds. In conclusion, VMA urges the DEQ and the Board to maintain the approach to state-only requirements in Virginia's current Title V regulations i.e., any Board regulations not part of the Virginia SIP and any NSR and state operating permit terms based on such regulations are not federally enforceable applicable requirements and need not be included in a source's Title V application or permit. To the extent that any further changes to the regulations are required to make this approach perfectly clear, we urge the Department and the Board to make those changes.

RESPONSE: The commenter addresses two concepts: (1) the proposal retains the concept in the current definition of "applicable federal requirement" which excludes permit terms and conditions that are derived from applicable state requirements, and (2) the proposal removes the wording in the current definition of "federally enforceable" which excludes permit terms and conditions established to address applicable state requirements. The commenter supports retention of the first concept but objects to changing the second.

Correction of some misinformation in the comment is necessary. First, the March 31, 1999 letter from EPA does not provide "guidance" but interpretation of federal regulations (40 CFR §§ 52.23 and 70.20) and the Clean Air Act (section 504(a)). Second, the revisions were not made at the insistence of EPA Region III, which provided no input on

the changing of these definitions and made no demands on this matter. The board approved the proposal in May 1999 (before the issuance of the August 18, 1999 letter). The intent was to align the proposal with the regulatory interpretation in the March 31, 1999 letter in an attempt to make the state's requirements conform more closely with the federal requirements.

Definitions in regulations generally serve one of two purposes: (1) to convey the legal requirements of the regulation or (2) to convey information that would be helpful in understanding the regulation. The definition of "federally enforceable" serves primarily the second purpose, not the first. The definition of "federally enforceable" is not intended to nor can it legally determine which of those provisions designed to carry out the Clean Air Act are enforceable under the Clean Air Act and federal regulations. The definition is intended to convey to the reader information as to which provisions in state and federal regulations and other legal documents are federally enforceable. Thus, the definition of "federally enforceable" in this proposal was not changed to alter the legal requirements of any regulation but to convey accurate information concerning the concept as it currently exists. The concept of which requirements are federally enforceable is determined by the enabling regulations for the programmatic requirement and can only be changed by changing the program regulations. In addition, the definitions and provisions in this proposal related to this issue are sufficiently flexible as to allow changes.

The commenter states that the proposal "would significantly expand the universe of applicable federal requirements to include **any** NSR and state operating permit terms and conditions even if they are derived from or based on state-only enforceable requirements."

This is incorrect. The regulations for those permit programs and how they are incorporated in the state implementation plan determine whether they are federally enforceable or not. The terms and conditions for those permit programs are now and will be federally enforceable regardless of how federally enforceable is defined in this regulation. The only way this situation can be changed is by submitting a revised version of the regulations to EPA and getting an approval that recognizes that certain terms and conditions are not federally enforceable.

There are plans underway to submit regulations that would get an approval that recognizes that certain permit terms and conditions are not federally enforceable with regard to the minor new source review permit program (9 VAC 5-80-10). Until that process is complete, the situation will not change.

This opinion is supported by comments made by EPA regarding both the permit program to satisfy the requirements of section 112(g) of the Clean Air Act and the Title V permit program.

Regarding the recently adopted regulation to address section 112(g) EPA said, "any limitation or condition that is part of a permit issued under 40 CFR Part 52.21 or that was approved by EPA in a State Implementation Plan is, by definition, federally enforceable.

The language added in these subsections will not preempt the definition of federally enforceable for other programs."

In addition, EPA has indicated that despite the fact that the current state Title V permit program regulations specifically provide that terms and conditions in minor new source review permits are not to be federally enforceable, EPA contends that this provision of the state Title V permit regulation cannot override the fact that the minor new source review permit program regulations were approved into the implementation plan in a manner that makes the terms and conditions federally enforceable.

While the March 31, 1999 letter from John S. Seitz provides a valid interpretation of 40 CFR § 52.23 with regard to permit terms and conditions that are federally enforceable, there is sufficient latitude in the reading of section 504(a) of the Clean Air Act to exclude from the definition of "applicable federal requirements" those permit terms and conditions that are derived from applicable state requirements. In other words, the Clean Air Act does not require that all provisions of the air regulatory program that are federally enforceable be included in the Title V permit as applicable federal requirements. For this reason, the definition of that term in this proposal has not been changed.

Section 504(a) of the Act provides that "Each permit issued under this title shall include … such other conditions as are necessary to assure compliance with applicable requirements of this Act, including the requirements of the applicable implementation plan." Even though terms and conditions are included in permits issued under federally approved permit program that are derived from applicable state requirements, these provisions are included at the discretion of the state and are intended only to implement state-only regulatory programs. Clearly, these provisions are not necessary to assure compliance with any requirement of the Act, including the requirements of the applicable implementation plan. The wording of section 504(a) can reasonably be interpreted to exclude permit terms and conditions that are derived from applicable state requirements since those provisions do not meet the "necessity" clause of that section. After all, these provisions have been made federally enforceable by the construct of an unrelated federal regulation (40 CFR § 52.23), not by any provision of the Act itself; and this federal regulation could legally be changed to exclude permit terms and conditions that are derived from applicable state requirements from being considered federally enforceable.

