TENTATIVE AGENDA
STATE AIR POLLUTION CONTROL BOARD MEETING

MONDAY, SEPTEMBER 30, 2002
HOUSE ROOM D, GENERAL ASSEMBLY BUILDING
9TH & BROAD STREETS
RICHMOND, VIRGINIA

Convene - 9:30 A.M.

I.	**Air Program Briefing**	Daniel	
II.	**Regulations**		
	General Permit for Nonmetallic Mineral Mining Facilities - Final Action (9 VAC 5-510)	Mann	1
	Control Technology Determinations for Major Sources of Hazardous Air Pollutants - Final Action(Rev. E02)	Sands	2
	Variances for Atlantic Research Corporation - Final Action (9 VAC 5-220 and 9 VAC 5-221)	Sands	3
	Northern Virginia Vehicle Emission I/M Program - Action (Rev. MG)	Major	4
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	Emission Trading - (Rev. H02)	Mann	6
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Adjourn

NOTE: The Board reserves the right to revise this agenda without notice unless prohibited by law. Revisions to the agenda include, but are not limited to, scheduling changes, additions or deletions. Questions arising as to the latest status of the agenda should be directed to Cindy M. Berndt at (804) 698-4378.

SUBJECT: General Permit for Nonmetallic Mineral Mining Facilities (9 VAC Chapter 510) - Public Participation Report and Request for Board Action

INTRODUCTION

The general permit was developed at the request of the Virginia Aggregates Association and designed to achieve two goals: (1) to identify and clarify for the Department and source owner the key air quality program requirements applicable to the permitted facility and (2) to minimize the regulatory burden of regulatory programs on the permitted facility.

The regulation establishes a general permit that regulates emissions from new and exiting units in nonmetallic mineral mining facilities and the procedures for facility owners to request and the Department to grant authorizations to operate under the general permit.

The Department is requesting approval of a draft final general permit that meets federal statutory and regulatory requirements. Approval of the general permit will ensure that the Commonwealth will be able to administer the regulatory programs for nonmetallic mineral mining facilities in a more efficient and effective manner.

PUBLIC PARTICIPATION ACTIVITIES

To solicit comment from the public on the proposed general permit, the Department issued a notice that provided for receiving comment during a comment period and at a public hearing. A copy of the summary and analysis of testimony is attached.

SUMMARY OF PROPOSED GENERAL PERMIT

Below is a brief summary of the substantive provisions of the general permit that were originally proposed for public comment.

The general permit covers nonmetallic mineral mining facilities and:

1. Provides procedures for facility owners to obtain authority to operate under the general permit.

2. Requires the use of the current aggregate processing emission calculation spreadsheet as the primary vehicle to apply for a permit and to update facility and emissions data.

3. Establishes emission standards for new and exiting units which are no less stringent than current standards prescribed in 9 VAC 5 Chapter 40, Articles 1 (opacity) and 14 (particulate matter) and 40 CFR Part 60, subpart OOO.

4. Provides for compliance determination and verification by emission testing or monitoring.

5. Provides for recordkeeping and reporting.

6. Provides for compliance and enforcement.

SUMMARY OF CHANGES TO PROPOSED GENERAL PERMIT

Below is a brief summary of the substantive changes the Department is recommending be made to the proposed general permit. These changes are enclosed in [brackets] in the attached draft general permit. Provisions have been added to:

1. Address the issue of granting authorizations to operate under the general permit should the general permit regulation be amended. (9 VAC 5-510-50 G)

2. Allow reauthorizations to operate under the general permit. (9 VAC 5-510-80 A 4)

3. Incorporate the particulate matter emission standard for AQCR 7 (Northern Virginia) which differs from the remainder of the state. (9 VAC 5-510-190 B 1)

SUPPORTING DOCUMENTATION

Immediately following this agenda memo are the following documents:

1. The summary and analysis of public testimony.

2. The draft final general permit.

DEPARTMENT RECOMMENDATION

It is recommended that the Board adopt the attached proposal, with an effective date of December 1, 2002.

SUBJECT: Variances for Atlantic Research Corporation (9 VAC 5 Chapters 220 and 221): Public Participation Report and Request for Board Action

INTRODUCTION

At its Orange County and Gainesville facilities, the Atlantic Research Corporation (ARC) conducts periodic tests of solid propellant rocket motors as part of its research, development, and production program for the armed forces. ARC conducts these tests in strict compliance with the emission limits and other conditions of its permits. Air dispersion modeling of the worst-case scenario for ARC's rocket motor test operations shows that the permitted emissions will not result in any violation of national ambient air quality standards or significant ambient air concentration guidelines. Thus, DEQ is satisfied that ARC's rocket motor test operations are conducted in a manner that does not jeopardize human health or the environment.

The standards for particulate matter with which ARC must comply require the company to certify compliance through a determination made using EPA's "Method for the Visual Determination of the Opacity of Emissions from Stationary Sources" (40 CFR Part 60, Appendix A, Method 9) or an alternate method. Method 9, however, is inappropriate because most of ARC's tests last less than the 6-minute minumum specified for the opacity readings that demonstrate a source's compliance with the standards. Thus, DEQ's inspector cannot observe the source's normal performance for the required duration of the test. The EPA-approved Alternate Method 1, "Determination of the Opacity of Emissions from Stationary Sources Remotely by Lidar," cannot be substituted for Method 9 because DEQ lacks the resources necessary to implement and use this method. For its rocket motor test operations, therefore, ARC has no

appropriate method by which it can demonstrate compliance with the board's opacity standards, although it is legally obligated to do so.

A variance for each of ARC's facilities will eliminate this problem. If the board grants ARC the variances, the opacity standards would not be applicable requirements for the rocket motor test operations at the two facilities. Thus, ARC would not face the problem of certifying or demonstrating compliance with the opacity standards for the rocket motor test operations at these two facilities. In support of ARC's request for these variances, the department requested that ARC prepare a technical support document before the department requested the board's approval of the variances. This technical support document was prepared by ARC, was reviewed and approved by department enforcement staff and EPA, and is attached to this board book item.

The department is therefore requesting the board's approval of two draft final variances that meet federal and state statutory and regulatory requirements. Approval of the variances will ensure that the Commonwealth will be able to meet its obligations under the federal Clean Air Act.

PUBLIC PARTICIPATION REQUIREMENTS

Because the variances are regulations, they are subject to the public participation requirements of § 10.1-1307 C of the Code of Virginia. Because they are classified as "exempted regulations," however, they are exempt from parts of the normal regulatory process under the provisions of §§ 2.2-4007 L, -4013 E, -4014 B, and -4015 B of the Administrative Process Act. Section 10.1-1307 C requires a public hearing with a 30-day notice; § 10.1-1307.01 requires an additional 15-day comment period beyond the date of the hearing. Because the variances will be submitted as a SIP revision, they are subject to federal public participation requirements. In order to meet these requirements, the public participation activities described below were conducted.

PUBLIC PARTICIPATION ACTIVITIES

To solicit comment from the public on the proposal, the department issued a notice that provided for receiving comment during a comment period and at a public hearing. No one attended the hearing, and no comments were received during the comment period.

SUMMARY OF DRAFT VARIANCE

Below is a brief summary of the substantive provisions of the variances that were originally proposed for public comment. (Chapter 220 applies to the Orange County facility; Chapter 221 applies to the Gainesville facility.)

1. 9 VAC 5-220/221-10 specifies the facility to which the provisions of the variance apply.

2. 9 VAC 5-220/221-20 defines words and phrases used in the variance.

3. 9 VAC 5-220/221-30 specifies that (i) the standard for visible emissions in 9 VAC 5-50/40-80 shall not apply to the rocket motor test operations at the facility and that (ii) the particulate matter emissions from those operations shall be limited to 714 pounds per hour.

4. 9 VAC 5-220/221-40 specifies provisions for determining compliance, monitoring, recordkeeping, and reporting.

5. 9 VAC 5-220/221-50 specifies provisions for transfer of ownership of the facility.

6. 9 VAC 5-220/221-60 specifies that future amendments to 9 VAC 5-50/40-80 shall not apply to rocket motor test operations at the facility unless the board amends this variance to specifically address the applicability of the regulatory amendments to those operations.

SUMMARY OF CHANGES TO PROPOSAL

The department is recommending no changes to the proposal.

SPECIAL CONSIDERATIONS

1. The character and degree of injury to, or interference with, safety, health, or the reasonable use of property which is caused or threatened to be caused:

The opacity variance ARC seeks would cause no injury to or interference with safety, health, or the reasonable use of property. ARC's current rocket motor test operations are conducted in strict compliance with the permits issued by the department for the two facilities. The department issued these permits after considering the effects of ARC's emissions on ambient air quality and concluded that with the appropriate limitations in the permits, the company's rocket motor test operations would not jeopardize human health or the environment. The same would be true of future rocket motor test operations because they would also be bound by the limits and terms in the new source review and Title V permits for the Orange County facility and the state operating permit for the Gainesville facility. Thus, the variances would not cause any injury to or interfere with safety, health, or reasonable use of property in the vicinity of the company's two facilities.

2. The social and economic value of the activity involved:

ARC employs about 25 management, staff, and hourly workers at its Orange County facility and about 350 management, staff, and hourly workers at its Gainesville facility. Through its payrolls and the purchases of local goods and services, ARC contributes millions of dollars annually to the local economies near the Orange County and Gainesville facilities. Consequently, ARC is an important economic contributor to each locality. The variances ARC seeks from the board would help stabilize the long-term economic viability of the Company's two Virginia facilities. Without the opacity variances, ARC would be forced to conduct the research, development, and production of future generations of military rockets at the company's other facilities outside of Virginia. This would severely jeopardize the long-term viability of ARC's two Virginia facilities. ARC is one of only a few companies that support the U.S. military through the research, development, and production of rocket motors essential for our national defense and our country's expanded peacekeeping role around the world. The work ARC does at its Virginia facilities helps the U.S. maintain military readiness and worldwide supremacy in these volatile times. ARC considers its role vital to the defense of America and our country's interests throughout the world, and the company is proud

of the role it plays in this regard. The opacity variances ARC seeks from the board would allow the company's Virginia facilities to continue to fulfill their vital role in our national defense.

3. The suitability of the activity to the area in which it is located:

ARC has been testing rocket motors at its Gainesville facility since the 1950's and at its Orange County facility since 1990. ARC has obtained all necessary local approvals for construction and operation of these facilities. For example, ARC has been issued special use permits for the facilities by Orange County and Prince William County. The company operates the facilities in strict compliance with local permits, approvals, and applicable ordinances. The opacity variances ARC seeks from the board would have no effect whatsoever on the suitability of the company's rocket motor test operations for the areas in which they are located.

4. The scientific and economic practicality of reducing or eliminating the discharge resulting from such activity:

Current indications are that EPA will not mandate emission controls in its upcoming proposal of MACT standards for rocket engine test firing operations, thus implying that EPA recognizes that emission controls are not technically and economically practicable for rocket motor test operations such as ARC's. It is important to recall that opacity during ARC's rocket motor testing results from particulate matter emitted during the tests. Thus, the "discharge resulting from the activity" is not opacity; the discharge is particulate matter. Annual emissions of PM and PM_{10} from the facilities are limited by terms in the current NSR and upcoming Title V permits for the Orange County facility and the current state operating permit for the Gainesville facility. These emission limits are based in part on considerations of the scientific and economic practicability of reducing or eliminating the emissions from ARC's rocket motor test operations.

SUPPORTING DOCUMENTATION

Immediately following this agenda memo are the following documents:

1. The draft final variances and orders.

2. The technical support document.

DEPARTMENT RECOMMENDATION

1. It is recommended that board issue the attached two orders, to be effective upon signature of the chairman, that grant the variances.

2. It is also recommended that the board adopt 9 VAC 5-220-10 et seq. and 9 VAC 5-221-10 et seq. with an effective date of December 1, 2002.

3. It is recommended that the variances as adopted be submitted to EPA as a State Implementation Plan Revision.

SUBJECT: Control Technology Determinations for Major Sources of Hazardous Air Pollutants (Rev. E02) - Request for Board Action

INTRODUCTION

As required under the Clean Air Act, the federal § 112(j) regulations apply if EPA misses a deadline for the promulgation of a hazardous air pollutant standard established in the source category schedule for standards. In such a case, the owner of a major source of hazardous air pollutants in a source category for which EPA has failed to promulgate a standard is required to submit an application for the purpose of enabling a state to determine, on a case-by-case basis, emission limitations that meet the criteria for maximum achievable control technology (MACT). The federal regulations contain provisions addressing requirements for the content of permit applications, the establishment of the emission limitations by a state, the criteria for the state to determine completeness, and compliance dates.

9 VAC 5 Chapter 60, Article 3 (9 VAC 5-60-120 et seq.) is Virginia's equivalent to the federal § 112(j) regulations. Adopted by the State Air Pollution Control Board on January 1, 2001, this regulation now needs to be updated to conform to recent changes in the federal regulations.

The Department is requesting approval of draft final regulation amendments that meet federal statutory and regulatory requirements. Approval of the amendments will ensure that the Commonwealth will be able to meet its obligations under the federal Clean Air Act.

SUMMARY OF AMENDMENTS TO REGULATION

The amendments update a state regulation that essentially duplicates federal regulatory provisions concerning control technology determinations for major sources of hazardous air pollutants under § 112(j) of the federal Clean Air Act. The original state regulation was based on 40 CFR 63.2 and 40 CFR 63.50-63.56. The regulation amendments are based on changes to the federal regulations promulgated in 67 FR 16582, April 5, 2002, which were determined through settlement negotiations between EPA and petitioners requesting a review of the § 112(j) provisions. The amendments clarify the applicability requirements and extend the timing of the permit application schedule, thus easing the regulatory burden on the affected sources.

PUBLIC PARTICIPATION REQUIREMENTS

Because the state regulations are essentially the same as the federal, the state regulations are exempt from all state public participation requirements under the provisions of § 2.2-4006 A 4 of the Administrative Process Act, but notice of the regulation adoption must be forwarded to the Registrar for publication in the Virginia Register 30 days prior to the effective date. Also, the Registrar must agree that the regulations are not materially different from the federal version and are, therefore, exempt from the state public participation requirements and must notify the agency accordingly. This notification and the notice of adoption will be published in the Virginia Register subsequently. Also, because the regulations will not be submitted as a SIP revision, they are not subject to federal public participation requirements either. Therefore, no public hearing or public comment period was advertised.

SUPPORTING DOCUMENTATION

Immediately following this agenda memo are the draft final regulation amendments.

DEPARTMENT RECOMMENDATION

1. It is recommended that the Board adopt the attached proposal with an effective date of December 1, 2002.

2. In adopting this proposal, the Board should affirm that it will receive, consider, and respond to petitions by any person at any time with respect to reconsideration or revision, as provided in § 2.2-4006 B of the Administrative Process Act.

SUBJECT: Northern Virginia Vehicle Emission Inspection and Maintenance (I/M) Program (9 VAC 5 Chapter 91, Rev. MG) - Public Participation Report and Request for Board Action

INTRODUCTION

Vehicle emission inspection and maintenance (I/M) programs achieve their objective by identifying vehicles that have high emissions as a result of one or more malfunctions and requiring them to be repaired. Minor malfunctions in the emissions control system can increase emissions significantly. I/M programs provide a way to check whether the emission control systems on a vehicle are working correctly. All new passenger cars and trucks sold in the United States today must meet stringent air pollution standards but they can only retain this low-polluting profile if the emission controls and engine are functioning properly. An I/M program is designed to ensure that vehicles stay clean in actual use. This, in turn, can substantially reduce the amount of volatile organic compounds, carbon monoxide, and nitrogen oxides emitted to the ambient air, thereby reducing the formation of ozone, lowering ozone concentrations, and contributing toward attainment of the national ambient air quality standards.

The current program requires that affected vehicles be presented to emissions inspection stations biennially to receive an emissions inspection. This is accomplished through a network of service stations, repair garages, and other similar facilities that perform the inspections. Vehicles that fail the test are denied motor vehicle registration. Retests, after failure and repair, are free if accomplished within 14 days of the test and performed by the emissions inspection station that performed the initial test. If a motorist wishes to request a waiver of the test, an expenditure of at least $450 on emissions-related repairs is required. The cost amount is adjusted each January by applying the Consumer Price Index released the previous fall by the federal government.

The geographic coverage of the program consists of the counties of Arlington, Fairfax, Loudoun, Prince William, and Stafford; and the cities of Alexandria, Fairfax, Falls Church, Manassas, and Manassas Park. Cars and trucks weighing up to 10,000 pounds and are 25 years old and newer are subject to an exhaust emissions inspection using acceleration simulation mode (ASM) equipment which tests cars under "loaded" conditions using a dynamometer. On- Board Diagnostics Systems (OBD) on vehicles so equipped will also be inspected. In addition, random testing of vehicles is accomplished using either roadside pullovers or a remote sensing device next to the roadway. Failing vehicles are required to report to an inspection for an out-of-cycle test.

The proposed amendments to the current program make a number of revisions to conform to changes in Virginia law and federal regulations, as well as to conform to current testing procedures and to enhance program enforcement.

As you may recall, at the May Board meeting we informed the Board that we would be holding another public comment period on Rev. MG to satisfy federal requirements. We conducted the public comment period and received some comments.

The Department is requesting approval of draft final regulation amendments that meet federal statutory and regulatory requirements. Approval of the amendments will ensure that the Commonwealth will be able to meet its obligations under the federal Clean Air Act.

PUBLIC PARTICIPATION ACTIVITIES

To solicit comment from the public on the proposed regulation amendments, the Department issued a notice that provided for receiving comment during a comment period and at a public hearing. The summary and analysis of public testimony is attached.

SUMMARY OF CHANGES TO PROPOSAL

At the May Board meeting we informed the Board that we would be holding another public comment period on Rev. MG to satisfy federal requirements. We conducted the public comment period and received some comments. All except one are without merit.

One commenter noted that 9 VAC 5-91-380 F 4 says an inspector is not to provide his identification number to anyone except department personnel, yet in 9 VAC 5-91-300 G requires stations to maintain a file of the name, address and inspector identification numbers of the currently employed inspectors. These provisions are in conflict.

To fix this oversight, we would like to initiate a new regulatory action using an exemption under § 2.2-4006 A of the Administrative Process Act.

SUPPORTING DOCUMENTATION

Immediately following this agenda memo are the following documents:

1. The summary and analysis of public testimony.

2. The draft final regulation amendments.

DEPARTMENT RECOMMENDATION

1. It is recommended that the Board reaffirm its decision of May 21, 2002 to adopt the attached proposal, with an effective date of October 1, 2002.

2. It is recommended that the proposal, if adopted, be submitted to EPA as a State Implementation Plan Revision.

SUBJECT: Northern Virginia Vehicle Emission Inspection and Maintenance (I/M) Program (9 VAC 5 Chapter 91, Rev. MI) - Public Participation Report and Request for Board Action

INTRODUCTION

As you may recall, at the May Board meeting we informed the Board that we would be

holding another public comment period on Rev. MG to satisfy federal requirements. We conducted the public comment period and received some comments.

One commenter noted that 9 VAC 5-91-380 F 4 says an inspector is not to provide his identification number to anyone except department personnel, yet in 9 VAC 5-91-300 G requires stations to maintain a file of the name, address and inspector identification numbers of the currently employed inspectors. These provisions are in conflict.

While editing the final, language was inadvertently added to 9 VAC 5-91-380 F 4 that prohibited the release of identification numbers to anyone but department personnel. The addition of this language was an error.

The Department is requesting approval of a draft final regulation amendment that will correct this technical error.

PUBLIC PARTICIPATION REQUIREMENTS

Because the amendment consists only of a correction of a technical error, the amendment is exempt from all state public participation requirements under the provisions of § 2.2-4006 A 3 of the Administrative Process Act; but, notice of the amendment adoption must be forwarded to the Registrar for publication in the Virginia Register 30 days prior to the effective date. Also, the Registrar must agree that the amendment consists only of a correction of a technical error and is, therefore, exempt from the state public participation requirements and must notify the agency accordingly. This notification and the notice of adoption will be published in the Virginia Register subsequently. Because the amendment will be submitted as a SIP revision, it is subject to federal public participation requirements; however since the provision in question has already been subject to public participation and the change is being made in response to public comment, there is no further need for any additional public hearing/comment period.

SUMMARY OF PROPOSED AMENDMENT

The Department is recommending that the following change be made to 9 VAC 5-91-380 F 4.

> Emissions inspector identification numbers and access codes are valid only for the person to whom they are issued. Emissions inspectors shall not provide ~~identification numbers or~~ access codes to anyone except department personnel upon request.

SUPPORTING DOCUMENTATION

Immediately following this agenda memo is the draft final regulation amendment.

DEPARTMENT RECOMMENDATION

1. It is recommended that the Board adopt the attached proposal, with an effective date of December 1, 2002.

2. It is recommended that the proposal, if adopted, be submitted to EPA as a State Implementation Plan Revision.

SUBJECT: Emission Trading, Virginia NOx Budget Trading Program (9 VAC 5 Chapter 140, Rev. H02) - Request for Board Action

INTRODUCTION

On May 21, 2002, the Board adopted the final regulation concerning Emissions Trading, Virginia NOx Budget Trading Program (9 VAC 5 Chapter 140). The final regulation was published in the Virginia Register on June 17, 2002 and became effective on July 17, 2002. The regulation was submitted to EPA as a revision to the Virginia State Implementation Plan on June 25, 2002.

The purpose of the regulation is to establish general provisions addressing applicability, permitting, allowance allocation, excess emissions, monitoring, and opt-in provisions to create a Virginia NOx Budget Trading Program as a means of mitigating the interstate transport of ozone and nitrogen oxides in order to protect public health and welfare. The regulation was promulgated to create an enforceable mechanism to assure that collectively, all affected sources will not exceed the total NOx emissions budget established by regulation for the year 2007 ozone season and to provide the regulatory basis for a program under which the creation, trading (buying and selling) and registering of emission credits can occur. Furthermore, the regulation identifies specific source categories that are covered by the budget; these include electric generating units (EGUs) with a nameplate capacity greater than 25 MWe and non-electric generating units (non-EGUs) above 250 mmBtu.

The Department is requesting authorization to proceed with development of the proposal without the use of the participatory approach and the public meeting during the proposed regulation development stage. The proposal will correct an EPA identified deficiency in the final Virginia regulation. Approval of this request will aid in ensuring that the Commonwealth will be able to meet its obligations under the federal Clean Air Act. The rationale for this recommendation may be found below.

DISCUSSION

We have received an informal notice from EPA that it intends to grant conditional approval of the submittal because of a deficiency in the start date for flow control. The state regulation uses a start date of 2006, whereas EPA requires a date of 2005. We will be given a limited time to correct this deficiency; it could be as short as one year. The regulation development and adoption process in Virginia typically takes two or more years to complete.

Sources have flexibility to save unused allowances (carry over for use in future) via the banking portion of the emissions trading program. “Flow control” is used to minimize emissions variability with the use of banked allowances. Flow control provides an “insurance policy” that is triggered only when saved allowances equal more than 10% of trading budget; and if triggered, sets a 2-for-1 rate for saved allowances used above a specified level. EPA maintains that some form of management is necessary to discourage the use of a large number of banked allowances in a given control period and to limit the negative impact of excessive use of banked allowances on the trading program budget and therefore, the environment. Flow control is a restriction on use of emissions allowances at certain times, or within certain areas. One use of flow control management is to discourage the excessive use of banked allowances during periods when the potential of increased emissions to adversely affect air quality is likely. There is concern that

during a really hot summer sources would deplete their banks of excessive allowances while operating at full electrical generating capacity and essentially providing very little reductions in emissions for that particular control period, leading, it was speculated, to adverse impacts on air quality.

PUBLIC PARTICIPATION FOR REPROPOSAL

Under the provisions of the board's regulatory public participation procedures (9 VAC 5-170-100 C 1 and D 2), the board may authorize the department to proceed without the participatory approach (ad hoc groups or advisory panels) or the public meeting at the end of the NOIRA public comment period. Given that development of the proposal will only involve the changing of a date, it is unlikely that any worthwhile input would be gained by holding the meeting or using the participatory approach during the development of this proposal. Also, proceeding without these steps will aid the department in expediting the development of the proposal.

DEPARTMENT RECOMMENDATION

It is recommended that the Board authorize the department to proceed with development of the proposal without the use of the participatory approach and the public meeting during the proposed regulation development stage.

SUBJECT: Report on Air Quality Program Activities

Below is a summary of the significant activities related to the Air Quality Program; attached is a detailed status report on regulatory projects.

NO_X SIP CALL

In March 1995, EPA agreed to work with the Environmental Commissioners of 37 states to deal with the issue of ozone nonattainment in areas designated "Serious" and above as established by the 1990 Clean Air Act Amendments. The 37 states included the OTC states, southern states, midwestern states, and other states bordering the Mississippi River on the west plus Texas, Oklahoma, Kansas, Nebraska and the Dakotas. This group of states was called the Ozone Transport Assessment Group (OTAG). The Serious and above areas included the Northeast corridor from northern Virginia through New England or the OTC (Ozone Transport Commission) states; Atlanta, Georgia and the greater Chicago area. The study was to include extensive air quality modeling to determine whether transport of ozone precursor pollutants (nitrogen oxides or NO_X and volatile organic compounds or VOCs) was affecting the ability of these nonattainment areas to attain the health based one-hour ozone air quality standard. Five states did not support the OTAG recommendations because they felt that more detailed technical analysis should be performed before recommendations were made or a SIP call issued. Many also questioned the legality of a SIP call at this time. These five states were Alabama, Kentucky, Michigan, Virginia, and West Virginia. Some of the dissenting states, including Virginia, did not simply take issue with the EPA proposal but developed an alternative proposal under the auspices of the Southeast and Midwest Governor's Ozone Coalition. This alternative proposal was developed because the EPA SIP call requires infeasible and unnecessary emission reductions that will adversely affect the economy of the Commonwealth of Virginia without a commensurate improvement in air quality.

In November 1997 EPA proposed a NO_X SIP call based upon selected OTAG

recommendations. The SIP call is a “one size fits all” approach that ignores key OTAG recommendations that do not support the EPA action. During the public comment period on the proposed SIP Call Rule, thirteen states, including Virginia, submitted an alternative proposal to EPA. EPA rejected that proposal, however, and on September 30, 1998, the EPA Administrator signed the final version of the SIP call requiring submission of revised SIPs by September 30, 1999. The final version of the SIP call appeared in the Federal Register on October 27, 1998 (63 FR 57356).

In late November 1998, the Commonwealth of Virginia and other states, together with utility industry representatives, filed a petition to review with the DC Circuit Court to overturn the NO_X SIP call because it violates the Clean Air Act. The Court was also asked to delay the September 30, 1999 deadline for SIP submittals until April 2000 in order to provide adequate time to prepare the SIP revisions.

In May 1999, the District of Columbia Circuit Court granted a stay for six months or until a decision might be rendered on the merits of the petition. On March 3, 2000, the court decided in EPA’s favor. On April 20, however, Virginia and other states petitioned the court for an en banc hearing. The petition for rehearing would further stay the deadline for SIP submittals.

On June 22, 2000, the U.S. Circuit Court of Appeals for the District of Columbia rejected requests for the en banc hearing on the original NO_X SIP call decision. Only one judge dissented. The Court also lifted the stay on submittal of NO_X SIP call SIP revisions, and set a date of October 30, 2000 for submittal by the affected 19 states.

On August 4, 2000, six states, including Virginia, asked a federal appeals court to stay the deadline for states to submit NO_X SIP call SIP revisions, in order to gain more time to take the case to the Supreme Court. Virginia and the other appeal participants have stated in their motion that the SIP submission deadline should be delayed at least until the high court decides whether to accept the case, or at the latest until the high court makes a final determination on the merits of the rule.

Meanwhile, electric utilities and labor groups have filed briefs asking the D.C. Circuit Court to change the NO_X SIP call rule's compliance deadlines for air pollution sources to a later date. The underlying EPA rule had a SIP submittal deadline of September 30, 1999, and a source compliance deadline of May 1, 2003. On August 30, 2000, the U.S. Circuit Court of Appeals for the District of Columbia issued an order changing the NO_X SIP call rule's compliance deadlines for air pollution sources to May 31, 2004.

In the Fall of 2000, several industry groups and seven States, including Virginia, asked the U.S. Supreme Court to overturn the 2-1 decision of the D.C. Circuit Court of Appeals upholding the NOx SIP call rule. The petitioners argued that EPA had exceeded its authority in setting the rule and that EPA had improperly considered the cost of air pollution controls in determining the degree to which each affected state must reduce emissions.

On March 5, 2001, without comment, the U.S. Supreme Court denied the petitions for certiorari challenging EPA's NOx SIP call rule. Thus, the core elements of the NOx SIP call remain in place. However, there are still two suits pending in the D.C. Circuit Court challenging EPA's emission budgets, one alleging faulty growth projections and the other alleging faulty public participation procedures in developing revised budgets. Brought by Industry groups, their position is that EPA cannot implement the NOx SIP

call until these issues are resolved.

On June 8, 2001, the U.S. Circuit Court of Appeals for the District of Columbia remanded to EPA the growth factors for EGUs, as well as the agency's source definitions. Most other pertinent claims were rejected.

Another factor affecting the issue of implementation of the NOx SIP call rule is the litigation challenging EPA's rule under § 126 of the Clean Air Act. Plaintiffs charged that EPA's rule requiring many power plants and other NOx sources in several midwestern and southeastern states to comply with emission limits established by EPA and to participate in an emissions trading program was inconsistent with the Clean Air Act, arbitrary, capricious and technically deficient. The NOx SIP call and § 126 rules are not "in sync" because they apply to somewhat different sources and have different compliance dates.

On May 15, 2001, the U.S. Circuit Court of Appeals for the District of Columbia remanded the rule to EPA in order for the agency to "(1) properly justify either the current or a new set of [electric generating unit] utilization growth factors to be used in estimating utilization in 2007, and (2) either alter or properly justify its categorization of cogenerators that sell electricity to the electric grid as [electric generating units]." Aside from the remand of these two issues, the court otherwise found that "[w]ith respect to all other issues, including those not discussed expressly herein, the petitions are denied," thus upholding EPA's authority to impose emission limits on affected sources by 2003.

On August 3, 2001 (66 FR 40609), EPA made available data on the growth rates for heat input by electric generating units for both the NOx SIP Call and the rule responding to state petitions under Section 126 of the Clean Air Act. With this notice, EPA has maintained that, based on the existing record, its preliminary view is that the growth calculations and methodology used were reasonable and that they can be supported with a more detailed explanation that takes into account the concerns of the D.C. Circuit Court. EPA is also considering new data that has recently been placed in the dockets for EPA's ozone transport rules and is seeking public comment.

On April 30, 2002 (67 FR 21522), EPA promulgated a final regulation to address the June 8, 2001 and May 15, 2001 court decisions mentioned above, along with an August 24, 2001 court decision relating to the 126 rules. In this action EPA revised the compliance date and other related dates for facilities subject to EPA's ozone transport rule, known as the Section 126 Rule. In an effort to harmonize compliance dates, EPA has established May 31, 2004 as the compliance date for all affected sources under both the NOx SIP Call and the Section 126 Rule. In a previous action, EPA had already extended the compliance date for electric generating units (EGUs) until May 31, 2004, matching the deadline established by the D.C. Circuit for the NOx SIP Call.

On May 1, 2002 (67 FR 21868), EPA announced its decision to retain the original growth projections used in setting limits on nitrogen oxides (NOx) emissions as part of the NOx SIP Call and the Section 126 Rule, designed to reduce interstate transport of ozone. In making this decision, EPA was responding to the D.C. Circuit Court decision that remanded the heat-input growth rates to EPA for the agency to either justify or replace with new growth rates (with justification). After a thorough review, during which EPA reexamined the growth rates and the methodology used to develop them and analyzed more recent information on actual heat input, EPA has confirmed the reasonableness of its methodology and the resulting growth rates.

VIRGINIA RESPONSE TO NOx SIP CALL

Many areas within the eastern half of the United States petitioned EPA regarding their inability to achieve the ozone standard due to significant amounts of ozone and oxides of nitrogen (NOx), a precursor to ozone, being transported across state boundaries. EPA made a determination (Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone; 63 FR 57491, October 27, 1998, as amended at 63 FR 71225, December 24, 1998; 64 FR 26305, May 14, 1999; and 65 FR 11230, March 2, 2000) that sources in 22 states and the District of Columbia emitted NOx in amounts that significantly contribute to nonattainment of the ozone NAAQS in one or more downwind states. EPA also required that each of the affected upwind jurisdictions (sometimes referred to as upwind states) submit SIP revisions prohibiting those amounts of NOx emissions which significantly contribute to downwind air quality problems. Virginia was included as one of the upwind states.

The rulemaking, known as the NOx SIP Call Rule (40 CFR 51.121), also includes statewide NOx emissions budget levels that each state must achieve by the year 2007. Furthermore, the NOx SIP Call Rule identifies specific source categories that are covered by the budget; these include electric generating units (EGUs) with a nameplate capacity greater than 25 MWe and non-electric generating units (non-EGUs) above 250 mmBtu. Failure to achieve the budget will result in a Federal Implementation Plan (FIP) which EPA has promulgated as 40 CFR Part 97 (65 FR 2727, January 18, 2000).

The NOx SIP Call Rule identifies Virginia, along with other states and the District of Columbia, as having substantially inadequate SIPs to comply with requirements of the Clean Air Act that address interstate transport of nitrogen oxides in amounts that will contribute significantly to nonattainment in one or more other States with respect to the ozone national ambient air quality standard. It mandates that, for each jurisdiction identified, a SIP revision must be submitted to EPA that imposes enforceable mechanisms to assure that, collectively, all sources identified in the budget will not exceed the NOx emissions projected for the year 2007 ozone season. The SIP revisions must include control measures to limit the amount of NOx so that the jurisdiction's budget is not exceeded. The control measures must be implemented no later than May 1, 2003 (later adjusted by the United States Court of Appeals for the District of Columbia Circuit to May 31, 2004). Emission reductions used to demonstrate compliance with the revision must occur during the ozone season. The revision must include a description of enforcement methods including monitoring compliance with each selected control measure and procedures for handling violations. For large electric generators and industrial boilers, the control measures must include a NOx mass emissions cap on each source, and impose a NOx emission rate so that the State can comply with the 2007 ozone NOx budget.

The NOx SIP Call Rule permits the states to include a budget trading program as an option in their SIP revisions. The use of this type of program is allowed under 40 CFR 51.121(p), and EPA provides a model NOx budget trading rule (hereafter called the EPA Model Rule) in 40 CFR Part 96 (63 FR 57514, October 27, 1998) of the NOx SIP Call Rule. In fact, EPA encourages states to use the EPA Model Rule and if the state chooses this approach the state's SIP revision will be automatically approved according to 40 CFR 51.121(p).

The original NOx SIP Call rule had a SIP submittal deadline of September 30, 1999, but

this was later changed to October 30, 2000 to accommodate the delay caused by the litigation.

On October 27, 2000, the Commonwealth submitted a NOx Budget Trading Program draft regulation based on 40 CFR Part 96; however the draft regulation was not fully adopted and the submittal did not meet EPA's criteria for being administratively complete. On November 8, 2000, the State Air Pollution Control Board approved 9 VAC 5 Chapter 140 (hereafter called the proposed regulation) and authorized it for release to seek public comment. The Board-approved proposed regulation had only minor variations from the draft regulation submitted on October 27, 2000.

By letter of December 18, 2000, the EPA Regional Administrator notified the Governor that the Commonwealth's submittal contained significant problems that would affect its approvability. On December 26, 2000 (65 FR 81366), EPA issued a finding that Virginia did not submit a complete, fully adopted SIP in response to the NOx SIP Call. The notice is effective January 25, 2001. If the Commonwealth does not make the required submittal, or the submittal is not found by EPA to be administratively complete, within 18 months of the effective date (July 25, 2002), EPA will impose certain sanctions.

On December 12, 2000, the Department submitted the proposed regulation to the Regional Office of EPA for preliminary review. By letter of March 9, 2001, EPA, Region III, provided its comments on the proposed regulation. EPA provided both (i) comments that identified certain changes that must be made to gain approval of the proposed regulation by EPA and (ii) comments suggesting changes to improve the quality of the proposed regulation. The mandatory changes addressed the value of the emission trading budget for EGUs and the compliance supplement pool, both of which are larger in the proposed regulation than in the EPA NOx SIP Call Rule. The other comments suggested changes to make the proposed regulation consistent with the version of the federal regulation (40 CFR Part 97) that is to be used if EPA should impose a federal implementation plan on the Commonwealth.

On July 16, 2001, the Department issued a notice seeking comment on the proposed regulation. A public hearing was held August 22, 2001 and the comment period closed September 14, 2001. Action by the Board on the final regulation was expected at the January 2002 meeting but was delayed until the February 27, 2002 meeting at the request of the Governor's Office. Final action was taken on the regulation at the February 27 meeting but publication of the final regulation in the Virginia Register on March 25, 2002 was accompanied by a notice of suspension and reopening for public comment. This action was taken due to the substantive differences between the proposed regulation and the final. The second comment period closed on April 24, 2002 and the Board approved the final regulation at its May 21, 2002 meeting.

On June 25, 2002, the regulation was submitted to EPA as Virginia's response to the NO_X SIP Call, along with the initial allocations for the affected units. On July 23, 2002 (67 FR 48032), EPA issued a notice determining the submittal to be administratively complete. EPA has yet to issue the notice of approval.

CURRENT 1-HOUR OZONE AIR QUALITY STANDARD

On July 18, 1997 (62 FR 38856), U.S. Environmental Protection Agency (EPA) issued a regulation replacing the 1-hour 0.12 parts per million (ppm) ozone national ambient air

quality standard (NAAQS) with an 8-hour standard at a level of 0.08 ppm. Also, on July 18, 1997, EPA announced that the 1-hour ozone NAAQS would continue to apply to nonattainment areas until they attained the 1-hour NAAQS. EPA did this to provide continuity in public health protection during the transition to implementation of the new NAAQS. EPA codified this approach in a regulation providing that the 1-hour standard would no longer apply to an area upon a determination by EPA that the area was attaining the 1-hour standard.

