

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
1999–2005 Rate-of-Progress Plan SIP Revision and the Transportation Control Measures (TCMs) in Appendix J.	Washington DC 1-hour ozone nonattainment area.	9/2/03, 2/24/04	5/16/05, 70 FR 25688 .....	Only the TCMs in Appendix J of the 2/24/2004 revision 2002 motor vehicle emissions budgets (MVEBs) of 125.2 tons per day (tpy) for VOC and 290.3 tpy of NO <sub>x</sub> , and, 2005 MVEBs of 97.4 tpy for VOC and 234.7 tpy of NO <sub>x</sub> .
VMT Offset SIP Revision .....	Washington DC 1-hour ozone nonattainment area.	9/2/03, 2/24/04	5/16/05, 70 FR 25688 .....	
Contingency Measure Plan ...	Washington, DC Area .....	9/2/03, 2/24/04	5/16/05, 70 FR 25688 .....	
1-hour Ozone Modeled Demonstration of Attainment.	Washington DC 1-hour ozone nonattainment area.	9/2/03, 2/24/04	5/16/05, 70 FR 25688 .....	
Attainment Demonstration and Early Action Plan for the Washington County Ozone Early Action Compact Area.	Washington County .....	12/20/04, 2/28/05.	8/17/05, 70 FR 48283 .....	
1-hour Ozone Attainment Plan.	Washington DC 1-hour ozone nonattainment area.	9/2/2003, 2/24/2004.	11/16/05, 70 FR 69440 .....	
8-Hour Ozone Maintenance Plan for the Kent and Queen Anne's Area.	Kent and Queen Anne's Counties.	05/2/06, 05/19/06.	12/22/06, 71 FR 76920 .....	

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA–R03–OAR–2007–0200; FRL–8773–1]

### Approval and Promulgation of Air Quality Implementation Plans; Virginia; Amendments to the Open Burning Regulation

**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 SIP revision pertains to the amendments of Virginia's open burning regulation. EPA is approving this SIP revision in accordance with the Clean Air Act (CAA).

**DATES:** *Effective Date:* This final rule is effective on April 20, 2009.

**ADDRESSES:** EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2007–0200. All documents in the docket are listed in the <http://www.regulations.gov> Web site. 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 through <http://www.regulations.gov> 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 are available at 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](mailto:quinto.rose@epa.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On June 7, 2007 (72 FR 31493), EPA published a notice of proposed rulemaking (NPR) for the Commonwealth of Virginia. The NPR proposed approval of the amendments to Virginia's open burning regulation (9 VAC 5, Chapter 40, Part II, Article 40, Sections 5–40–5600 through 5–40–5630). The formal SIP revision was submitted by the Virginia Department of Environmental Quality (VADEQ) on February 5, 2007. The provisions of Virginia's open burning regulation and the rationale for EPA's proposed action are explained in the NPR and will not be restated here. On July 9, 2007, EPA received comments from VADEQ on the June 7, 2007 NPR. The comments state that they are not to be considered adverse to EPA's proposed action; rather, VADEQ requests that EPA revise the preamble to the rule where the

preamble is arguably inconsistent with Virginia's submittal. A summary of those comments and EPA's responses are provided in Section II of this document.

##### II. Summary of Public Comments and EPA Responses

*Comment:* The commenter requests to correct the following under the "Summary of SIP Revision," the list of volatile organic compound (VOC) emission control areas:

1. Western Virginia Emissions Control Area: Add "Roanoke City;" change "Salem County" to "Salem City;" and change "Winchester County" to "Winchester City."

2. Hampton Roads Emissions Control Area: Add "Gloucester County" and "Isle of Wight County" and change "Suffolk County" to Suffolk City."

3. Richmond Emissions Control Area: Add "Prince George County" and "Petersburg City."

*Response:* EPA acknowledges that the June 7, 2007 proposal inadvertently omitted the above-referenced geographic areas, which were included in Virginia's submittal.

*Comment:* The commenter requests that the seasonal restrictions in 9 VAC 5–40–5630(A)(8) and 9 VAC 5–40–5630(A)(10) as applying in the County of Gloucester and the County of Isle of Wight not become part of Virginia SIP until 2009.

*Response:* The effective date of this approval is 2009; therefore this comment is moot.

