the point of origin, (Datum NAD 1983), located 500 yards north of Cape Fear Memorial Bridge.

(26) Cape Fear River, Southport, NC, Safety Zone. All waters of the Cape Fear River within a 600 yard radius of the fireworks barge in approximate position 33°54′40″ N, 078°01′18″ W (Datum NAD 1983), approximately 700 yards south of the waterfront at Southport, NC.

(27) Green Creek and Smith Creek, Oriental, NC, Safety Zone. All waters of Green Creek and Smith Creek that fall within a 300 yard radius of the fireworks launch site at 35°01′29.6″ N, 076°42′10.4″ W (Datum NAD 1983), located near the entrance to the Neuse River in the vicinity of Oriental, NC.

(28) Pamlico River, Washington, NC, Safety Zone. All waters of the Pamlico River that fall within a 300 yard radius of the fireworks launch site at 35°32′19″ N, 077°03′20.5″ W (Datum NAD 1983), located 500 yards north of Washington railroad trestle bridge.

(29) Neuse River, New Bern, NC, Safety Zone. All waters of the Neuse River within a 360 yard radius of the fireworks barge in approximate position 35°06′07.1″ N, 077°01′35.8″ W (Datum NAD 1983), located 420 yards north of the New Bern, Twin Span, high rise bridge.

(30) Upper Potomac River, Alexandria, VA, Safety Zone. All waters of the Upper Potomac River within a 300 yard radius of the fireworks barge in approximate position 38°48′37″ N, 077°02′02″ W (Datum NAD 1983), located near the waterfront of Alexandria, Virginia.

(31) Potomac River, Prince William County, VA, Safety Zone. All waters of the Potomac River within a 200 yard radius of the fireworks barge in approximate position 38°34′08″ N, 077°15′34″ W (Datum NAD 1983), located near Cherry Hill, Virginia.

(32) Chincoteague Channel, Chincoteague, VA, Safety Zone. All waters of the Chincoteague Channel within a 360 yard radius of the fireworks launch location at the Chincoteague carnival waterfront in approximate position 37°55′40.3″ N, 075°23′10.7″ W (Datum NAD 1983), approximately 900 yards southwest of Chincoteague Swing Bridge.

(33) Atlantic Ocean, Virginia Beach, VA, Safety Zone. All waters of the Atlantic Ocean enclosed within a 360 yard radius of the center located on the beach at approximate position 36°51′34.8″ N, 075°58′30″ W (Datum NAD 1983).

(34) Elizabeth River, Southern Branch, Norfolk, VA, Safety Zone: All waters of Elizabeth River Southern Branch in an area bound by the following points: 36°50′54.8″ N, 076°18′10.7″ W; thence to 36°51′7.9″ N, 076°18′01″ W; thence to 36°50′45.6″ N, 076°17′44.2″ W; thence to 36°50′29.6″ N, 076°17′23.2″ W; thence to 36°50′7.7″ N, 076°17′32.3″ W; thence to 36°49′58″ N, 076°17′28.6″ W; thence to 36°49′52.6″ N, 076°17′43.8″ W; thence to 36°50′27.2″ N, 076°17′45.3″ W thence to the point of origin,(Datum NAD 1983).

(b) *Notification.* (1) Fireworks barges and launch sites on land in paragraph (a) of this section shall have a sign on the port and starboard side of the barge or mounted on a post 3 foot above ground level when on land and facing the water labeled ''FIREWORKS—DANGER—STAY AWAY''. This will provide on scene notice that the safety zone will be enforced on that day. This notice will consist of a diamond shaped sign 4 foot by 4 foot with a 3-inch orange retro-reflective border. The word ''DANGER'' shall be 10 inch black block letters centered on the sign with the words ''FIREWORKS'' and ''STAY AWAY'' in 6 inch black block letters placed above and below the word ''DANGER'' respectively on a white background.

(2) Coast Guard Captains of the Port in the Fifth Coast Guard District will notify the public of the enforcement of these safety zones by all appropriate means to effect the widest publicity among the affected segments of the public, including publication in the local notice to mariners, marine information broadcasts, and facsimile broadcasts may be made for these events, beginning 24 to 48 hours before the event is scheduled to begin, to notify the public.

(c) *Enforcement Period.* The safety zones in paragraph (a) of this section will be enforced from 5:30 p.m. to 1 a.m. each day a barge with a ''FIREWORKS—DANGER—STAY AWAY'' sign on the port and starboard side is on-scene or a ''FIREWORKS—DANGER—STAY AWAY'' sign is posted on land, in a location listed in paragraph (a) of this section. Vessels may not enter, remain in, or transit through the safety zones during these enforcement periods unless authorized by the Captain of the Port or designated Coast Guard patrol personnel on scene.

(d) *Regulations.* (1) The general regulations contained in 33 CFR 165.23 apply.

(2) All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or the designated on-scene-patrol personnel. Those personnel are compromised of commissioned, warrant, and petty officers of the Coast Guard. Other Federal, State and local agencies may assist these personnel in the enforcement of the safety zone. Upon being hailed by the U.S. Coast Guard vessel by siren, radio, flashing light or other means, the operator of a vessel shall proceed as directed.

(e) *Definitions.*

Captain of the Port means any Coast Guard commissioned, warrant or petty officer who has been authorized by the Captain of the Port to act on his or her behalf.

State or local law enforcement officers mean any State or local government law enforcement officer who has the authority to enforce State criminal laws.

Dated: May 3, 2005.

Lawrence J. Bowling,

Captain, U.S. Coast Guard, Commander, Fifth Coast Guard District, Acting.

[FR Doc. 05–9436 Filed 5–11–05; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R03–OAR–2004–DC–0007; FRL–7909–8]

Approval and Promulgation of Air Quality Implementation Plans; District of Columbia; VOC Emission Standards for AIM Coatings

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the District of Columbia (the District). This revision pertains to the volatile organic compound (VOC) emission standards for architectural and industrial maintenance (AIM) coatings in the District. EPA is approving this SIP revision in accordance with the Clean Air Act (CAA or Act).

DATES: *Effective Date:* This final rule is effective on June 13, 2005.

ADDRESSES: EPA has established a docket for this action under Regional Material in EDocket (RME) ID Number R03–OAR–2004–DC–0007. All documents in the docket are listed in the RME index at *http://www.docket.epa.gov/rmepub/*. Once in the system, select ''quick search,'' then key in the appropriate RME identification number. Although listed in the electronic docket, some information is not publicly available, *i.e.*, confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly

available only in hard copy form. Publicly available docket materials are available either electronically in RME or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the state submittal at the District of Columbia Department of Public Health, Air Quality Division, 51 N Street, NE., Washington, DC 20002.

FOR FURTHER INFORMATION CONTACT: Rose Quinto, (215) 814–2182, or by e-mail at *quinto.rose@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

On December 27, 2004 (69 FR 77149), EPA published a notice of proposed rulemaking (NPR) for the District of Columbia. The NPR proposed approval of the VOC emission standards for AIM coatings. The formal SIP revision was submitted by the District on April 16, 2004 and supplemented on September 20 and November 26, 2004. Other specific requirements of the District's SIP revision for AIM coatings and the rationale for EPA's proposed action are explained in the NPR and will not be restated here. EPA received adverse comments on the December 27, 2004 NPR. A summary of the comments submitted and EPA's responses are provided in Section II of this document.

EPA is aware that concerns have been raised about the achievability of VOC content limits of some of the product categories under the District's AIM coatings rule. Although we are approving this rule today, the Agency is concerned that if the rule's limits make it impossible for manufacturers to produce coatings that are desirable to consumers, there is a possibility that users may misuse the products by adding additional solvent, thereby circumventing the rule's intended VOC emission reductions. We intend to work with the District and manufacturers to explore ways to ensure that the rule achieves the intended VOC emission reductions, and to address this issue in evaluating the amount of VOC emission reduction credit attributable to the rule.

II. Public Comments and EPA Responses

A private citizen and the Sherwin Williams Company (SWC) submitted adverse comments on EPA's December 27, 2004 (69 FR 77149) proposed approval of the District's AIM coatings rule The SWC submitted its adverse comments in letter to EPA dated January 26, 2005. The SWC's comment letter also includes, by reference, the comments it previously submitted to the District on its proposed version of the AIM coatings rule during the District's adoption process and to the Ozone Transport Commission (OTC) in a letter dated January 11, 2001.[1] Lastly, the SWC's January 26, 2005 letter of comment to EPA also includes, by reference, the Petition for Reconsideration and Request for Stay, 42 U.S.C.A. Subsection 7607(d)(7)(B): Environmental Protection Agency's Approval and Promulgation of Air Quality Improvement Plans; Pennsylvania; Control of Volatile Organic Compound Emissions from AIM Coatings submitted by the SWC to EPA on January 20, 2005 (hereafter the Petition for Reconsideration).[2] The following summarizes the comments submitted to EPA on the December 27, 2004 (69 FR 77149) proposed approval of the District's AIM coatings rule and EPA's response to those comments.

A. *Comment: The Products Should Contain No VOCs*—A private citizen submitted a comment to EPA by e-mail on December 27, 2005. The commenter states that no VOCs, zero emissions and zero pollution should be allowed from any product allowed to be used or sold.

Response: EPA disagrees with this comment. Aside from issues associated with the technological infeasibility of all paints and coatings used or sold to contain no VOCs, it is important to understand EPA's role with regard to review and approval or disapproval of rules submitted by states as SIP revisions. EPA can only take action upon the final adopted version of a state's regulation as submitted by that state in its SIP revision request. It is not within EPA's authority, by its rulemaking on the SIP revision or otherwise, to change or modify the text or substantive requirements of a state regulation. Therefore, EPA cannot modify the District's AIM regulation as recommended in the comment.

B. *Comment: Using Flawed Data Violates the Data Quality Objectives Act and Administrative Procedures Act*— The commenter asserts that the District's AIM coatings rule is based on flawed data and that the use of this data violates the Data Quality Objectives Act (''DQOA'') (Section 515(a) of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)). The data at issue is contained in what the commenter characterizes as a ''study prepared by E.H. Pechan & Associates'' (Pechan Study) in 2001. The alleged flaws relate to projected VOC emissions reductions calculated in the Pechan Study. The commenter asserts that certain of the underlying data and data analyses are allegedly ''unreproduceable.'' Further, the commenter asserts that if better data were used, the OTC model AIM coatings rule would achieve greater VOC emissions reductions, relative to the Federal AIM coatings rule, than was calculated in the Pechan Study (54 percent reduction versus 31 percent reduction), even if certain source categories were omitted from regulation under the OTC rule. For these reasons, the commenter states that EPA must not approve the proposed District's AIM coatings rule as a revision to the SIP.[3] These same issues are also raised in the commenter's Petition for Reconsideration.

Response: EPA disagrees with this comment. What the commenter characterizes as the Pechan Study is not at issue in this rulemaking. The Pechan Study was not submitted to EPA by the District in its SIP revision requesting that EPA approve its AIM coatings rule.[4]

[1] The SWC's January 26, 2005 letter of comment to EPA states that it is also includes, by reference, the comments submitted to the OTC, enclosed as Exhibit B., and asks that they also be treated as direct comments on the proposed revision to the DC SIP. However, Exhibit B. to the SWC's January 26, 2005 letter of comment to EPA is a ''Petition for Reconsideration and Request for Stay, 42 U.S.C.A. Subsection 7607(d)(7)(B); Environmental Protection Agency's Approval and Promulgation of Air Quality Improvement Plans; Pennsylvania; Control of Volatile Organic Compound Emissions from AIM Coatings submitted to EPA by the SWC to EPA on January 20, 2005.''

The SWC's January 11, 2001 letter of comment to the OTC is enclosed as attachment 4 to Exhibit A of SWC's January 26, 2005 letter of comment to EPA on the December 27, 2004 (69 FR 77149) proposed approval of the District's AIM coatings rule.

[2] This Petition for Reconsideration, as it pertains to EPA's approval of Pennsylvania's AIM coatings rule (69 FR 68080), was withdrawn by a letter dated March 17, 2005.

[3] The SWC submitted a ''Request for Correction of Information'' (RFC) dated June 2, 2004, to EPA's Information Quality Guidelines Office in Washington, DC which raises substantively similar issues to those raised by this comment. By letter dated February 25, 2005 from Robert Brenner, Principal Deputy Assistant Administrator to the Counsel for Sherwin Williams Company, EPA responded separately to the RFC. A copy of that letter is included in the administrative record for this final rulemaking.

[4] The SWC concedes that the Pechan Study and related spreadsheet are not part of the record submitted to EPA by the District. The SWC assert, however, that there are references to the Pechan Study in other materials submitted by the District. Whether or not the Pechan Study, or data from that study, was submitted to EPA does not alter our analyses or conclusion, described herein, that the Pechan Study is not relevant in this rulemaking. Consequently, because the Pechan Study is not relevant to this rulemaking, the commenter's reliance on the document entitled, ''A Summary of General Assessment Factors for Evaluating the Quality of Scientific and Technical Information,'' EPA 100/B–03–001 (June 2003), provided as exhibit C to SWC's comments is misplaced. This

The validity of the Pechan Study data is not at issue in this rulemaking because the District did not request approval of a quantified amount of VOC emission reduction from the enactment of its regulation. Rather, this AIM coatings regulation has been submitted by the District, and is being approved by EPA, on the basis that it strengthens the existing District SIP. The commenter does not dispute that the District's AIM coatings rule will, in fact, reduce VOC emissions.

Section 110 of the Act provides the statutory framework for approval/disapproval of SIP revisions. Under the Act, EPA establishes NAAQS for certain pollutants. The Act establishes a joint Federal and state program to control air pollution and to protect public health. States are required to prepare SIPs for each designated ''air quality control region'' within their borders. The SIP must specify emission limitations and other measures necessary for that area to meet and maintain the required NAAQS. Each SIP must be submitted to EPA for its review and approval. EPA will review and *must approve* the SIP revision if it is found to meet the minimum requirements of the Act. *See* section 110(k)(3) of the Act, 42 U.S.C. 7410(k)(3); *see also Union Elec. Co.* v. *EPA*, 427 U.S. 246, 265, 96 S.Ct. 2518, 49 L.Ed.2d 474 (1976). The Act expressly provides that the states may adopt more stringent air pollution control measures than the Act requires with or without EPA approval. *See* section 116 of the Act, 42 U.S.C. 7416. EPA must disapprove state plans, and revisions thereto, that are less stringent than a standard or limitation provided by Federal law. *See* section 110(k) of the Act, 42 U.S.C. 7410(k); *see also Duquesne Light* v. *EPA*, 166 F.3d 609 (3d Cir. 1999). The Pechan Study is not part of the District's submission in support of its AIM coatings rule. Because the District's April 16, 2004 submission (supplemented on September 20 and November 26, 2004) does not seek approval of a specific amount of emissions reductions, the level of emissions reductions that might be calculable using data contained in the Pechan Study is irrelevant to whether EPA should approve this SIP revision.[5] The only relevant inquiry at this time is whether this SIP revision meets the minimum criteria for approval under the Act, including the requirement that the District's AIM coatings rule be at least as stringent as the otherwise applicable Federal AIM coatings rule set forth at 40 CFR 59.400, subpart D.[6]

EPA has concluded that the District's AIM coatings rule meets the criteria for approvability. It is worth noting that EPA agrees with the commenter's conclusion that the District AIM coatings rule is more stringent than the Federal AIM coatings rule, though not for the reasons given by the commenter, *i.e.*, that the commenter's ''better'' data demonstrates that OTC Model AIM coatings rule achieves a 54 percent, as opposed to the Pechan Study's 31 percent reduction in VOC emissions beyond that required by the Federal AIM coatings rule. Rather, EPA has determined that the District's AIM coatings rule is, on its face, more stringent than the Federal AIM coatings rule. Examples of categories for which the District's AIM coatings rule is facially more stringent than the Federal AIM coatings rule include, but are not limited to, the VOC content limit for non-flat high gloss coatings and antifouling coatings. The Federal AIM coatings rule's VOC content limit for non-flat high gloss coatings is 380 grams/liter while the District's AIM coatings rule's limit is 250 grams/liter, and the Federal AIM coatings rule's VOC content limit for anti-fouling coatings is 450 grams/liter while the District's AIM coatings rule's is 400 grams/liter. Examples of categories for which the District's AIM coatings rule is as stringent, but not more stringent, than the Federal AIM coatings rule include, but are not limited to, the VOC content limit for antenna coatings and low-solids coatings. In both rules the VOC content limits for these categories are 530 grams/liter and 120 grams/liter, respectively. Thus, on a category by category basis, the District's AIM coatings rule is as stringent or more stringent than the Federal AIM coatings rule.

C. *Comment:* EPA's Determination That the District of Columbia AIM Coatings Rule Is as Least as Stringent as the Federal AIM Coatings Rule Is Inadequate—EPA determined that the District's AIM coating rule is as stringent, or more stringent, than the otherwise applicable Federal AIM coatings rule because the VOC content limit of each product category of the District's AIM coatings rule is equal to or below the VOC content limit of the Federal AIM coatings rule. The commenter claims that EPA's determination is inadequate for at least three reasons: (i) EPA's comparison of VOC content fails to include an ''ozone impact analysis;'' (ii) EPA acknowledged that the stringent VOC content limits of the rule might result in ''behavioral changes;'' and (iii) EPA failed to consider that more stringent VOC content limits might result in more use of products, or use of products with VOCs of higher reactivity, and that this would make the District's AIM coatings rule less stringent in terms of ozone impacts. The commenter raised these arguments in a Petition for Reconsideration concerning EPA's approval of the comparable Pennsylvania AIM coatings rule, asserting that EPA's ''on its face'' stringency finding is insufficient to meet the requirements of the CAA and that EPA's reliance on *Union Elec. Co.* v. *EPA*, 427 U.S. 246 (1976) to support its approval of the rule was misplaced. As noted previously, SWC has incorporated this Petition for Reconsideration in its comments opposing approval of the District's AIM coatings rule.

Response: EPA disagrees that these comments provide a basis for disapproval of the District's AIM coating rule as a SIP revision. First, with respect to the comparison of the stringency of the District AIM coatings rule and the Federal AIM coatings rule, EPA believes that the VOC content levels of the respective rule for each category is the appropriate basis of comparison. The current Federal AIM coatings rule

''Assessment Factors'' document describes the considerations EPA takes into account in evaluating scientific or technical information ''used in support of Agency actions.'' *Assessment Factors*, p.1. The Pechan Study is not being used in support of this rulemaking, therefore, EPA is under no obligation to evaluate the scientific or technical information in that study.

[5] After submission of a request for approval of a quantified amount of emissions reductions credit due to the AIM coatings rule by the District, EPA will evaluate the credit attributable to the rule. Whatever methodology and data the District uses in such a request, the issue of proper credit will become ripe for public comment.

[6] The commenter asserts that ''it makes no difference whether the District is asking for credits at this time for there to be a Data Quality Act challenge,'' apparently because the fact that material from the Pechan Study appears in the rulemaking docket for this action, there is ''dissemination of flawed data.'' This ignores that fact that EPA is taking no stance on the Pechan Study and its underlying data. That study is irrelevant to our analysis as to whether the District's AIM rule is approvable as a measure meeting the requirements of section 110 of the Act that strengthens the District's SIP. EPA is not required to address irrelevant material merely because it is in the rulemaking docket. Section 307(d)(6)(B) of the CAA (which applies to, among other things, SIP revisions, *see* 42 U.S.C. 7607(d)(1)(B)), requires EPA to respond to ''each of the significant comments, criticisms, and new data submitted * * * during the public comment period.'' 42 U.S.C. 7607(d)(6)(B). The United States Supreme Court has held that ''irrelevant'' matter in the docket is not ''significant'' as that term is used in the CAA, and EPA has no duty to respond to them. *See Whitman* v. *Amer. Trucking Ass'ns., Inc.*, 531 U.S. 457, n. 2 at 470 (2001). With respect to the Pechan data, we are not disseminating it, but we rather are fulfilling our statutory role as custodian of a docket containing irrelevant material submitted by third parties.

achieves reductions of VOC content for each individual coating category, and an aggregate amount of VOC content for all of the categories covered by the rule. These mass-based VOC content limits apply to each category of product and, based upon an analysis of the types of products used and the amount of products used in a given area, are estimated to result in a given amount of mass based VOC emission reductions. As we have previously noted in this rulemaking, the District did not request approval of a quantified amount of VOC emission reduction from the enactment of its regulation; the ozone impacts of the VOC reductions from the District's AIM coatings rule will be determined at a subsequent point in time. Even though the specific amount of VOC emission reduction credit attributable to the District's AIM coatings rule is not at issue in EPA's approval of the rule into the SIP in this rulemaking, EPA believes that the category-by-category comparison of VOC content between the Federal AIM coatings rule and the District's coating rule is a reasonable way to assess whether the latter is at least as stringent as the former. The commenter did not dispute that the District's AIM coatings rule is overall more stringent than the Federal AIM coatings rule in terms of its tighter VOC limits, and in fact states in its comments that it believes that the OTC model AIM coatings rule will achieve a 54 percent VOC emissions reduction relative to the Federal AIM coatings rule.

Second, with respect to what the commenter refers to as ''behavioral changes,'' EPA did note in its approval of comparable State AIM coatings rules in Pennsylvania and New York (and reiterates in today's action) that it had concerns with respect to some of the product categories that: ''if the rule's limits make it impossible for manufacturers to produce coatings that are desirable to consumers, there is a possibility that users may misuse the products, thereby circumventing the rule's intended VOC emission reductions.'' EPA further stated that it would address these types of concerns when evaluating credit for VOC emission reductions. The commenters appear to suggest that because product users might engage in ''behavioral changes'' such as adding solvent to products, which would be illegal under the District's AIM coatings rule, EPA cannot consider the District's AIM coatings rule to be at least as stringent as the Federal AIM coatings rule. To the contrary, EPA believes that the potential for illegal behavior should not be a basis for concluding that the District's AIM coatings rule is not as stringent as the Federal AIM coatings rule, and accordingly should not be a basis for disapproving the SIP revision. EPA appropriately assumes, for purposes of approving such a rule, that manufacturers, distributors, and users will abide by the law, or that the District or EPA will ultimately insure that they do. EPA reiterates, however, that the specific amount of credit attributable to the rule is not at issue in this action, and EPA concludes that the mere potential for illegal behavior is not a basis for determining that the District's AIM coatings rule is not as stringent as the Federal AIM coatings rule.

Third, concerning the possibility that more stringent limits will result in more frequent painting, or painting with products that contain more highly reactive VOCs, EPA notes that the commenter already raised these issues with the District and the District ascertained that such concerns did not outweigh the overall benefits of the rule in the area. Similarly, EPA believes that these concerns are not a basis for determining that the District's AIM coatings rule is not at least as stringent as the Federal AIM coatings rule as a whole. At the outset, it must be noted that the District did not elect to develop and submit to EPA an AIM coatings rule based upon VOC relative reactivity, as the commenter implicitly suggests the District should have. EPA must act on the AIM coatings rule submitted by the District, not on one that the commenters would have preferred. Were the District to have submitted such an AIM coatings rule, EPA agrees with the commenter that the District would have needed to establish that the limits it imposed are in fact more stringent than those otherwise required by the Federal AIM coatings rule. In addition, EPA notes that as a general matter EPA believes that its approval of such a rule could not be inconsistent with the requirements of section 110(l) and section 193 of the CAA, as applicable. A determination of consistency with those statutory provisions would be made in the context of approval of a specific rule based upon relative reactivity. Because neither the District's AIM coatings rule nor the Federal AIM coatings rule is premised upon VOC relative reactivity, it is neither possible nor required that EPA compare the relative stringency of the rules on this basis in this rulemaking.

In criticizing the District's AIM coatings rule, the commenter has hypothesized that users will necessarily use more product, or that manufacturers will necessarily choose to use more reactive VOCs to meet a more stringent limit, at least with respect to one specific category of product (the commenter alleges that an applicator would have to use 50 percent more of the compliant waterborne clear wood finish to achieve the dry film thickness equivalent to current, federally compliant solvent-based varnish). EPA believes that the commenter's assertions are speculative in nature and do not provide compelling evidence that the District's AIM coatings rule is not at least as stringent as the otherwise applicable Federal AIM coatings rule. EPA believes that it would be arbitrary and capricious to disapprove the District's AIM coatings rule based on the speculative behavior of the persons who will apply the coatings (*e.g.*, that the applicators necessarily will use more of a product or will necessarily violate the law by adulterating a complying product).[7] This is especially so when the regulation at issue is both facially more stringent and conceded by the commenter to be more stringent overall (*i.e.*, will result in greater VOC emissions reductions), than the otherwise applicable Federal AIM coatings rule, and any supposed increase in ozone from tighter VOC content limits is confined to one, or at the most a limited number of product categories, not to the regulation as a whole, which provides limits on 53 categories of AIM coatings. *See Duquesne Light Co.* v. *EPA* 166 F.3d 609, 613 (3d Cir. 1999) (in approving a SIP revision, EPA is not required ''to engage in a formalistic exercise by conducting a fuller demonstration of the stringency of'' a definition contained in a SIP, when ''[s]uch a 'demonstration' would be a technical formality *as the stringency of that definition is not only apparent on the face of the definition, but also conceded by Duquesne*'') (emphasis added). We believe that there is no plausible basis to reject this regulation, which is more stringent than Federal law overall, merely because the commenter has speculated that even more reductions might be achieved by selectively raising the VOC content limits for some product categories covered by the comprehensive regulation.

Finally, in response to the District's AIM coatings rule, EPA believes that it is likely that manufacturers will produce, and users will use, products that are lower in VOC content. While an important consideration, EPA believes

[7] It must also be noted that unlike the Federal AIM rule, the state AIM rules (including the District's), include enforceable provisions which prohibit the applicator end users from adding additional solvent to complying coatings. D.C. Code Sec 20–750.5.

that coatings performance is not exclusively dependent upon VOC content, as evidenced by the fact that manufacturers already produce coatings that meet these limits for sale and use.

For these reasons EPA disagrees that these comments form a basis to conclude that EPA's ''on its face'' stringency finding is insufficient to meet the requirements of the CAA and that EPA's reliance on *Union Elec. Co.* v. *EPA*, 427 U.S. 246 (1976) to support its approval of the District's AIM rule is misplaced.

D. *The CAA and Its Regulations Require That Data or Evidence Assessing the Air Quality Impacts Associated With a SIP Revision Must Be Submitted in Support of the SIP Revision.* The commenter alleges that the section 110(a)(K) authorizes EPA to require, and that EPA regulations in 40 CFR part 51 (subparts G and F and Appendix v) demand, that states submit data and modeling in support of a SIP revision for the purposes of predicting its impact on air quality. The commenter raises these arguments in the Petition for Reconsideration to urge that EPA require Pennsylvania to submit such data and modeling in support of its AIM coatings rule. As noted previously, SWC has incorporated this Petition for Reconsideration in its comments opposing approval of the District's AIM coatings rule.

Response: EPA disagrees with this comment with regard to its approval of state AIM coatings rules in general and in the specific instance of its approval of the District's AIM coatings rule. Section 110(K) of the Act authorizes EPA to prescribe the modeling and data to be provided in a state plan or plan revision. The statute commits to EPA's discretion whether and what type of data or modeling a state should submit in support of a SIP revision for the purposes of predicting the impact of that SIP revision on air quality. EPA's regulations in 40 CFR part 51, cited by the commenter, apply only to control strategy plans. Control strategy plans are by definition *a combination of measures to achieve the aggregate reduction* necessary for attainment and maintenance of the NAAQS. 40 CFR 51.100 (n). A state regulation to control VOCs from a source or source category, such as the District's AIM coatings rule, is a single control measure and is not, by itself, a control strategy for an ozone nonattainment area subject to the requirements of part D of the CAA. As such, submittal of such a control measure as a SIP revision is not required to meet the requirements of 40 CFR part 51 for submittal of a control strategy SIP or SIP revision. Rate-of-progress and attainment plans are control strategy plans for ozone nonattainment areas.

Section 182 of the CAA sets out the plan submissions and requirements for ozone nonattainment areas. The requirements and schedules mandated by section 182 provide evidence that compliance with the CAA contemplates the submittal of control measures as SIP revisions separately from control strategy plans. For example, the states which comprise ozone nonattainment areas were required to submit corrections to previously SIP-approved reasonably available control technology (RACT) requirements by May 15, 1991 (6 months from the November 15, 1990 date of enactment of the 1990 CAA) and to submit newly applicable RACT provisions as SIP revisions by November 15, 1992 (2 years from the date of enactment of the 1990 CAA). Submittal of these state rules to impose RACT on a widely divergent range of source categories of VOC as SIP revisions required no data or modeling with regard to their individual impact on the NAAQS for ozone for approval by EPA. The first control strategy plan SIP revision required by section 182 of the CAA (the 15 percent ROP plan) was not due to EPA until November 15, 1993 (3 years after the date of enactment of the 1990 CAA). The attainment demonstration plans were not due to EPA until November 15, 1994 (4 years after the date of enactment). With regard to ozone nonattainment areas, these attainment demonstrations plans are the only plans which the CAA requires be based on photochemical grid modeling or any other analytical method determined by the Administrator of EPA.

EPA disagrees with the commenter's contention that every type of SIP revision submitted to EPA must be supported by data and modeling to assess its impact on ambient air quality and the NAAQS. As numerous of EPA's SIP approval Final actions published in the **Federal Register** amply demonstrate, EPA has approved hundreds of SIP revisions submitted by states consisting of state rules to control VOCs from stationary sources and source categories where such approvals did not require data and modeling to assess the individual rules' impacts on the NAAQS. The CAA and EPA's regulations found in 40 CFR part 51 for the requirements of state plans and plan revisions provide EPA the flexibility to determine and require such technical support as EPA deems necessary for approval depending upon the nature of the SIP revision.

For all these reasons, EPA disagrees that it cannot approve the District's AIM coatings rule SIP revision because the District's submittal does not include data and modeling to assess its AIM coatings rules's individual impact on the NAAQS for ozone.

E. *Comment: The District of Columbia AIM Coatings Rule Was Adopted in Violation of Clean Air Act Section 183(e)(9)*—The commenter states that in 1998, after a seven-year rule development process, EPA promulgated its nationwide regulations for AIM coatings pursuant to section183(e) of the Act. The commenter notes that the District's AIM coatings rule imposes numerous VOC emission limits that will be more stringent than the corresponding limits in EPA's regulation. The commenter asserts that section 183(e)(9) of the Act requires that any state which proposes regulations to establish emission standards other than the Federal standards for products regulated under Federal rules shall first consult with the EPA Administrator. The commenter believes that the District failed to engage in that required consultation, and, therefore (1) the District violated section 183(e)(9) in its adoption of the District AIM coatings rule, and (2) approval of the AIM coatings rule by EPA would violate, and is, therefore, prohibited by sections 110(a)(2)(A) and (a)(2)(E) of the Act.

Response: EPA disagrees with this comment. Contrary to the implication of the commenter, section 183(e)(9) does not require states to seek EPA's permission to regulate consumer products. By its explicit terms, the statute contemplates consultation with EPA only with respect to ''whether any other state or local subdivision has promulgated or is promulgating regulations or any products covered under [section 183(e)].'' The commenter erroneously construes this as a requirement for permission rather than informational consultation. Further, the final Federal AIM coatings regulations at 40 CFR 59.410 explicitly provides that states and their political subdivisions retain authority to adopt and enforce their own additional regulations affecting these products. *See also* 63 FR 48848, 48884, September 11, 1998. In addition, as stated in the preamble to the final rule for architectural coatings, Congress did not intend section 183(e) to preempt any existing or future state rules governing VOC emissions from consumer and commercial products. *See id.* at 48857. Accordingly, the District retains authority to impose more stringent limits for architectural coatings as part of its SIP, and its election to do so is not a basis for EPA to disapprove the submission for inclusion in the SIP. *See*

Union Elec. Co. v. *EPA,* 427 U.S. at 265–66 (1976). Although national uniformity in consumer and commercial product regulations may have some benefit to the regulated community, EPA recognizes that some localities may need more stringent regulation to combat more serious and more intransigent ozone nonattainment problems.

Further, there was ample consultation with EPA prior to the District's adoption of its AIM coatings rule. On March 28, 2001, the OTC adopted a Memorandum of Understanding (MOU) on regional control measures, signed by all the member states of the OTC, including the District, which officially made available the OTC model rules, including the AIM coatings model rule. *See* the discussion of this MOU in the Report of the Executive Director, OTC, dated July 24, 2001, a copy of which has been included in administrative record of this final rulemaking. That MOU includes the following text, ''WHEREAS after reviewing regulations already in place in OTC and other States, reviewing technical information, consulting with other States and Federal agencies, consulting with stakeholders, and presenting draft model rules in a special OTC meeting, OTC developed model rules for the following source categories * * * architectural and industrial maintenance coatings* * *.'' (a copy of the signed March 28, 2001 MOU has been placed in the administrative record of this final rulemaking). Therefore, there is no validity to the commenter's assertion that the District failed to consult with EPA in the adoption of its AIM coatings rule. EPA was fully cognizant of the requirements of the District's AIM coatings rule before its formal adoption by the District.[8] For all these reasons, EPA disagrees that the District violated section 183(e)(9) in its adoption of the its AIM coatings rule, and disagrees that approval of the District AIM coatings rule by EPA is in violation of or prohibited by sections 110(a)(2)(A) and (a)(2)(E) of the Act.

F. *Comment: The District of Columbia's AIM Coatings Rule Was Adopted in Violation of Clean Air Act Section 184(c), and Approval of the SIP Revision Would, Itself, Violate That Section*—The commenter believes the OTC violated section 184(c)(l) of the Act by failing to ''transmit'' its recommendations to the Administrator, and that the OTC's violation was compounded by the Administrator's failure to review the Model Rule through the notice, comment and approval process required by CAA section184(c)(2)–(4). The commenter asserts that these purported violations of the Act prevented the District from adopting the District's AIM coatings rule, and now prevent EPA from validly approving it as a revision to the District's SIP.

Response: EPA disagrees with this comment. Section 184(c)(1) of the Act states that ''the [OTC] may, after notice and opportunity for public comment, develop recommendations for additional control measures to be applied within all or a part of such transport region if the commission determines such measures are necessary to bring any area in such region into attainment by the dates provided by this subpart.'' It is important to note that the OTC model AIM coatings rule was not developed pursuant to section 184(c)(1), which provision is only triggered ''[u]pon petition of any state within a transport region established for ozone* * *.'' No such petition preceded the development of the model AIM coatings rule. Nor, for that matter, was development of a rule upon state petition under section 184(e)(1) meant to be the exclusive mechanism for development of model rules within the OTC. Nothing in section 184 prevents the voluntary development of model rules without the prerequisite of a state petition. Section 184 is a voluntary process and the OTC may opt for that process or another. This provision of the Act was not intended to prevent OTC's development of model rules which states may individually choose to adapt and adopt on their own, as the District did, basing its AIM coatings rule on the model developed within the context of the OTC. In developing its own rule from the OTC model, the District was free to adapt that rule as it saw fit (or to leave the OTC model rule essentially unchanged), so long as its rule remained at least as stringent as the Federal AIM coatings rule.

As previously stated, on March 28, 2001, the OTC member states signed a MOU on regional control measures, including the AIM coatings model rule. The OTC did not develop recommendations to the Administrator for additional control measures. The MOU stated that implementing these rules will help attain and maintain the 1-hour standard for ozone and were therefore made available to the states for use in developing their own regulations.[9]

G. *Comment: The District of Columbia's AIM Coatings Rule Violates the Commerce Clause and the Equal Protection of the U.S. Constitution*—The commenter's title heading of this comment states that the District's AIM coatings rule violates the Equal Protection Clause of the U.S. Constitution, but the text that follows that title heading provides no arguments or assertions to support this claim. In both the title heading and the text that follows, the commenter claims that the District's AIM coatings rule also violates the Commerce Clause of Article I, section 8, of the U.S. Constitution,

[8] While EPA reviewed the model AIM coatings rule and the draft District version of that rule, EPA had no authority conferred under the Clean Air Act to dictate the exact language or requirements of the rule. As explained previously, EPA's role is to review a state's submission to ensure it meets the applicable criteria of section 110 generally, and in the case of an AIM rule to ensure its is at least as stringent as the otherwise applicable Federal rule.

[9] The commenter argues that section 184 either does not require a formal petition to be triggered, or, alternatively, that the MOU between the OTC states qualifies as a ''petition.'' With respect to their first argument, section 184(c) says that the OTC ''may, after notice and opportunity for public comment, develop recommendations for additional control measures * * *'' and that the recommendations shall be presented to the EPA Administrator. This mechanism is triggered ''upon petition of any State with a transport region established for ozone, and based on a majority vote of the Governors on the Commission (or their designees)* * *.'' 42 U.S.C. 7511d(c)(1) (emphasis added). The clear and unambiguous language of the Act requires a petition and a vote. We reasonably interpret section 184(c), in light of the obligation to conduct a vote, to require the petition to be a manifestation of an express intent to invoke the section 184(c) process. Further, any petition would need to be sufficient in its clarity to put members on notice of their obligation to hold a vote and fulfill the other provisions of the section 184 process. We do not believe that a document which in hindsight might be construed as an inadvertent opt-in to the voluntary section 184 process could be the petition affirmatively intended by the Act.

Even though the OTC did not develop the model AIM coatings rule pursuant to section 184(c)(1) of the Act, nevertheless it provided ample opportunity for OTC member and stakeholder comment by holding several public meetings concerning the model rules including the AIM coatings model rule. The sign-in sheets or agenda for four meetings held in 2000 and 2001 at which the OTC AIM coatings model was discussed (some of which reflect the attendance of a representative of the EPA and/or the commenter), have been placed in the administrative record for this final rulemaking.

With respect to the argument that the MOU is in hindsight a ''petition'' triggering the section 184 rule development process, nothing in the record indicates that the OTC treated this MOU as a petition to initiate the section 184 process. This is not surprising because the MOU's plain language recites that the model rules had already been developed that by the time the MOU was signed (''WHEREAS * * * OTC developed final model rules for the following source categories* * *.''). Under section 184(c) the petition initiates the voluntary section 184 rule development process. 42 U.S.C. 7511d(c)(1). The MOU, however, came near the end of the OTC's model rule development process. This is a strong indication that the OTC did not intend the AIM coatings rule, or the other rules recited in the MOU, to be subject to the section 184 process. By its failure to express an intention to trigger the section 184 rule development mechanism, we reject the argument that the MOU constitutes a section 184(c) petition. The MOU neither expressly nor inadvertently opted-in the OTC states to the section 184 process.

because it allegedly imposes an unreasonable burden on interstate commerce. The commenter asserts that because the District's AIM coatings rule contains VOC limits and other provisions that differ from the Federal AIM coatings rule in 40 CFR 59.400, the rule imposes unreasonable restrictions and burdens on the flow of coatings in interstate commerce. The commenter further claims that the burdens of the District's AIM coatings rule are excessive and outweigh the benefits of the rule.

Response: As indicated previously, the commenter provides no arguments or assertions as to the claim made in the title heading of this comment that the District's AIM coatings rule violates the Equal Protection Clause of the U.S. Constitution (*see* pages 13–14 of the letter dated January 26, 2005 from the Counsel for the Sherwin-Williams Company to Makeba Morris, Chief, Air Quality Planning Branch, U.S. EPA Region III, regarding EPA's Proposal to Approve SIP Revision Submitted by the State of Maryland Concerning Architectural and Industrial Maintenance (AIM) Coatings). Moreover, the text of the comment following the title heading does not reference or even make mention of the Equal Protection Clause. Lastly, in no other comment submitted by SWC on EPA's December 27, 2004 (69 FR 77149) proposed approval of the District's AIM coatings rule is there any mention or reference to the Equal Protection Clause of the U.S. Constitution. EPA does not believe that any provision of the District's AIM rule violates the Equal Protection Clause of the U.S. Constitution.

Regarding the comment that the District's AIM coatings rule violates the Commerce Clause of the U.S. Constitution, EPA agrees with this comment only to the extent that it acknowledges that AIM coatings are products in interstate commerce and that state regulations on coatings therefore have the potential to violate the Commerce Clause. EPA understands the commenter's practical concerns caused by differing state regulations, but disagrees with the commenter's view that the District AIM coatings rule impermissibly impinges on interstate commerce. A state law may violate the Commerce Clause in two ways: (i) By explicitly discriminating between interstate and intrastate commerce; or (ii) even in the absence of overt discrimination, by imposing an incidental burden on interstate commerce that is markedly greater than that on intrastate commerce. The District's AIM coatings rule does not explicitly discriminate against interstate commerce because it applies evenhandedly to all coatings manufactured or sold for use within the state. At most, therefore, the District's AIM coatings rule could have an incidental impact on interstate commerce. In the case of incidental impacts, the Supreme Court has applied a balancing test to evaluate the relative impacts of a state law on interstate and intrastate commerce. *See, Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). Courts have struck down even nondiscriminatory state statutes when the burden on interstate commerce is ''clearly excessive in relation to the putative local benefits.'' *Id.* at 142.

At the outset, EPA notes that it is unquestionable that the District has a substantial and legitimate interest in obtaining VOC emissions for the purpose of attaining the ozone NAAQS. The adverse health consequences of exposure to ozone are well known and well established and need not be repeated here. *See, e.g., National Ambient Air Quality Standards for Ozone: Final Response to Remand*, 68 FR 614, 620–25 (January 6, 2003). Thus, the objective of the District in adopting their AIM coatings rule is to protect the public health of the citizens of the District. The courts have recognized a presumption of validity where the state statute affects matters of public health and safety. *See, e.g., Kassel* v. *Consolidated Freightways Corp. of Delaware*, 450 U.S. 662, 671 (1980). Moreover, even where the state statute in question is intended to achieve more general environmental goals, courts have upheld such statutes notwithstanding incidental impacts on out of state manufacturers of a product. *See, e.g, Minnesota* v. *Clover Leaf Creamery, et al.*, 449 U.S. 456 (1981) (upholding state law that banned sales of milk in plastic containers to conserve energy and ease solid waste problems).