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

Regarding item c, the board agrees that all its regulations involve either applicable state requirements or applicable federal requirements and that the definition in question needs to be clarified. The proposal has been amended accordingly.

2. **SUBJECT:** Compliance Certification.

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

<u>TEXT</u>: Virginia's Title V permit regulations require applicants to certify compliance with "all applicable requirements" or submit a plan and schedule to come into compliance. 9 VAC 5-80-90.J.1. Under both the current and proposed regulations, Title V permittees must at least annually certify compliance with "the terms and conditions contained in the permit." 9 VAC 5-80-110.K.5. VMA believes this certification should be restricted to only federally enforceable applicable requirements included in the source's Title V permit. The certification requirement should not apply to any state-only enforceable terms and conditions included for whatever reason in the source's Title V permit. Title V is a federally dictated permit program designed to address federally enforceable applicable requirements. Our understanding, as stated above, is that the program does not and should not mandate the inclusion of state-only enforceable requirements in Title V permits. If, for whatever reason, whether voluntary or not, a state-only requirement is included in a source's Title V permit, the certification requirement mandated by EPA' s Title V regulations should not apply to that state-only requirement. To implement this approach, VMA recommends that the certification requirements in Virginia's current and proposed Title V regulations, including particularly the provisions cited above, be revised to specify that applicants and permittees must certify compliance with all "applicable **federal** requirements" rather than all "applicable requirements" or all "terms and conditions contained in the permit."

<u>RESPONSE</u>: The decision to include a state-only enforceable section in a Title V permit requires a request and consent by the source. The need to certify compliance is one factor that the source must take into account when determining if the advantage gained from including these terms in one permit document outweighs the additional compliance certification requirements that are a requirement of the Title V permit.

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

3. **<u>SUBJECT</u>:** Equipment Specifications and Operating Parameters.

<u>COMMENTER</u>: Carol C. Wampler, Esq., Vice President and General Counsel, Virginia Manufacturers Association

<u>TEXT</u>: VMA members who participated on the DEQ's ad hoc Advisory Group strongly advocated amendments to the current Title V regulations to clarify that equipment specifications and operating parameters included in Title V permits are **not** enforceable permit terms. Rather they are included in permit applications and in the permits themselves only for informational purposes--to allow EPA and DEQ inspectors to identify equipment subject to the applicable requirements contained in the source's Title V permit. The Board's proposed revision to 9 VAC 5-80-110.C.2 embodies this approach, and VMA strongly supports it.

<u>RESPONSE</u>: Support for the proposed amendment is appreciated.

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

4. **SUBJECT:** Title V Permit Program Fees.

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

TEXT: VMA members who participated on the DEQ's ad hoc Advisory Group advocated revising 9 VAC 5-80-350 to allow Title V applicants and permittees to pay the annual fee on a quarterly basis. Many of VMA's members pay large amounts, upwards of $300,000 annually, in Title V fees. Many of these sources expressed concern about budgeting and paying this large amount in one lump sum annually. They wanted the opportunity to spread the cost out more evenly over the year through quarterly fee payments to the DEQ. DEQ staff on the Advisory Group objected to this approach on the grounds that setting up a quarterly fee payment process would be too burdensome and costly for the Department. Some VMA members found this objection lacking given the large sums of money they pay DEQ in Title V program fees. Some of the larger sources found it disingenuous for DEQ to object to the high cost of implementing a quarterly payment process when the Department collects over a third of a million dollars annually from each of them. The Board's proposed regulations do not contain any revised provisions for paying the annual Title V program fees in quarterly installments. VMA urges the Board to include such provisions in Virginia's revised Title V regulations.

RESPONSE: The implementation of a quarterly fee payment schedule could significantly increase the administrative Title V burden on DEQ's financial staff, thus necessitating the hiring of more staff and the raising of fees. No other state allows such a payment plan under Title V.

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

5. **SUBJECT:** Miscellaneous Items.

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

TEXT: (a) The proposed definition of "new source review program" contains a citation to 9 VAC-80-1100 et seq. To our knowledge, that regulatory provision does not exist. (b) The regulations cite 9 VAC 5-80-40 (state operating permits) which has been repealed and replaced by 9 VAC 5-80-800 et seq. (c) Similarly, 9 VAC 5-80-30 (nonattainment area NSR) has been repealed and replaced by 9 VAC 5-80-2000. (d) Section 9 VAC 5-80-260.C.2 cites 9 VAC 5-20-90 regarding a source's appeal of any Board decision to suspend, revoke, or terminate a source's Title

V permit. 9 VAC 5-20-90 has been repealed and replaced by 9 VAC 5-170-190 and 200. (e) Proposed 9 VAC 5-80-80.C.2 refers to "the requirements of) 112(g)(2) (construction, reconstruction or modification of sources of hazardous air pollutants) of the federal Clean Air Act." It should be noted that EPA imposes the requirements of 112(g) only in cases of the construction or the reconstruction, but not the modification, of major sources of hazardous air pollutants.

RESPONSE: The proposal was amended to accommodate the necessary corrections.