*Comment:* The commenter requests to remove the terms "landfill," "local

landfill” and “salvage operation” from the list of definitions affected by this SIP approval, since no changes were made to these definitions. The commenter requests to add the term “junkyard” in the list of definitions, since a change was made to this definition.

*Response:* EPA agrees that Virginia’s submittal did not change the definitions of the terms “landfill,” “local landfill” and “salvage operation,” which were inadvertently included in the June 7, 2007 notice as having been changed. EPA also agrees that Virginia added the term “junkyard” although this term was inadvertently omitted from the list of changes in the SIP Revision Summary of the notice.

*Comment:* The commenter requests to replace the following statement contained in the preamble: “This SIP revision provides for the control of open burning and use of special incineration devices for destruction of rubber tires, asphaltic materials, crankcase oil, impregnated wood or other rubber or petroleum based materials except when conducting bona fide fire fighting instruction at fire fighting training schools having permanent facilities. This SIP revision also provides for the control of open burning and use of special incineration device for the destruction of hazardous waste or containers for such materials. In addition, this SIP revision provides for the control of open burning and use of special incineration device for the purpose of salvage operation or for the destruction of commercial/industrial waste.”

The commenter suggests replacing that statement with: “The destruction of rubber tires, asphaltic materials, crankcase oil, impregnated wood or other rubber or petroleum based materials is prohibited by open burning or the use of special incineration devices except when conducting bona fide fire fighting instruction at firefighting training schools having permanent facilities. Open burning or the use of special incinerator devices is also prohibited for the destruction of hazardous waste or containers for such materials as well as for salvage operations or for the destruction of commercial/industrial waste.”

*Response:* EPA agrees that VADEQ’s suggested replacement statement is an accurate synopsis of the rule, and should replace EPA’s statement from the rule proposal.

### III. General Information Pertaining to SIP Submittals From the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) “privilege” for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed. Virginia’s legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia’s Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1–1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information (1) That are generated or developed before the commencement of a voluntary environmental assessment; (2) that are prepared independently of the assessment process; (3) that demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) that are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege law, Va. Code Sec. 10.1–1198, precludes granting a privilege to documents and information “required by law,” including documents and information “required by Federal law to maintain program delegation, authorization or approval,” since Virginia must “enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts. \* \* \*” The opinion concludes that “[r]egarding § 10.1–1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval.” Virginia’s Immunity law, Va. Code Sec. 10.1–1199, provides that “[t]o the

extent consistent with requirements imposed by Federal law,” any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General’s January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any federally authorized programs, since “no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity.”

Therefore, EPA has determined that Virginia’s Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its program consistent with the Federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law.

### IV. Final Action

EPA is approving the amendments to the open burning regulation (9 VAC 5, Chapter 40, Part II, Article 40, Sections 5–40–5600 through 5–40–5630) as a revision to the Virginia SIP submitted on February 5, 2007.

### V. Statutory and Executive Order Reviews

#### A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA’s role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under

Executive Order 12866 (58 FR 51735, October 4, 1993);

- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

*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 action 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**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action 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 CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by May 18, 2009. Filing a petition for reconsideration by the Administrator of this final rule does not

affect the finality of this action 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, approving the amendments of Virginia’s open burning regulation, 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, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

January 22, 2009.

**William T. Wisniewski,**  
*Acting Regional Administrator, Region III.*

■ 40 CFR Part 52 is amended as follows:

**PART 52—[AMENDED]**

■ 1. The authority citation for 40 CFR part 52 continues to read as follows:

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

**Subpart VV—Virginia**

■ 2. In § 52.2420, the table in paragraph (c) is amended by revising the entries for 9 VAC 5, Chapter 40, Part II, Article 40, Sections 5–40–5600 through 5–40–5630 to read as follows:

**§ 52.2420 Identification of plan.**

\* \* \* \* \*  
(c) \* \* \*

**EPA-APPROVED VIRGINIA REGULATIONS AND STATUTES**

State citation (9 VAC 5)	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
*	*	*	*	*
<b>Chapter 40 Existing Stationary Sources</b>				
*	*	*	*	*
<b>Part II Emission Standards</b>				
*	*	*	*	*
<b>Article 40 Open Burning (Rule 4–40)</b>				
5–40–5600 .....	Applicability .....	10/18/06	March 19, 2009 [Insert page number where the document begins].	Provisions of Article 40 expanded to new localities in the emissions control areas.
5–40–5610 .....	Definitions .....	10/18/06	March 19, 2009 [Insert page number where the document begins].	Terms added: “Air curtain incinerator,” “Clean lumber,” “Wood waste,” and “Yard waste.”