The commenter asserts, without reference to any facts, that the District's AIM coatings rule imposes burdens and has impacts on consumers that are ''clearly excessive in relation to the purported benefits * * *.'' By contrast, EPA believes that any burdens and impacts occasioned by the District's AIM coatings rule are not so overwhelming as to trump the District's interest in the protection of public health. First, the District's AIM coatings rule does not restrict the transportation of coatings in commerce itself, only the sale of nonconforming coatings within the state's own boundaries. The District's rule excludes coatings sold or manufactured for use outside the state or for shipment to others (section 751.1). The District's AIM coatings rule cannot be construed to interfere with the transportation of coatings through the state en route to other states. As such, EPA believes that the cases concerning impacts on the interstate modes of transportation themselves are inapposite. *See, e.g., Bibb* v. *Navajo Freight Lines*, 359 U.S. 520 (1938).

Second, the District's AIM coatings rule is not constructed in such as way that it has the practical effect of requiring extraterritorial compliance with the District's VOC limits. The District's AIM coatings rule only governs coatings manufactured or sold for use within the state's boundaries. The manufacturers of coatings in interstate commerce are not compelled to take any particular action, and they retain a range of options to comply with the rule, including, but not limited to: (1) Ceasing sales of nonconforming products in the District; (2) reformulating nonconforming products for sale in the District and passing the extra costs on to consumers in that state; (3) reformulating nonconforming products for sale more broadly; (4) developing new lines of conforming products; or (5) entering into production, sales or marketing agreements with companies that do manufacture conforming products. Because manufacturers or sellers of coatings in other states are not forced to meet the District's regulatory requirements elsewhere, the rule does not impose the type of obligatory extraterritorial compliance that the courts have considered unreasonable. *See, e.g., NEMA* v. *Sorrell*, 272 F.3d 104 (2d Cir. 2000) (state label requirement for light bulbs containing mercury sold in that state not an impermissible restriction). It may be that the District's AIM coatings rule will have the effect of reducing the availability of coatings or increasing the cost of coatings within the District, but courts typically view it as the prerogative of the state to make regulatory decisions with such impacts upon its own citizens. *NPCA* v. *City of Chicago*, 45 F.3d 1124 (7th Cir. 1994), *cert. denied*, 515 U.S. 1143 (1995) (local restriction on sales of paints used by graffiti artists may not be the most effective means to meet objective, but that is up to the local government to decide).

Third, the burdens of the District's AIM coatings rule typically do not appear to fall more heavily on interstate commerce than upon intrastate commerce. The effect on manufacturers and retailers will fall on all manufacturers and retailers regardless of location if they intend their products for sale within the District, and does not

appear to have the effect of unfairly benefitting in-state manufacturers and retailers. The mere fact that there is a burden on some companies in other states does not alone establish impermissible interference with interstate commerce. *See, Exxon Corp.* v. *Maryland*, 437 U.S. 117, 126 (1978).

In addition, EPA notes that courts do not typically find violations of the Commerce Clause in situations where states have enacted state laws with the authorization of Congress. *See, e.g., Oxygenated Fuels Assoc., Inc.* v. *Davis*, 63 F. Supp. 1182 (E.D. Cal. 2001) (state ban on MTBE authorized by Congress); *NEMA* v. *Sorell*, 272 F.3d 104 (2d Cir. 2000) (RCRA's authorization of more stringent state regulations confers a ''sturdy buffer'' against Commerce Clause challenges). Section 183(e) of the Act governs the Federal regulation of VOCs from consumer and commercial products, such as coatings covered by the District's AIM coatings rule. EPA has issued a Federal regulation that provides national standards, including VOC content limits, for such coatings. *See* 40 CFR 59.400 *et seq.* Congress did not, however, intend section 183(e) to pre-empt additional state regulation of coatings, as is evident in section183(e)(9) which indicates explicitly that states may regulate such products. EPA's regulations promulgated pursuant to the Act recognized that states might issue their own regulations, so long as they meet or exceed the requirements of the Federal regulations. *See, e.g.*, the National Volatile Organic Compound Emission Standards for Architectural Coatings, 40 CFR 59.410, and the **Federal Register** which published the standards, 63 FR 48848, 48857 (September 11, 1998). Thus, EPA believes that Congress has clearly provided that a state may regulate coatings more stringently than other states.

In section 116 of the Act, Congress has also explicitly reserved to states and their political subdivisions the right to adopt local rules and regulations to impose emissions limits or otherwise abate air pollution, unless there is a specific Federal preemption of that authority. When Congress intended to create such Federal preemption, it does so through explicit provisions. *See, e.g.*, Section 209(a) of the Act, which pertains to state or local emissions standards for motor vehicles; and section 211 of the Act which pertains to fuel standards. Moreover, the very structure of the Act is based upon ''cooperative federalism,'' which contemplates that each state will develop its own state implementation plan, and that states retain a large degree of flexibility in choosing which sources to control and to what degree in order to attain the NAAQS by the applicable attainment date. *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976). Given the structure of the Act, the mere fact that one state might choose to regulate sources differently than another state is not, in and of itself, contrary to the Commerce Clause.

Finally, EPA understands that there may be a practical concern that a plethora of state regulations could create a checkerboard of differing requirements would not be the best approach to regulating VOCs from AIM coatings or other consumer products. Greater uniformity of standards does have beneficial effects in terms of more cost effective and efficient regulations. As EPA noted in its own AIM coatings rule, national uniformity in regulations is also an important goal because it will facilitate more effective regulation and enforcement, and minimize the opportunities for undermining the intended VOC emission reductions. 63 FR 48856–48857. However, EPA also recognizes that the District and other states with longstanding ozone nonattainment problems have local needs for VOC reductions that may necessitate more stringent coatings regulations. Under section 116 of the Act, states have the authority to do so, and significantly, many states in the Northeast have joined together to prepare and promulgate regulations more restrictive than the Federal AIM coatings rule to apply uniformly across that region. This regional collaboration provides regional uniformity of standards. The District may have additional burdens to insure compliance with its rule, but for purposes of this action, EPA presumes that the District takes appropriate actions to enforce it as necessary. The EPA has no grounds for disapproval of the SIP revision based upon the Commerce Clause comment.

H. *Comment: The Emission Limits and Compliance Schedule in the District of Columbia AIM Coatings Rule Are Neither Necessary nor Appropriate To Meet Applicable Requirements of the Clean Air Act*—The commenter claims that the District AIM coatings rule is not ''necessary or appropriate'' for inclusion in the District SIP, because EPA did not direct the District to achieve VOC reductions through the AIM coatings rule, but left it to the District to decide how such reduction can be achieved. The commenter further claims that the District AIM coatings rule is not necessary or appropriate for inclusion in the District SIP because of the numerous alleged procedural and substantive failings on the part of the District in promulgating the rule.

Response: EPA disagrees with this comment. If fulfillment of the ''necessary or appropriate'' condition of section 110(a)(2)(A) required EPA to first determine that a measure was necessary or appropriate and require a state to adopt that measure, this condition would present a ''catch 22'' situation. EPA does not generally have the authority to require the state to enact and include in its SIP any particular control measure, even a ''necessary'' one.[10] However, under section 110(a)(2)(a) a control measure must be either ''necessary *or* appropriate'' (emphasis added); the use of the disjunctive ''or'' does not provide that a state must find that *only* a certain control measure *and no other measure* will achieve the required reduction. Rather, a state may adopt and propose for inclusion in its SIP any measure that meets the other requirements for approvability so long as that measure is at least as appropriate, though not exclusive, means of achieving emissions reduction. *See also, Union Elec. Co.* v. *EPA*, 427 U.S. 246, 264–266 (1976) (holding that ''necessary'' measures are those that meet the 'minimum conditions' of the Act, and that a state ''may select whatever mix of control devices it desires,'' even ones more stringent than Federal standard, to achieve compliance with a NAAQS, and that ''the Administrator must approve such plans if they meet the minimum requirements'' of section 110(a)(2) of the Act). Clearly, in light of the Act and the case law, EPA's failure to specify the state adoption of a specific control measure cannot dictate whether a measure is necessary or appropriate.

In this particular instance, the District needs reductions to satisfy the requirements for rate-of-progress (ROP) and attainment plans (including contingency measures) for the reclassified Metropolitan Washington DC severe 1-hour ozone nonattainment area. It is the District's prerogative to develop whatever rule or set of rules it deems necessary or appropriate such that the rule or rules will collectively achieve the additional emission reductions needed to satisfy the ROP

[10] As noted in *Virginia* v. *EPA*, 108 F.3d 1397 (D.C. Cir. 1997), EPA does have the authority within the mechanism created by section 184 of the Act to order states to adopt control measures recommended by the OTC, if EPA agrees with and approves that recommendation. 108 F.3d, n.3 at 1402. As we have previously stated, the OTC model AIM coatings rule was not developed pursuant to the section 184 mechanism; EPA therefore has no authority to order that the District or any other state adopt this measure in order to reduce VOC emissions.

and attainment plan requirements for its 1-hour ozone severe nonattainment area. Because commenters might find it more necessary or appropriate to obtain the needed VOC emission reductions elsewhere is not a basis for EPA to disapprove the rule implementing the District's determination of the best approach to obtain the needed reductions.

The District's April 16, 2004 SIP revision submittal (supplemented on September 20 and November 24, 2004) provides evidence and certification that it has the legal authority to adopt its AIM coatings rule and that it has followed all of the requirements in the District's law and constitution that are related to adoption of a SIP revision. As noted in *BCCA Appeal Group* v. *EPA*, 355 F.3d 817 (5th Cir. 2004):

> [T]he CAA only requires that the states provide ''necessary assurances that the State * * * will have adequate * * * authority under State (and as appropriate, local) law to carry out such implementation plan (and it is not prohibited by any provision of * * * State law from carrying out such implementation plan or portion thereof).'' 42 U.S.C. 7410(a)(2)(E)(i). There is no statutory requirement that the EPA review SIP submissions to ensure compliance with state law * * * . Such a requirement would be extremely burdensome and negate the rationale for having the state provide the assurances in the first instance. The EPA is entitled to rely on a state's certification unless it is clear that the SIP violates state law, and proof thereof, such as a state court decision, is presented to EPA during the SIP approval process. 355 F.3d 817, n.11 at 830.

The commenter has offered no proof, such as a court decision, that the District's AIM coatings rule clearly violates local law. EPA therefore is relying on the District's certification that it had the legal authority to adopt its AIM coatings rule and that it has followed all of the requirements in the District's law that are related to adoption of this SIP revision.

I. *Comment: EPA's Action To Approve or Disapprove the District's AIM Coatings Rule Is a ''Significant Regulatory Action'' as Defined by Executive Order 12866, 58 FR 51735 (September 30, 1993).*

Response: EPA disagrees with this comment. Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. The commenter alleges that EPA's approval of the District's AIM coatings rule is a ''significant regulatory action'' because it meets several of the following criteria specified in Executive Order 12866: ''[it will have] an annual effect on the economy of $100 million or more or [it will] adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities * * *'' However, this action merely approves existing state law as meeting Federal requirements. EPA's approval of this SIP revision imposes no additional requirements beyond those imposed by state law. Accordingly, this action meets none of the criteria listed above. Any cost or any material adverse effects on the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities exist, if at all, due to the District's approval of its state AIM coatings rule, not by EPA's approval of that rule into the District's SIP. If EPA failed to act on the District's AIM coatings rule, the effects of the rule would not be changed because this rule went effect in the District on January 1, 2005. Nothing that EPA might do at this point in time alters that fact.

Furthermore, the District voluntarily adopted its version of the OTC model AIM coatings rule and, as the commenter itself acknowledges, EPA could not impose this control measure on the District. *Virginia* v. *EPA,* 108 F.3d 1397 (D.C. Cir. 1997). EPA's approval of this state rule merely fulfills its statutory obligation under the Act to review SIP submissions and approve state choices, provided that they meet the criteria of the Act.

J. *Comment: The District of Columbia Has Not Analyzed the Cost-Effectiveness of Any Reasonably Available Alternatives to the Proposed Rule*—The commenter states that the District has an obligation to perform a thorough evaluation of the cost-effectiveness of the District AIM coatings rule, including a comparison with the cost-effectiveness of reasonably available alternatives. The rule, and related rulemaking materials, do not analyze the cost-effectiveness of any reasonably available alternatives to the proposed rule. The commenter claims that this omission demonstrates the arbitrary and capricious nature of the rule, and clearly is a direct violation of the laws of the District of Columbia.

Response: EPA disagrees with this comment. The cost per ton figure determined by the District in its economic analysis, and its decision to rely upon information from California, are all decisions which fall within a state's purview, and issues regarding those decisions are rightly raised by interested parties to the state during its regulatory adoption The District's April 16, 2004 SIP revision submittal (supplemented on September 20 and November 24, 2004) provides evidence and certification that it that it has the legal authority to adopt its AIM coatings rule and that it has followed all of the requirements in the District's law that are related to adoption of a SIP revision. (*See* EPA's response to Comment II. H.). *See BCCA Appeal Group* v. *EPA,* 355 F.3d 817 n.11 at 830 (EPA may rely on the state's certification that it has complied with applicable state requirements for promulgating a rule submitted as a revision to its SIP).

K. *Comment: Additional Comments Submitted to the OTC and Commonwealth of Virginia Included, by Reference, in the Comments Submitted to EPA on the December 27, 2004 Proposed Approval of District's AIM Coatings Rule (69 FR 77149)*—As previously noted the SWC has included, by reference, in its comments to EPA on the proposed approval of the District's AIM rule the comments it submitted to the OTC in a letter dated January 11, 2001 (and its attachments). The SWC has also included, by reference, the comments it submitted to the District during its adoption process. Most of theses comments have already been summarized and responded to previously in Comments A–K as the SWC also submitted them directly to EPA on its proposed rulemaking. The following summarizes the remaining comments submitted to the District during its rule adoption process:

(1) The commenter has significant concerns with the proposed standards for certain paints and coatings, *e.g.,* interior wood clear and semi-transparent stains, interior wood vanishes, interior wood sanding sealers, exterior wood primers, and floor coatings. The commenter asserts that the District's proposed AIM coatings regulation is based upon the inaccurate assumption that compliant coatings are available or can be developed which will satisfy customer requirements and meet all of the performance requirements of these categories. The commenter contends that such coatings are not effectively within the limits of current technology and that this inaccurate assumption will result in increased and earlier repainting which can damage floors in the District due to seasonal variations in temperature and humidity.

(2) The commenter asserts that the economic analysis of the District's proposed AIM coatings rule is inaccurate because it uses a cost figure of $6400 per ton of emissions reduced based upon an economic analysis done for California. The commenter contends that the cost figure is inappropriate

given the differences in the stringency of the current requirements for AIM coatings in the District versus California, and therefore, the District needs to make an independent determination of the cost of VOC reductions from its proposed AIM coatings regulation.

(3) The commenter is concerned that the California Air Resources Board (CARB) suggested control measure (SCM) has been adopted in only 25 of the 35 air districts in California since it was first issued in June 1977. In 22 of the districts that have adopted the SCM, there are significant modifications and revisions, typically in the VOC limits for one or more AIM coating categories. Such modifications and revisions are necessary in those categories where there are no known substitute products, where it is shown that no substitute is necessary, since the increase in VOC emissions is marginal.

(4) The commenter is concerned that the proposed rule does not allow averaging of VOC content for various coatings produced by a manufacturer, which the CARB SCM allows.

(5) The commenter is concerned that there are no suitable substitutes for all the applications for these 5 categories of products, *e.g.,* interior wood clear and semi-transparent stains, interior wood vanishes, interior wood sanding sealers, exterior wood primers, and floor coatings. No water-based substitute meets performance standard for many applications, and their use can cause grain raising, lapping and a panelization problem, and that the District has not addressed these issues.

(6) The commenter suggests that there should be numerous exemptions that should be included in the District's rule, such as low-temperature products manufactured by the commenter intended for use in colder weather when ozone is not an issue. If more consumers use coatings in non-summer months, some of the summer ozone problems will disappear. Low temperature products should be encouraged with incentives, not regulated out of the market.

(7) The commenter is concerned that the CARB report contains numerous flaws which prevent it from being a valid basis for the proposed AIM rule.

(8) The commenter was not aware of the Districts prior hearing regarding the proposed rule and requests a hearing for an opportunity to present live testimony regarding the proposed rule, prior to the District taking any action on the proposal.

Response: With regard to the comments submitted to the OTC, and to the District on its proposed AIM coatings rule and subsequently, by reference, to EPA on its December 27, 2004 proposed approval of the District's April 16, 2004 SIP revision request (supplemented on September 20 and November 24, 2004), it is important to understand EPA's role with regard to review and approval or disapproval of rules submitted by states as SIP revisions. EPA can only take action upon the final adopted version of a state's regulation as submitted by that state in its SIP revision request. It is not within EPA's authority, by its rulemaking on the SIP revision or otherwise, to change or modify the text or substantive requirements of a state regulation. Therefore, EPA cannot modify the District's AIM coatings regulation to address the commenter's concerns.

The District's reliance upon both technical and cost analyses from California in its decisions with regard to the provisions in its final AIM coatings rule, its decisions to not include provisions for averaging, and its decisions to not provide exemptions are all decisions which fall within a state's purview, and issues regarding those decisions are rightfully raised by interested parties to the state during its regulatory adoption process. Therefore, it was appropriate that the SWC commented to the District on these matters during the adoption of its AIM coatings rule. A complete SIP revision submission from a state includes a compilation of timely comments properly submitted to the state on the proposed SIP revision and the state's response thereto (40 CFR part 51, appendix V, 2.1 (h)). EPA has reviewed the District's SIP revision submittal and has determined that comments the SWC submitted to the District (which the SWC has incorporated by reference as comments on this rulemaking), along with the District's responses to those comments, are included therein.

With regard to the SWC's comment that it was not aware of the public hearing held by the District regarding the proposed rule and its request for an additional hearing to present live testimony regarding the District's proposed AIM rule, EPA notes that in addition to the public hearing held on July 9, 2003 to which the SWC's comment refers (notice of which was published in the Washington Times), the District held a second public hearing on its AIM coatings rule on November 15, 2004 (notice of which was also published in the Washington Times). The SWC did not attend this second public hearing. EPA's review of the District's April 16, 2004 SIP revision request (supplemented on September 20 and November 24, 2004) indicates that the District satisfied the requirements of section 110(a) of the CAA with regard to providing public notice and public hearings on its AIM coatings rule SIP revision.

The District's April 16, 2004 SIP revision submittal (supplemented on September 20 and November 24, 2004) provides evidence and certification that it that it has the legal authority to adopt its AIM coatings rule and that it has followed all of the requirements in the District's law that are related to adoption of this SIP revision. (*See* EPA's response to Comment II. H.). In the context of a SIP approval, EPA's review of these state decisions is limited to whether the SIP revision meets the minimum criteria of the Act. Provided that the rule adopted by the state satisfies those criteria, EPA must approve such a SIP revision. *See, Union Elec Co.* v. *EPA, BCCA Appeal Group* v. *EPA,* 355 F.3d 817, n.11 at 830.

III. Final Action

EPA is approving the District's SIP revision for the control of VOC emissions from AIM coatings rule submitted on April 16, 2004, and supplemented on September 20 and November 24, 2004. The District's AIM coatings rule is part of the District's strategy to satisfy the CAA's requirements for a severe ozone nonattainment area and to achieve and maintain the ozone standard in the Metropolitan Washington, DC ozone nonattainment area.

IV. Statutory and Executive Order Reviews

A. General Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not

contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register.** This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 11, 2005. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action.

This action, pertaining to the District of Columbia's AIM coatings rule, may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: May 2, 2005.

Donald S. Welsh,

Regional Administrator, Region III.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart J—District of Columbia

■ 2. In § 52.470, the table in paragraph (c) is amended by adding the following entries to ''District of Columbia Municipal Regulations (DCMR), Title 20—Environment, Chapter 7—Volatile Organic Compounds':

■ a. Adding entries for section 749 through Section 754.

■ b. Adding a new entry for section 799 after the existing entries for section 799.

The added entries read as follows:

§ 52.470 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED DISTRICT OF COLUMBIA REGULATIONS

State citation	Title/subject	State effective date	EPA approval date	Additional explanation
District of Columbia Municipal Regulations (DCMR), Title 20—Environment				
*	*	*	*	*
Chapter 7 Volatile Organic Compounds				
*	*	*	*	*
Section 749	Architectural and Industrial Maintenance Coating—General Requirements.	04/16/04 11/26/04	5/21/05 [Insert page number where the document begins].	
Section 750	Architectural and Industrial Maintenance Coating— Standards.	04/16/04 11/26/04	5/21/05 [Insert page number where the document begins].	
Section 751	Architectural and Industrial Maintenance Coating—Exemptions.	04/16/04 11/26/04	5/21/05 [Insert page number where the document begins].	
Section 752	Architectural and Industrial Maintenance Coating—Labeling Requirement.	04/16/04 11/26/04	5/21/05 [Insert page number where the document begins].	

EPA-APPROVED DISTRICT OF COLUMBIA REGULATIONS—Continued

State citation	Title/subject	State effective date	EPA approval date	Additional explanation
Section 753	Architectural and Industrial Maintenance Coating—Reporting Requirements.	04/16/04 11/26/04	5/21/05 [Insert page number where the document begins].	
Section 754	Architectural and Industrial Maintenance Coating—Testing Requirements.	04/16/04 11/26/04	5/21/05 [Insert page number where the document begins].	
*	* * * *	*	*	*
Section 799	Definitions	04/16/04 11/26/04	5/21/05[Insert page number where the document begins].	
*	* * * *	*	*	*

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[FR Doc. 05–9312 Filed 5–11–05; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[VA151–5085; FRL–7910–1]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; VOC Emissions Standards for AIM Coatings

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the Commonwealth of Virginia. This revision pertains to the control of volatile organic compounds (VOC) emissions from architectural and industrial maintenance (AIM) coatings. EPA is approving this SIP revision in accordance with the Clean Air Act (CAA or Act).

DATES: *Effective Date:* This final rule is effective on June 13, 2005.

ADDRESSES: Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103; and Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: Rose Quinto, (215) 814–2182, or by e-mail at *quinto.rose@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On June 7, 2004 (69 FR 31780), EPA published a notice of proposed rulemaking (NPR) for the Commonwealth of Virginia. The NPR proposed approval of a Virginia regulation pertaining to the control of VOC from AIM coatings. The formal SIP revision was submitted by the Virginia Department of Environmental Quality (VADEQ) on February 23, 2004. The specific requirements of Virginia's SIP revision for AIM coatings and the rationale for EPA's proposed action are explained in the NPR and will not be restated here. EPA received adverse comments on the June 7, 2004 NPR. A summary of the comments submitted and EPA's responses are provided in Section II of this document.

EPA is aware that concerns have been raised about the achievability of VOC content limits of some of the product categories under the Virginia AIM coatings rule. Although we are approving this rule today, the Agency is concerned that if the rule's limits make it impossible for manufacturers to produce coatings that are desirable to consumers, there is a possibility that users may misuse the products by adding additional solvent, thereby circumventing the rule's intended VOC emission reductions. We intend to work with Virginia and manufacturers to explore ways to ensure that the rule achieves the intended VOC emission reductions, and we intend to address this issue in evaluating the amount of VOC emission reduction credit attributable to the rule.

II. Public Comments and EPA Responses

The National Paint and Coatings Association (NPCA) is one of the adverse commenters on EPA's June 7, 2004 proposed approval of Virginia's AIM coatings rule. The NPCA's comments include, by reference, the comments it previously submitted to Virginia on the proposed version of the AIM coatings rule during the Commonwealth's adoption process as transmitted by VADEQ in its February 23, 2004 SIP revision submittal to EPA. The NPCA also includes, by reference, the comments submitted by the Sherwin Williams Company (SWC) to EPA on the June 7, 2004 proposed approval of Virginia's AIM coatings rule. The SWC is the other adverse commenter on EPA's June 7, 2004 proposed approval of Virginia's AIM coatings rule. The SWC also includes, by reference, the comments it submitted to Virginia on the proposed version of the AIM coatings rule during the Commonwealth's adoption process, and the comments it submitted to the Ozone Transport Commission in a letter dated January 11, 2001.

The following summarizes the comments submitted by the NPCA and the SWC to EPA on the June 7, 2004 proposed approval of Virginia's AIM coatings rule and EPA's response to those comments.

A. *Comment:* Using Flawed Data Violates the Data Quality Objectives Act and Administrative Procedures Act—The commenters assert that the Virginia AIM coatings rule is based on flawed data and that the use of this data violates the Data Quality Objectives Act (''DQOA'') (Section 515(a) of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)). The data at issue is contained in what the commenters characterize as a ''study prepared by E.H. Pechan & Associates'' (Pechan Study) in 2001. The alleged flaws relate to projected emissions reductions calculated in the Pechan Study.

The commenters assert that certain of the underlying data and data analyses are allegedly ''unreproduceable.'' Further, the commenters assert that if better data were used, the OTC model AIM coatings rule would achieve greater VOC emissions reductions, relative to