Also, on July 16, 1997, the President issued a memorandum (62 FR 38421, July 18, 1997) to the EPA Administrator indicating that EPA would publish an action identifying ozone areas where the 1-hour, 0.12 ppm standard would no longer apply. The memorandum recognized that for areas where the air quality did not currently attain the 1-hour standard, the 1-hour standard would continue in effect. The memorandum also recognized that provisions of subpart 2, part D of title I of the Clean Air Act would apply to areas that remained subject to the 1-hour standard and that were designated nonattainment until EPA determined that the area was attaining the 1-hour standard.

The EPA Administrator signed a direct final rule on December 29, 1997 and EPA published the rule in the Federal Register of January 16, 1998 (63 FR 2726). The rule was scheduled to be final on March 17. As result of this EPA action, the 1-hour standard no longer applied to those areas where the 1-hour standard would apply (that is, attainment and maintenance areas), and the areas were to be subject only to the new 8-hour, .08 ppm requirement.

However, EPA made the decision to withdraw the rule after receiving adverse comments from environmental and industry groups. According to rulemaking procedure, EPA summarized the comments, addressed the issues that surfaced, and issued subsequent final rules on June 5, 1998 (63 FR 31014), July 22, 1998 (63 FR 39432), and June 9, 1999 (64 FR 30911). This final action by EPA left the Northern Virginia area as the only area in Virginia to which the 1-hour standard applies.

In an attempt to restore certainty to areas that have been without an enforceable Clean Air Act ozone standard for much of this year, EPA formally proposed (October 25, 1999, 64 FR 57424) reinstatement of its older 1-hour ozone standard across the country. EPA was forced to make this move in the aftermath of a May 1999 federal court ruling (see discussion above) that had essentially stopped implementation of a more stringent 8-hour standard. As a result of the ruling, EPA had to either reinstate the 1-hour standard or leave much of the country without enforceable ozone standards.

Subsequently, EPA took final action to reinstate its older, 1-hour ozone standard in nearly 3000 counties across the United States where it had been revoked, but gave a number of areas with "clean" air quality data additional time to show that they are in attainment with the standard.

On July 20, 2000 (65 FR 45182) EPA officially reinstated the older, 1-hour standard, requiring the affected counties to take some additional action to protect their air quality or to avoid future increases in air pollution. Generally, this reinstatement restores areas to the air quality designation they had when EPA moved to revoke the standard. In most areas, the action will have little practical effect; but in areas that have had air quality problems since the standard was revoked, this action will trigger air quality maintenance plans.

At the same time, EPA also delayed the effective date for the reinstatement for at least 90

days and gave areas with clean air quality data even more time before the standard takes effect. Many of the "clean data areas" had postponed obtaining formal redesignation to attainment status because EPA had revoked the 1-hour standard. But reinstatement threatened to trigger immediate imposition of additional air quality controls in these "clean data" areas, including more stringent permitting requirements for new and modified stationary sources.

While EPA is reinstating the ozone standard, it is giving the clean data areas a full 180 days before the reinstatement takes place, which will allow them more time to prepare requests to EPA asking for redesignation to attainment. White Top Mountain meets the criteria for a clean data area. The reinstatement has triggered pre-existing air quality contingency measures in the Richmond Ozone Maintenance Area, which is legally in attainment with the older ozone standard, but violated it based on 1996-1998 data. Because the contingency measures in the current maintenance plan for the Richmond area are not consistent with the policies of the Commonwealth, the plan was revised. The most significant change to the plan is the removal of a motor vehicle inspection and maintenance (I/M) program as a contingency measure. The final plan was submitted to EPA on November 20, 2001.

On August 15, 2002, the Sierra Club notified the state and EPA of its intent to commence a civil action against Virginia officials for failure to implement the original maintenance plan for the Richmond area approved by EPA in a SIP revision on November 17, 1997. They state that the maintenance plan--in particular, the contingency measures (including I/M) found in the maintenance plan to be implemented in the event of ozone violations in the area-- was not carried out according to schedule. States are allowed by the Clean Air Act to revise their SIPs and maintenance plans in order to more expeditiously attain the ozone standard. As discussed in the previous paragraph, the plan was revised to replace the I/M program with more effective measures because it would have imposed considerable expense with negligible air quality improvement. In the meantime, we have requested that EPA expedite its approval of the maintenance plan.

The pre-existing air quality contingency measures will also be triggered for the Hampton Roads Ozone Nonattainment Area, which is legally in attainment with the older ozone standard, but has violated it based on 1999-2001 data. By letter of October 29, 2001, EPA officially notified the Commonwealth of the violation and the need to implement the contingency measures. However, as was the case with the Richmond area, changes will be needed before this is done.

Meanwhile, EPA had approved plans and control strategies to achieve the 1-hour standard in the Northern Virginia area. However, on July 2, 2002, the U.S. Court of Appeals for the DC circuit overturned EPA's approval of the SIP revisions (Virginia, along with Maryland and the District) submitted for the Washington DC metropolitan area, which extended the area's attainment deadline for ozone from 1999 to 2005. The court found that EPA lacked the authority to grant an extension of the attainment deadline from 1999 to 2005 without reclassifying the area as a severe nonattainment area. Although EPA had argued that it could extend the attainment deadline because of the impact of upwind emissions impeding the area's ability to attain the standard, the court responded that the Clean Air Act details the conditions under which EPA may extend an attainment deadline due to transport, and none of these conditions applied in this case. The court also directed EPA to determine which measures, if any, are reasonably available control measures (RACM) to be implemented by the states, as EPA's failure to analyze whether particular measures constituted RACM was arbitrary and capricious. Additionally, the court held the EPA had

no authority to approve the SIPs when they failed to include a rate of progress plan for the years after 1999, as the Clean Air Act makes inclusion of such a plan a requirement for approving a revised SIP. Finally, the court held that since the SIPs did not meet the Clean Air Act requirement to include contingency measures, then EPA did not have the authority to approve the SIPs. The court thus vacated EPA's approval of the SIPs, and remanded the matter to EPA for further consideration.

NEW 8-HOUR OZONE AIR QUALITY STANDARD

On July 18, 1997 (62 FR 38856), U.S. Environmental Protection Agency (EPA) issued a regulation replacing the 1-hour 0.12 parts per million (ppm) ozone national ambient air quality standard (NAAQS) with an 8-hour standard at a level of 0.08 ppm. An area's compliance with the 8-hour standard is measured by the 3-year average of the annual fourth-highest daily maximum 8-hour average ozone concentrations measured at each monitor within an area. The new primary standard became effective on September 16, 1997.

On May 14, 1999, the U.S. Appeals Court for the District of Columbia Circuit ruled that EPA has failed to offer an "intelligible principle" for setting the new 8-hour ozone standard at the current level. While the court did not reject the standard outright or technically overturn the agency's new ozone standard, it did rule that EPA had interpreted the Clean Air Act so broadly that the interpretation amounts to an unconstitutional delegation of power to the agency from Congress. At the heart of this reasoning is EPA's apparent failure to articulate an "intelligible principle" under the Clean Air Act for setting the standard at the current levels. The court, therefore, remanded the standard back to the agency in search of a "construction of the act" that satisfies constitutional requirements.

The court decision also says that the new ozone standard is not currently enforceable because of language in the 1990 Clean Air Act Amendments that specify an extended timeline for areas to attain the older, less stringent standard. Because the 1990 amendments extended the time for nonattainment areas to comply with the old 1-hour ozone standard, they preclude the EPA from requiring areas to comply either more quickly or with a more stringent ozone standard.

Subsequently, EPA requested a rehearing of the issue by the full court, after the panel ruled that the agency had failed to cite an "intelligible principle" under the Clean Air Act that authorized the agency to set standards at the level of stringency it chose.

In its October 29 ruling, the U.S. Court of Appeals for the District of Columbia Circuit denied EPA's request for a rehearing of its May 14 decision. The request for a rehearing by the full 11-judge panel garnered 5 votes, with EPA falling one vote short of the six needed to reopen the heart of the decision to additional scrutiny. Two of the court's judges did not weigh in on EPA's request.

In denying the request, the court essentially declined to rule on new EPA arguments defining the scope of the agency's authority to set the standards, saying the agency has not used those arguments in the rulemaking process. The court also left open the possibility of vacating the ozone standard at some point in the future, if a compelling case can be made that the rules would cause "imminent harm." In addition, the ruling leaves intact the original decision's call for the agency to consider beneficial health effects from ozone when setting health standards.

This ruling by the federal appeals court rejecting EPA's request that the court reconsider the landmark May ruling that blocked implementation of the air standards for ozone left EPA little recourse but to appeal to the Supreme Court. On May 22, 2000, the U.S. Supreme Court granted the EPA petition for review of the decision by the U.S. Court of Appeals for the District of Columbia Circuit remanding the ozone air quality standard.

In a unanimous opinion issued February 27, 2001, the Supreme Court reversed most of the D.C. Circuit Court's decision invalidating EPA's new 8-hour ozone standard, including striking down the decision that EPA must consider costs in setting ambient standards. However the Court remanded the case back to the D.C. Circuit Court and EPA to determine if the number chosen by EPA was arbitrary and capricious and for EPA to develop a legal mechanism for implementing the new 8-hour standard. EPA is now reconsidering implementation plans for the new ozone standard in light of the Supreme Court decision. The timetable for completion of guidance from EPA is uncertain but likely to be many months and perhaps years. In Virginia, all of the major urban/suburban centers and many counties in between would likely be designated as nonattainment areas. The Commonwealth would likely have to institute more stringent control programs for NOx and VOC emissions as part of the state implementation plan to get these areas into attainment.

A coalition of industry groups and states (Virginia not included) has resumed its legal battle against EPA air quality standards for ozone and particulate matter, relying heavily on the argument that the agency failed to show that standards were sufficient, “but not more than necessary,” to protect public health. The arguments, outlined in two legal briefs submitted to a federal court, reflect the industry and state effort to prove that EPA’s standard setting process was “arbitrary and capricious,” after the Supreme Court turned aside an earlier decision by the same court taking issue with the constitutionality of the controversial standards.

In the briefs, arguments against the gaps in EPA science resurface, including the claim that EPA’s ozone standard is improper because the agency failed to consider the benefits of ozone in reducing exposure to ultraviolet radiation. But the plaintiffs rely heavily on language in the Supreme Court’s ruling, suggesting that the proper basis for EPA’s decision should be that it set a standard “ ‘requisite’ – that is, not lower or higher than is necessary – to protect the public health with an adequate margin of safety.” But in their new briefs to the D.C. Circuit, the industry and state plaintiffs contend that the administrative record does not indicate that EPA used this “requisite” standard in its rulemaking procedures, and call for the standards to be overturned.

On November 14, 2001 (66 FR 57268), EPA published a proposed rule rejecting industry arguments that increased concentrations of ground-level ozone pollution can be beneficial to human health, saying there is no reliable data to suggest the pollutant has any positive side effects and that its tough 1997 rules for controlling ozone should not be loosened based on the argument. EPA’s rejection comes as part of a draft response to the May 1999 federal court ruling remanding the agency’s eight-hour ozone standard to EPA in part because the court wanted EPA to justify the rule in light of industry contentions that ozone can have beneficial health effects. In the Federal Register notice, EPA also notes that the available information on possible benefits of reduced exposure to ultraviolet light because of ozone pollution is “too uncertain” to warrant a relaxation of the agency’s 1997 eight-hour ozone standard. Therefore, EPA is proposing to reaffirm the standard. The response is open for public comment before it will be sent to the court.

On March 26, 2002, the U.S. Court of Appeals for the District of Columbia upheld the 8-hour ozone and fine particulate matter (PM) standards issued by EPA in 1997, finding the challenged standards neither arbitrary nor capricious. That EPA could not identify a safe level for a pollutant nor quantify precisely a pollutant's risk does not mean EPA cannot set a NAAQS, the court said. Rather, it means that EPA must err on the side of caution and set the NAAQS at a level it deems necessary and sufficient to protect public health with an adequate margin of safety, taking into account both the available evidence and the inevitable scientific uncertainties. The court applied a deferential standard of review, presuming that EPA's action was valid as long as a rational basis for the action was presented, and the court was satisfied after performing a searching and careful inquiry into the underlying facts. The court denied the petitioners' challenges, except to the extent further action is required by EPA under previous holdings by the Supreme Court and the D.C. Circuit Court in those cases challenging the standards.

Meanwhile, EPA continues its efforts to develop an implementation strategy that meets the Supreme Court's mandate. EPA hopes to have a set of alternatives that it can submit for comment soon and finalize a set of requirements by 2003. EPA will have new ozone data by 2003 and will be able to provide the necessary information by 2003 or 2004 so that states can begin to develop their implementation plans utilizing the updated data.

EPA should also be able to establish the geographic boundaries of the nonattainment areas by 2004. Then, states would have to specify how they plan to gain attainment status, including developing strategies. This should take place by 2006. EPA projects the following schedule:

- 2003 - Final implementation of the 8-hour ozone NAAQS.
- 2004 - Designation of the 8-hour nonattainment areas, and reinstatement of the NOx SIP Call for 8-hour standard.
- 2005 - Complete modeling for additional states and additional SIP calls.
- 2007 - Assess reductions from NOx SIP call.
- 2007/2008 - SIP attainment submission date.
- 2007/2008 - Projected SIP call compliance date.

On July 26, 2002 (67 FR 48896), EPA published a notice of a proposed settlement agreement between the Department of Justice and environmental groups affecting how EPA will implement the transition from the 1-hour ozone standard to the 8-hour ozone standard. The settlement would require EPA to issue a notice of proposed rulemaking stating that it will stay its authority to determine that an area has met the 1-hour ozone standard, which under 40 CFR 50.9(b) would mean the 1-hour ozone standard would no longer apply to that area (assuming the 8-hour standard has become fully enforceable and is not subject to any further legal challenge). Instead, the settlement provides that EPA will propose that the stay be effective until EPA takes final agency action on a subsequent rulemaking addressing whether EPA should modify this provision (on the applicability of the 1-hour standard after the 8-hour standard has become fully enforceable), given the Supreme Court's decision of February 27, 2001 regarding implementation of the 8-hour standard. Furthermore, EPA agrees in the settlement that in this subsequent rulemaking, EPA will state that it will consider and address any comments concerning (a) which, if any, implementation activities for an 8-hour standard would need to occur before EPA determines that the 1-hour standard no longer applies to an area, and (b) the effect of revising the ozone NAAQS on existing ozone designations. The environmental groups agree to dismiss their lawsuit if EPA meets the terms of the settlement agreement. Comments on the proposed settlement were due August 26, 2002.

REGULATORY
PROJECT STATUS REPORT

September 1, 2002

MINOR NEW SOURCE REVIEW (REV. YY, 9 VAC 5 CHAPTER 80, ARTICLE 6)

Action: Revise the permit procedures to (i) be consistent with federal requirements and (ii) streamline and simplify the permit program.

Status: The final regulation was adopted by the Board at its May 2002 meeting, to be effective September 1, 2002. It appeared in the Virginia Register on June 17, 2002 and the final review period ended 30 days later.

SPECIAL PROVISIONS (REV. D97, 9 VAC 5 CHAPTERS 10, 40, 50 AND 60)

Action: Update certain requirements (compliance, testing, monitoring and recordkeeping) to be consistent with federal requirements identified pursuant to the review of existing regulations mandated by Executive Order 15(94).

Status: The final regulation was adopted by the Board at its May 2002 meeting, to be effective August 1, 2002. It appeared in the Virginia Register on July 1, 2002 and the final review period ended 30 days later.

NO_X SIP CALL CONTROL PROGRAM (REV. D98, 9 VAC 5 CHAPTER 140)

Action: Develop a regulation, to include the necessary emission caps accompanied by an emissions trading program, to meet the requirements of the EPA NO_X SIP Call.

Status: The final regulation was adopted by the Board at its May 2002 meeting. It appeared in the Virginia Register on June 17, 2002 and the final review period ended on July 17, 2002 and the regulation became effective.

COMMERCIAL/INDUSTRIAL SOLID WASTE INCINERATORS (REV. J00, 9 VAC 5 CHAPTER 40, ARTICLE 47)

Action: Develop a regulation to meet the requirements of Sections 111(d) and 129 of the federal Clean Air Act and 40 CFR Part 60 Subpart DDDD of federal regulations.

Status: The proposed regulation was approved by the Board for public comment at the September 2001 meeting. The notice of public comment and proposed regulation appeared in the Virginia Register on September 9, 2002, and the notice appeared in newspapers in the affected areas on or about that same day and was subsequently sent to the Department mailing list. A public hearing is to be held in Richmond on October 10, 2002 and the public comment period ends on November 11, 2002. Presentation of the draft final regulation to the Board is unscheduled.

SMALL MUNICIPAL WASTE COMBUSTORS (REV. K00, 9 VAC 5 CHAPTER 40, ARTICLE 48)

Action: Develop a regulation to meet the requirements of Sections 111(d) and 129 of the

federal Clean Air Act and 40 CFR Part 60 Subpart BBBB of federal regulations.

Status: The proposed regulation was approved by the Board for public comment at the September 2001 meeting. The notice of public comment and proposed regulation appeared in the Virginia Register on September 9, 2002, and the notice appeared in newspapers in the affected areas on or about that same day and was subsequently sent to the Department mailing list. A public hearing is to be held in Richmond on October 10, 2002 and the public comment period ends on November 11, 2002. Presentation of the draft final regulation to the Board is unscheduled.

DIESEL ENGINES (REV. A02, 9 VAC 5 CHAPTER 230)

Action: Develop a regulation to establish testing and certification procedures for manufacturers of on-road heavy-duty diesel engines sold in Virginia. This action is being taken pursuant to Virginia's gubernatorial commitment to the other states of the Ozone Transport Commission for the Northeast United States.

Status: The notice of intended regulatory action appeared in the Virginia Register on August 12, 2002 and was subsequently sent to the Department mailing list. The meeting for general public input was held September 11, 2002 in Richmond. The ad hoc advisory group has yet to be formed. Presentation of the draft proposed regulation to the Board is unscheduled.

LANDFILLS (REV. B02, 9 VAC 5 CHAPTER 40, ARTICLE 43)

Action: Develop a regulation to meet the requirements of Sections 111(d) of the federal Clean Air Act and 40 CFR Part 60 Subpart Cc of federal regulations.

Status: The notice of intended regulatory action appeared in the Virginia Register on August 12, 2002 and was subsequently sent to the Department mailing list. The meeting for general public input was held September 11, 2002 in Richmond. The ad hoc advisory group has yet to be formed. Presentation of the draft proposed regulation to the Board is unscheduled.

VOC EMISSION STANDARDS (REV. C02, 9 VAC 5 CHAPTER 40)

Action: Develop VOC emission standards to achieve the necessary emissions reductions to stay within the SIP budget limit in order to safeguard federal approval of transportation projects in Northern Virginia. The regulations to be developed will apply to several source categories: (1) mobile equipment repair and refinishing; (2) solvent cleaning; (3) portable fuel container spillage control, (4) consumer products; (5) architectural and industrial maintenance coatings; and (6) additional NOx sources (industrial boilers, stationary combustion turbines, stationary reciprocating engines, emergency generators, load shaving units, cement kilns).

Status: The notice of intended regulatory action appeared in the Virginia Register on August 12, 2002 and was subsequently sent to the Department mailing list. The meeting for general public input was held September 11, 2002 in Richmond. The ad hoc advisory group has yet to be formed. Presentation of the draft proposed regulation to the Board is unscheduled.

HAZARDOUS AIR POLLUTANTS, 112(j) MACT (REV. E02, 9 VAC 5 CHAPTER 60,

ARTICLE 3)

Action: Update the existing regulation concerning control technology determinations for major sources of HAPs under §112(j) of the Clean Air Act to reflect the latest changes to 40 CFR 63.50 – 56.

Status: The draft proposed regulation has been developed. The regulation is exempt from the normal regulatory adoption process (including state public participation requirements) under the provisions of § 2.2-4006 A 4 c of the Administrative Process Act. Also, because the regulation will not be submitted as a state implementation plan (SIP) revision, it is not subject to federal public participation requirements either. Therefore, there was no public hearing or comment period. Presentation of the draft final regulation to the Board is scheduled for the September 2002 meeting.

NONMETALLIC MINERAL PROCESSING GENERAL PERMIT (REV. BG, 9 VAC 5 CHAPTER 510)

Action: Develop a general permit to provide terms and conditions that form the legally enforceable basis for the implementation of all substantive regulatory and statutory requirements applicable to new and existing emissions units in the nonmetallic mineral processing facilities.

Status: The proposed regulation was approved by the Board for public comment at its September 1999 meeting. The notice of public comment and proposed regulation appeared in the Virginia Register on December 20, 1999, and the notice appeared in newspapers in the affected areas on or about that same day and was subsequently sent to the Department mailing list. A public hearing was to be held in Richmond on January 25, 2000 and the public comment period was to end on February 18, 2000. Due to inclement weather, the public hearing was cancelled. The public hearing was rescheduled for March 29, 2000 and the public comment period extended to April 14, 2000. Presentation of the draft final regulation to the Board is scheduled for the September 2002 meeting.

CONTROL OF MOTOR VEHICLE EMISSIONS IN NORTHERN VIRGINIA (REV. MG, 9 VAC 5 CHAPTER 91)

Action: Revise the test and repair motor vehicle emissions inspection program in the Northern Virginia area to meet requirements of the Clean Air Act and state code regarding vehicle model years subject to the program.

Status: The final regulation was adopted by the Board at its May 2002 meeting, to be effective October 1, 2002. It appeared in the Virginia Register on June 17, 2002 and the final review period ended 30 days later.

ARC VARIANCES (REV. CV, 9 VAC 5 CHAPTERS 220 & 221)

Action: Develop variances for rocket motor testing operations at two facilities of the Atlantic Research Corporation that exempt the operations from the visible emissions standard.

Status: The proposed variance regulations have been developed. The regulations are exempt from the normal regulatory adoption process under the provisions of §§ 2.2-4007 L, -4013 E, -4014 D, and -4015 B of the Administrative Process Act. Public participation is being carried out under the provisions of §§ 10.1-1307 C and 10.1-1307.01

of the Code of Virginia. The notice of public comment and proposed regulations appeared in the Virginia Register on December 3, 2001, and the notice appeared in newspapers in the affected areas on or about that same day. A public hearing was held in Northern Virginia on January 3, 2002 and the public comment period ended on January 21, 2002. Presentation of the draft final regulations to the Board is scheduled for the September 2002 meeting.