EPA-APPROVED VIRGINIA REGULATIONS AND STATUTES—Continued

State citation (9 VAC 5)	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
5-40-5620 .....	Open burning prohibitions.	10/18/06	March 19, 2009 [Insert page number where the document begins].	Terms revised: "Clean burning waste," "Clean wood," "Commercial waste," "Construction waste," "Debris waste," "Demolition waste," "Garbage," "Hazardous waste," "Household waste," "Industrial waste," "Junkyard," "Open burning," "Open pit incinerator," "Refuse," "Sanitary landfill," and "Special incineration device."
5-40-5630 .....	Permissible open burning.	10/18/06	March 19, 2009 [Insert page number where the document begins].	
*	*	*	*	*

\* \* \* \* \*  
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**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[DC103-2051; FRL-8775-3]

**Approval and Promulgation of Air Quality Implementation Plans; District of Columbia; Update to Materials Incorporated by Reference**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule; Notice of administrative change.

**SUMMARY:** EPA is updating the materials submitted by the District of Columbia that are incorporated by reference (IBR) into the State implementation plan (SIP). The regulations affected by this update have been previously submitted by the District of Columbia Department of the Environment and approved by EPA. This update affects the SIP materials that are available for public inspection at the National Archives and Records Administration (NARA), the Air and Radiation Docket and Information Center located at EPA Headquarters in Washington, DC, and the EPA Regional Office.

**DATES:** *Effective Date:* This action is effective March 19, 2009.

**ADDRESSES:** SIP materials which are incorporated by reference into 40 CFR part 52 are available for inspection at the following locations: Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street,

Philadelphia, Pennsylvania 19103; the Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, 1301 Constitution Avenue, NW., Room B108, Washington, DC 20460; or the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: [http://www.archives.gov/federal\\_register/code\\_of\\_federal\\_regulations/ibr\\_locations.html](http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html).

**FOR FURTHER INFORMATION CONTACT:** Harold A. Frankford, (215) 814-2108 or by e-mail at [frankford.harold@epa.gov](mailto:frankford.harold@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The SIP is a living document which the state can revise as necessary to address the unique air pollution problems in the State. Therefore, EPA from time to time must take action on SIP revisions containing new and/or revised regulations as being part of the SIP. On May 22, 1997 (62 FR 27968), EPA revised the procedures for incorporating by reference Federally-approved SIPs, as a result of consultations between EPA and Office of the Federal Register (OFR). The description of the revised SIP document, IBR procedures and "Identification of plan" format are discussed in further detail in the May 22, 1997 **Federal Register** document. On December 7, 1998, (63 FR 67407) EPA published a document in the **Federal Register** beginning the new IBR procedure for the District of Columbia. On August 6, 2004 (69 FR 47773) and September 6, 2005 (70 FR 52919), EPA published updates to the IBR material for the District of Columbia.

**II. EPA Action**

In this action, EPA is doing the following:

1. Announcing the update to the IBR material as of December 1, 2008.
2. Making corrections to text in the "Title/subject" column to the following entries listed in the § 52.470(c) table: Section 702; Section 703.2, 703.3; Section 703.1, 703.4 through 703.7; Section 705.1 through 705.3, and Section 705.4 through 14.

EPA has determined that today's rule falls under the "good cause" exemption in section 553(b)(3)(B) of the Administrative Procedures Act (APA) which, upon finding "good cause," authorizes agencies to dispense with public participation and section 553(d)(3) which allows an agency to make a rule effective immediately (thereby avoiding the 30-day delayed effective date otherwise provided for in the APA). Today's rule simply codifies provisions which are already in effect as a matter of law in Federal and approved State programs. Under section 553 of the APA, an agency may find good cause where procedures are "impractical, unnecessary, or contrary to the public interest." Public comment is "unnecessary" and "contrary to the public interest" since the codification only reflects existing law. Immediate notice in the CFR benefits the public by removing outdated citations and incorrect chart entries.

**III. Statutory and Executive Order Reviews**

**A. General Requirements**

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable