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**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 52**

[EPA-R03-OAR-2023-0089; FRL-10213-01-Region 3]

**Air Plan Approval; Virginia; 1997 8-Hour Ozone National Ambient Air Quality Standard Second Maintenance Plan for the Hampton Roads Area****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to approve a state implementation plan (SIP) revision submitted by the Commonwealth of Virginia (Commonwealth or Virginia). This revision pertains to the Commonwealth's plan, submitted by the Virginia Department of Environmental Quality (VADEQ), for maintaining the 1997 8-hour ozone national ambient air quality standard (NAAQS) (referred to as the 1997 ozone NAAQS) in the Norfolk-Virginia Beach-Newport News (Hampton Roads), VA Area (Hampton Roads Area or Area). This action is being taken under the Clean Air Act (CAA).

**DATES:** Written comments must be received on or before September 21, 2023.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R03-OAR-2023-0089 at [www.regulations.gov](http://www.regulations.gov), or via email to [gordon.mike@epa.gov](mailto:gordon.mike@epa.gov). For comments submitted at [Regulations.gov](http://Regulations.gov), follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [Regulations.gov](http://Regulations.gov). For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission

methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit [www.epa.gov/dockets/commenting-epa-dockets](http://www.epa.gov/dockets/commenting-epa-dockets).

**FOR FURTHER INFORMATION CONTACT:** Om P. Devkota, Planning & Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, Four Penn Center, 1600 John F. Kennedy Boulevard, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814-2172. Mr. Devkota can also be reached via electronic mail at [devkota.om@epa.gov](mailto:devkota.om@epa.gov).

**SUPPLEMENTARY INFORMATION:** On September 9, 2022, the VADEQ submitted a revision to the Virginia SIP to incorporate a plan for maintaining the 1997 ozone NAAQS through December 31, 2032 in accordance with CAA section 175A.

**I. Background**

In 1979, under section 109 of the CAA, EPA established primary and secondary NAAQS for ozone at 0.12 parts per million (ppm), averaged over a 1-hour period. 44 FR 8202 (February 8, 1979). On July 18, 1997 (62 FR 38856),<sup>1</sup> EPA revised the primary and secondary NAAQS for ozone to set the acceptable level of ozone in the ambient air at 0.08 ppm, averaged over an 8-hour period. EPA set the 1997 ozone NAAQS based on scientific evidence demonstrating that ozone causes adverse health effects at lower concentrations and over longer periods of time than was understood when the pre-existing 1-hour ozone NAAQS was set.

Following promulgation of a new or revised NAAQS, EPA is required by the CAA to designate areas throughout the nation as attaining or not attaining the NAAQS. On April 30, 2004 (69 FR 23858), EPA designated the Hampton Roads Area as moderate nonattainment for the 1997 ozone NAAQS. The 1997 Hampton Roads Ozone Maintenance Area includes the counties of Gloucester, Isle of Wight, James City, and York, as well as the cities of Chesapeake, Hampton, Newport News,

<sup>1</sup> In March 2008, EPA completed another review of the primary and secondary ozone standards and tightened them further by lowering the level for both to 0.075 ppm. 73 FR 16436 (March 27, 2008). Additionally, in October 2015, EPA completed a review of the primary and secondary ozone standards and tightened them by lowering the level for both to 0.070 ppm. 80 FR 65292 (October 26, 2015).

Norfolk, Poquoson, Portsmouth, Suffolk, Virginia Beach, and Williamsburg.

Once a nonattainment area has three years of complete and certified air quality data that has been determined to attain the NAAQS, and the area has met the other criteria outlined in CAA section 107(d)(3)(E),<sup>2</sup> the state can submit a request to EPA to redesignate the area to attainment. Areas that have been redesignated by EPA from nonattainment to attainment are referred to as "maintenance areas." One of the criteria for redesignation is to have an approved maintenance plan, under CAA section 175A. The maintenance plan must demonstrate that the area will continue to maintain the standard for the period extending 10 years after redesignation, and it must contain such additional measures as necessary to ensure maintenance as well as contingency measures as necessary to assure that violations of the standard will be promptly corrected.

On June 1, 2007 (72 FR 30490), EPA approved a redesignation request (and maintenance plan) from VADEQ for the Hampton Roads Area. EPA published final approval of the redesignation request and maintenance plan on June 1, 2007 (72 FR 30490), and, as of that time, the area was designated as attainment for the 1997 ozone NAAQS. In accordance with CAA section 175A(b), at the end of the eighth year after the effective date of the redesignation, the state must also submit a second maintenance plan to ensure ongoing maintenance of the standard for an additional 10 years.

EPA's final implementation rule for the 2008 ozone NAAQS revoked the 1997 ozone NAAQS and provided that one consequence of revocation was that areas that had been redesignated to attainment (*i.e.*, maintenance areas) for the 1997 ozone NAAQS no longer needed to submit second 10-year maintenance plans under CAA section 175A(b).<sup>3</sup> However, in *South Coast Air Quality Management District v. EPA*<sup>4</sup> (South Coast II), the United States Court of Appeals for the District of Columbia vacated EPA's interpretation that, because of the revocation of the 1997 ozone standard, second maintenance plans were not required for "orphan maintenance areas," (*i.e.*, areas like the

<sup>2</sup> The requirements of CAA section 107(d)(3)(E) include attainment of the NAAQS, full approval under section 110(k) of the applicable SIP, determination that improvement in air quality is a result of permanent and enforceable reductions in emissions, demonstration that the state has met all applicable section 110 and part D requirements, and a fully approved maintenance plan under CAA section 175A.

<sup>3</sup> See 80 FR 12315 (March 6, 2015).

<sup>4</sup> 882 F.3d 1138 (D.C. Cir. 2018).

Hampton Roads Area) that had been redesignated to attainment for the 1997 ozone NAAQS and were designated attainment for the 2008 ozone NAAQS. Thus, states with these “orphan maintenance areas” under the 1997 ozone NAAQS must submit maintenance plans for the second maintenance period.

As previously discussed, CAA section 175A sets forth the criteria for adequate maintenance plans. In addition, EPA has published longstanding guidance<sup>5</sup> that provides further insight on the content of an approvable maintenance plan, explaining that a maintenance plan should address five elements: (1) an attainment emissions inventory; (2) a maintenance demonstration; (3) a commitment for continued air quality monitoring; (4) a process for verification of continued attainment; and (5) a contingency plan. The 1992 Calcagni Memo<sup>6</sup> provides that states may generally demonstrate maintenance by either performing air quality modeling to show that the future mix of sources and emission rates will not cause a violation of the NAAQS or by showing that future emissions of a pollutant and its precursors will not exceed the level of emissions during a year when the area was attaining the NAAQS (*i.e.*, attainment year inventory). See 1992 Calcagni Memo at p. 9. EPA further clarified in three subsequent guidance memos describing “limited maintenance plans” (LMPs)<sup>7</sup> that the requirements of CAA section 175A could be met by

demonstrating that the area’s design value<sup>8</sup> was well below the NAAQS and that the historical stability of the area’s air quality levels showed that the area was unlikely to violate the NAAQS in the future. Specifically, EPA believes that if the most recent air quality design value for the area is at a level that is below 85% of the standard, or in this case below 0.071 ppm, then EPA considers the state to have met the section 175A requirement for a demonstration that the area will maintain the NAAQS for the requisite period. Accordingly, on September 9, 2022, VADEQ submitted the Hampton Roads Area second maintenance plan, following the LMP guidance, and demonstrating that the area will maintain the 1997 ozone NAAQS through December 31, 2032, *i.e.*, through the entire second maintenance period. Starting from January 1, 2033, after this maintenance plan expires, the Area will no longer be bound by the general conformity requirements and transportation conformity requirements outlined in section 176 of the CAA. However, any other control programs will continue to be in effect, unless there is evidence to show that they are unnecessary for complying with the 1997 ozone NAAQS.

**II. Summary of SIP Revision and EPA Analysis**

VADEQ’s September 9, 2022 SIP submittal outlines a plan for continued maintenance of the 1997 ozone NAAQS

which addresses the criteria set forth in the 1992 Calcagni memo as follows.

*A. Attainment Emissions Inventory*

For maintenance plans, a state should develop a comprehensive and accurate inventory of actual emissions for an attainment year which identifies the level of emissions in the area which is sufficient to maintain the NAAQS. The inventory should be developed consistent with EPA’s most recent guidance. For ozone, the inventory should be based on typical summer day’s emissions of oxides of nitrogen (NO<sub>x</sub>) and volatile organic compounds (VOC), the precursors to ozone formation. In the first maintenance plan for the Hampton Roads Area, VADEQ used 2005 for the attainment year inventory, because 2005 was one of the years in the 2003–2005 three-year period when the area first attained the 1997 ozone NAAQS.<sup>9</sup> The Hampton Roads Area continued to monitor attainment of the 1997 ozone NAAQS in 2016. Therefore, the emissions inventory from 2016 represents emissions levels conducive to continued attainment (*i.e.*, maintenance) of the NAAQS.<sup>10</sup> Thus, VADEQ is using 2016 as representing attainment level emissions for its second maintenance plan. Virginia used 2016 summer day emissions from EPA’s 2016 version 2.0 modeling platform<sup>11</sup> as the basis for the 2016 inventory presented in Table 1 in this document.

TABLE 1—2016 TYPICAL SUMMER DAY VOC AND NO<sub>x</sub> EMISSIONS (tons/day) FOR HAMPTON ROADS AREA

Name	Source category	VOC emissions	NO <sub>x</sub> emissions
Gloucester County .....	Point .....	0.0690	0.4076
	Nonpoint .....	2.1190	0.1218
	Onroad .....	0.7055	1.0346
Isle of Wight County .....	Nonroad .....	1.0918	3.2830
	Point .....	0.8257	1.4711
	Nonpoint .....	1.1699	0.4066
James City County .....	Onroad .....	0.7703	1.4166
	Nonroad .....	0.5220	0.5769
	Point .....	0.3748	1.3513
	Nonpoint .....	2.1067	0.4862
	Onroad .....	0.8237	1.7141
	Nonroad .....	1.0240	1.5179

<sup>5</sup> See “Limited Maintenance Plan Option for Nonclassifiable Ozone Nonattainment Areas” from Sally L. Shaver, Office of Air Quality Planning and Standards (OAQPS), dated November 16, 1994.

<sup>6</sup> “Procedures for Processing Requests to Redesignate Areas to Attainment,” Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992 (1992 Calcagni Memo).

<sup>7</sup> See “Limited Maintenance Plan Option for Nonclassifiable Ozone Nonattainment Areas” from Sally L. Shaver, Office of Air Quality Planning and Standards (OAQPS), dated November 16, 1994; “Limited Maintenance Plan Option for Nonclassifiable CO Nonattainment Areas” from

Joseph Paisie, OAQPS, dated October 6, 1995; and “Limited Maintenance Plan Option for Moderate PM<sub>10</sub> Nonattainment Areas” from Lydia Wegman, OAQPS, dated August 9, 2001.

<sup>8</sup> The ozone design value for a monitoring site is the 3-year average of the annual fourth-highest daily maximum 8-hour average ozone concentrations. The design value for an ozone nonattainment area is the highest design value of any monitoring site in the area.

<sup>9</sup> For more information, see EPA’s June 1, 2007 “Approval and Promulgation of Air Quality Implementation Plans; Virginia; Redesignation of the Hampton Roads 8-Hour Ozone Nonattainment Area to Attainment and Approval of the Area’s

Maintenance Plan and 2002 Base-Year Inventory” (72 FR 30490).

<sup>10</sup> The design values for the Hampton Roads maintenance area for each of the three-year averages containing 2016 are 0.064 ppm for 2014–2016, 0.065 ppm for 2015–2017, and 0.064 ppm for 2016–2018. Since these values are well beneath the 1997 ozone NAAQS of 0.08 ppm, the 2016 emissions inventory is a suitable inventory to use as an attainment inventory for this second maintenance plan.

<sup>11</sup> For more information, visit [www.epa.gov/air-emissions-modeling/2016v2-platform](http://www.epa.gov/air-emissions-modeling/2016v2-platform).

TABLE 1—2016 TYPICAL SUMMER DAY VOC AND NO<sub>x</sub> EMISSIONS (tons/day) FOR HAMPTON ROADS AREA—Continued

Name	Source category	VOC emissions	NO <sub>x</sub> emissions
York County .....	Point .....	1.7402	12.8452
	Nonpoint .....	2.9341	0.2426
	Onroad .....	0.8814	1.8463
	Nonroad .....	1.5854	1.0722
City of Chesapeake .....	Point .....	1.6099	2.7698
	Nonpoint .....	9.3508	1.4014
	Onroad .....	2.8211	5.1701
	Nonroad .....	1.9042	3.0290
City of Hampton .....	Point .....	0.1701	0.1629
	Nonpoint .....	3.2443	0.3825
	Onroad .....	1.6943	2.8409
	Nonroad .....	1.1797	5.0726
City of Newport News .....	Point .....	1.3226	3.1034
	Nonpoint .....	6.5468	2.1701
	Onroad .....	2.0997	3.3499
	Nonroad .....	2.0554	0.9644
City of Norfolk .....	Point .....	1.4293	2.7084
	Nonpoint .....	8.3975	1.0968
	Onroad .....	2.6110	4.3803
	Nonroad .....	1.7455	6.4235
City of Poquoson .....	Point .....	0.00	0.00
	Nonpoint .....	0.2597	0.0245
	Onroad .....	0.1318	0.1137
	Nonroad .....	0.2712	0.1425
City of Portsmouth .....	Point .....	0.0177	3.7311
	Nonpoint .....	3.9935	0.3437
	Onroad .....	1.2541	1.6801
	Nonroad .....	0.4959	0.3991
City of Suffolk .....	Point .....	0.0478	0.0427
	Nonpoint .....	2.5712	0.6950
	Onroad .....	1.1467	3.1387
	Nonroad .....	0.6860	1.4919
City of Virginia Beach .....	Point .....	3.1577	0.6830
	Nonpoint .....	12.4218	1.4933
	Onroad .....	5.2219	6.3737
	Nonroad .....	4.0864	5.4491
City of Williamsburg .....	Point .....	0.00	0.00
	Nonpoint .....	0.3454	0.0984
	Onroad .....	0.1810	0.1919
	Nonroad .....	0.1640	0.1363

The data shown in Table 1 in this document is based on the 2017 National Emissions Inventory (NEI) version 2.<sup>12</sup> The inventory addresses four anthropogenic emission source categories: Stationary (point) sources, stationary nonpoint (area) sources, nonroad mobile, and onroad mobile sources. Point sources are stationary sources that have the potential to emit (PTE) more than 100 tons per year (tpy) of VOC, or more than 50 tpy of NO<sub>x</sub>, and which are required to obtain an operating permit. Data are collected for each source at a facility and reported to VADEQ. Examples of point sources include municipal solid waste incinerators, landfills, and electric

<sup>12</sup> The NEI is a comprehensive and detailed estimate of air emissions of criteria pollutants, criteria precursors, and hazardous air pollutants from air emissions sources. The NEI is released every three years based primarily upon data provided by State, Local, and Tribal air agencies for sources in their jurisdictions and supplemented by data developed by EPA.

generating units. Nonpoint sources include emissions from equipment, operations, and activities that are numerous and in total have significant emissions. Examples include emissions from commercial and consumer products, residential wood combustion, home heating, and small commercial operations such as vehicle refinishing. The onroad emissions sector includes emissions from engines used primarily to propel equipment on highways and other roads, including passenger vehicles, motorcycles, and heavy-duty diesel trucks. The nonroad emissions sector includes emissions from engines that are not primarily used to propel transportation equipment. Examples of equipment in the nonroad category include lawn equipment, construction equipment, commercial shipping, locomotives, and pleasure craft. EPA reviewed the emissions inventory submitted by VADEQ and proposes to conclude that the plan's inventory is

acceptable for the purposes of a subsequent maintenance plan under CAA section 175A(b).

#### *B. Maintenance Demonstration*

In order to attain the 1997 ozone NAAQS, the three-year average of the fourth-highest daily average ozone concentrations (design value or "DV") at each monitor within an area must not exceed 0.08 ppm. Based on the rounding convention described in 40 CFR part 50, appendix I, the standard is attained if the DV is 0.084 ppm or below. CAA section 175A requires a demonstration that the area will continue to maintain the NAAQS throughout the duration of the requisite maintenance period. Consistent with the prior guidance documents discussed previously in this document as well as EPA's November 20, 2018 "Resource Document for 1997 Ozone NAAQS Areas: Supporting Information for States Developing Maintenance Plans" (2018

Resource Document),<sup>13</sup> EPA believes that if the most recent DV for the area is well below the NAAQS (*i.e.*, below 85%, or in this case below 0.071 ppm), the section 175A demonstration requirement has been met, provided that Prevention of Significant Deterioration (PSD) requirements, any control measures already in the SIP, and any Federal measures remain in place through the end of the second maintenance period (absent a showing consistent with section 110(1) that such measures are not necessary to assure maintenance).

For the purposes of demonstrating continued maintenance with the 1997 ozone NAAQS, VADEQ provided 3-year

DVs for the Hampton Roads Area from 2001 to 2021. This includes DVs for 2001–2003, 2002–2004, 2003–2005, 2004–2006, 2005–2007, 2006–2008, 2007–2009, 2008–2010, 2009–2011, 2010–2012, 2011–2013, 2012–2014, 2013–2015, 2014–2016, 2015–2017, 2016–2018, 2017–2019, 2018–2020, and 2019–2021. 2007–2009 through 2019–2021 are shown in Table 2 of this document.<sup>14</sup> In addition, EPA has reviewed the most recent ambient air quality monitoring data for ozone in the Hampton Roads Area, as submitted by Virginia and recorded in EPA’s Air Quality System (AQS). The most recent DV (*i.e.*, 2019–2021) at monitors located

in the Hampton Roads Area are also shown in Table 2 of this rulemaking action.<sup>15</sup> There currently are three operating ozone monitoring sites in the Hampton Roads Area, two in Suffolk City (monitors 518000004 and 518000005) and one in Hampton City (monitor 516500008). As can be seen in Table 2 in this document, DVs at all monitors located in the Hampton Roads Area have been well below 85% of the 1997 ozone NAAQS (*i.e.*, 0.071 ppm) since the 2012–2014 period. The highest DV for the 2019–2021 period at a monitor in the Hampton Roads Area is 0.058 ppm, which is well below the 1997 ozone NAAQS.

TABLE 2—RECENT 1997 OZONE NAAQS DESIGN VALUES (ppm) AT MONITORING SITES IN THE HAMPTON ROADS AREA

Jurisdiction	Hampton City	Suffolk City	Suffolk City
AQS site ID	516500008	518000004	518000005
2007–2009 .....	.....	0.072	0.073
2008–2010 .....	.....	0.071	0.072
2009–2011 .....	.....	0.071	0.070
2010–2012 <sup>16</sup> .....	0.076	0.073	0.071
2011–2013 .....	0.072	0.070	0.068
2012–2014 .....	0.067	0.064	0.065
2013–2015 .....	0.064	0.061	0.062
2014–2016 .....	0.064	0.060	0.061
2015–2017 .....	0.065	0.061	0.059
2016–2018 .....	0.064	0.062	0.059
2017–2019 .....	0.062	0.060	0.058
2018–2020 .....	0.058	0.058	0.056
2019–2021 .....	0.058	0.056	0.056

Additionally, states can support the demonstration of continued maintenance by showing stable or improving air quality trends. According to EPA’s 2018 Resource Document, several kinds of analyses can be performed by states wishing to make such a showing. One approach is to take the most recent DV for the area and add the maximum DV increase (over one or more consecutive years) that has been observed in the area over the past several years. For an area with multiple monitors, the highest of the most recent DVs should be used. A sum that does not exceed the level of the 1997 ozone NAAQS may be a good indicator of expected continued attainment. As

shown in Table 2 in this document, the largest DV increase in the Hampton Roads Area was 0.002 ppm, which occurred between the 2009–2011 (0.071 ppm) and 2010–2012 (0.073 ppm) design value periods at one of the monitors located in Suffolk City (AQS ID 518000004). Adding 0.002 ppm to the highest DV for the 2019–2021 period (0.058 ppm at the Hampton City monitor AQS ID 516500008) results in 0.060 ppm, a sum that is still below the 1997 ozone NAAQS.

DVs at all monitors located in the Hampton Roads Area have been below 85% of the 1997 ozone NAAQS (*i.e.*, 0.071 ppm) since the 2012–2014 period. Additional supporting information that

the Area is expected to continue to maintain the standard can be found in projections of future year DVs that EPA recently completed to assist states with the development of interstate transport SIPs for the 2015 8-hour ozone NAAQS. Those projections, made for the year 2023, show that the highest DV at a monitor located in the Hampton Roads Area is expected to be 0.058 ppm.<sup>17</sup> The Hampton Roads Area has maintained the air quality levels well below the 1997 ozone NAAQS since the Area first attained the NAAQS in the 2003–2005 timeframe.<sup>18</sup> Therefore, EPA proposes to determine that future violations of the

<sup>13</sup> This resource document is included in the docket for this rulemaking available online at [www.regulations.gov](http://www.regulations.gov), Docket ID: EPA–R03–OAR–2023–0089 and is also available at [www.epa.gov/sites/default/files/2018-11/documents/ozone\\_1997\\_naaqs\\_imp\\_resource\\_document\\_nov\\_20\\_2018.pdf](http://www.epa.gov/sites/default/files/2018-11/documents/ozone_1997_naaqs_imp_resource_document_nov_20_2018.pdf).

<sup>14</sup> See also Figure-2 and Table 3 of VADEQ’s September 9, 2022 submittal, “Commonwealth of Virginia State Implementation Plan Revision Second Maintenance Plan 1997 Ozone National Ambient Air Quality Standards Hampton Roads Maintenance Area,” included in the docket for this rulemaking available online at

[www.regulations.gov](http://www.regulations.gov), Docket ID: EPA–R03–OAR–2023–0089.

<sup>15</sup> This data is also included in the docket for this rulemaking available online at [www.regulations.gov](http://www.regulations.gov), Docket ID: EPA–R03–OAR–2023–0089 and is also available at [www.epa.gov/air-trends/air-quality-design-values#report](http://www.epa.gov/air-trends/air-quality-design-values#report).

<sup>16</sup> AQS site 516500008’s design values were first available in 2010–2012 as this new site replaced a different Hampton City monitoring site that is no longer in existence. For more information see [www.epa.gov/air-trends/air-quality-design-values](http://www.epa.gov/air-trends/air-quality-design-values).

<sup>17</sup> See U.S. EPA, “Air Quality Modeling Technical Support Document for the Updated 2023 Projected

Ozone Design Values”, Office of Air Quality Planning and Standards, dated June 2018, available at [www.epa.gov/sites/default/files/2018-06/documents/aaq\\_modelingtsd\\_updated\\_2023\\_modeling\\_o3\\_dvs.pdf](http://www.epa.gov/sites/default/files/2018-06/documents/aaq_modelingtsd_updated_2023_modeling_o3_dvs.pdf).

<sup>18</sup> As explained in EPA’s April 13, 2007 document proposing “Approval and Promulgation of Air Quality Implementation Plans; Virginia; Redesignation of the Hampton Roads 8-Hour Ozone Nonattainment Area to Attainment and Approval of the Associated Maintenance Plan and 2002 Base-Year Inventory for the 1997 ozone NAAQS” (72 FR 18602), the 2003–2005 average DV for the Hampton Roads Area was 0.078 ppm.

1997 ozone NAAQS in the Hampton Roads Area are unlikely.

*C. Continued Air Quality Monitoring and Verification of Continued Attainment*

Once an area has been redesignated to attainment, the state remains obligated to maintain an air quality network in accordance with 40 CFR part 58, in order to verify the area’s attainment status. In the September 9, 2022 submittal, VADEQ commits to continue to operate their air monitoring network in accordance with 40 CFR part 58. VADEQ also commits to track the attainment status of the Hampton Roads Area for the 1997 ozone NAAQS through the review of air quality and emissions data during the second maintenance period. EPA has analyzed the commitments in VADEQ’s submittal and is proposing to determine that they meet the requirements for continued air quality monitoring and verification of continued attainment.

*D. Contingency Plan*

The contingency plan provisions are designed to promptly correct or prevent a violation of the NAAQS that might occur after redesignation of an area to attainment. Section 175A of the CAA requires that a maintenance plan include such contingency measures as EPA deems necessary to assure that the state will promptly correct a violation of the NAAQS that occurs after redesignation. The maintenance plan should identify the contingency measures to be adopted, a schedule and procedure for adoption and implementation of the contingency measures, and a time limit for action by the state. The state should also identify

specific indicators to be used to determine when the contingency measures need to be adopted and implemented. The maintenance plan must require that the state will implement all pollution control measures that were contained in the SIP before redesignation of the area to attainment. See section 175A(d) of the CAA.

VADEQ’s September 9, 2022 submittal includes a contingency plan for the Hampton Roads Area. Virginia has pledged to execute all actions related to the regulation of NO<sub>x</sub> and VOC contained in the SIP for the Hampton Roads area before redesignation to attainment and demonstration of maintenance status. Once the maintenance plan expires on December 31, 2032,<sup>19</sup> general conformity and transportation conformity requirements will not be applicable anymore. To avoid future violation of ozone NAAQS,<sup>20</sup> the maintenance plan has included contingency measures that VADEQ will implement if triggered under two main scenarios.

First, if there is an actual increase in the emissions of VOC or NO<sub>x</sub> above the inventory of the attainment year, such surges will be detected or predicted through the development of a comprehensive period tracking inventory, such as the NEI. Tracking this information is important because an increase in emissions of VOC and NO<sub>x</sub> above the attainment year inventory could be an early warning sign of a possible NAAQS exceedance or violation. VADEQ will track the observed growth rates for vehicle miles traveled, population, and point source VOC and NO<sub>x</sub> emissions annually.

Comprehensive tracking of inventories as part of the NEI will also be developed in collaboration with EPA every three years using current EPA-approved methods for estimating emissions. In the improbable event that estimated emissions in the Hampton Roads Area increase above the attainment year budget, VADEQ will perform a complete VOC and NO<sub>x</sub> emissions inventory assessment. If this analysis indicates that regional emissions of NO<sub>x</sub> or VOC surpass the attainment year levels, VADEQ will put in place one or more control measures which are mentioned in Table 3 of this document but are not yet implemented.

Second, VADEQ will use recorded ozone readings to monitor for ozone NAAQS exceedances and violations. The 1997 ozone NAAQS is *exceeded* when an annual fourth-highest, eight-hour average of 0.085 ppm or higher is recorded by any ozone monitor in the area. In the unlikely event that monitor registers an exceedance, VADEQ will implement one yet unimplemented control measure listed in Table 3 in this document. The 1997 ozone NAAQS is *violated* when a three-year average of each annual fourth-highest, eight-hour average of 0.085 ppm or higher is recorded by any ozone monitor in the area. In the unlikely event that a monitor registers a violation, VADEQ will implement one yet unimplemented control measure listed in Table 3 in this document. If an ozone monitor registers a second violation after the implementation of a contingency measure in response to the first violation, VADEQ will implement one additional yet unimplemented control listed in Table 3 in this document.

TABLE 3—HAMPTON ROADS AREA SECOND MAINTENANCE PLAN CONTINGENCY MEASURES

Program	Description
OTC Architectural and Industrial (AIM) Coating Model Rule dated October 13, 2014 <sup>21</sup> .	Rule provides additional requirements reducing emissions from the AIM source category.
OTC Model Rule for Consumer Products dated May 21, 2013 <sup>22</sup> .....	Rule provides additional requirements reducing emissions from the Consumer Product source category.
OTC Model Rule for Solvent Degreasing dated 2012 <sup>23</sup> .....	Rule provides additional requirements reducing emissions from the solvent degreasing category.
Article 51 of 9VAC5 Chapter 40, Emission Standards for Stationary Sources Subject to Case-by-Case RACT Determinations.	Application of NO <sub>x</sub> Reasonably Available Control Technology (RACT) on facilities with a potential to emit of at least 100 tpy NO <sub>x</sub> .
Article 51 of 9VAC5 Chapter 40, Emission Standards for Stationary Sources Subject to Case-by-Case RACT Determinations.	Application of VOC RACT on facilities with a potential to emit of at least 100 tpy VOC.

<sup>19</sup>The first plan for the Hampton Roads 1997 ozone NAAQS maintenance area used an end year of 2018. Therefore, this second maintenance plan must remain effective through December 31, 2028 at a minimum. Virginia chose an end year of 2032 for this second maintenance plan based on the availability of inventory information for that year. Since 2032 served as the end year of Virginia’s projected maintenance demonstration inventory, the plan should remain effective through December

31, 2032. For more information, [www.epa.gov/sites/default/files/2018-11/documents/fact\\_sheet\\_1997\\_ozone\\_maintenance\\_areas\\_resource\\_document\\_nov\\_20\\_2018.pdf](http://www.epa.gov/sites/default/files/2018-11/documents/fact_sheet_1997_ozone_maintenance_areas_resource_document_nov_20_2018.pdf).

<sup>20</sup>A violation of the NAAQS occurs when an area’s 3-year design value exceeds the NAAQS.

<sup>21</sup> Model Rule Preamble: Architectural and Industrial Maintenance Coatings at [otcair.org/upload/Documents/Model%20Rules/AIM\\_Preamble\\_Model\\_Rule.pdf](http://otcair.org/upload/Documents/Model%20Rules/AIM_Preamble_Model_Rule.pdf).

<sup>22</sup> OTC Model Rule for Consumer Products available at [otcair.org/upload/Documents/Model%20Rules/OTC%20CP%20Model%20Rule%20Final%20Clean%202013%20Revision%20Clean.pdf](http://otcair.org/upload/Documents/Model%20Rules/OTC%20CP%20Model%20Rule%20Final%20Clean%202013%20Revision%20Clean.pdf).

<sup>23</sup> OTC Model Rule for Solvent Degreasing 2012 available at [otcair.org/upload/Documents/Model%20Rules/2011%20OTC%20Model%20Rule%20for%20Solvent%20Degreasing.pdf](http://otcair.org/upload/Documents/Model%20Rules/2011%20OTC%20Model%20Rule%20for%20Solvent%20Degreasing.pdf).

The following schedule applies to contingency measures should they need to be implemented due to exceedances or violations of the 1997 ozone NAAQS:

- Notification received from EPA that a contingency measure must be implemented or three months after a recorded exceedance or violation is certified.

- Applicable regulation to be adopted 6 months after this date.

- Applicable regulation to be implemented 6 months after adoption.

- Compliance with regulation to be achieved within 12 months of adoption.

EPA proposes to find that the contingency plan included in VADEQ's September 9, 2022 submittal satisfies the pertinent requirements of CAA section 175A(d). EPA also finds that the submittal acknowledges Virginia's continuing requirement to implement all pollution control measures that were contained in the SIP before redesignation of the Hampton Roads Area to attainment.

#### *E. Transportation Conformity*

Transportation conformity is required by section 176(c) of the CAA.

Conformity to a SIP means that transportation activities will not produce new air quality violations, worsen existing violations, or delay timely attainment of the NAAQS (CAA 176(c)(1)(B)). EPA's conformity rule at 40 CFR part 93 requires that transportation plans, programs, and projects conform to SIPs and establish the criteria and procedures for determining whether or not they conform. The conformity rule generally requires a demonstration that emissions from the Regional Transportation Plan (RTP) and the Transportation Improvement Program (TIP) are consistent with the motor vehicle emissions budget (MVEB) contained in the control strategy SIP revision or maintenance plan (40 CFR 93.101, 93.118, and 93.124). A MVEB is defined as "that portion of the total allowable emissions defined in the submitted or approved control strategy implementation plan revision or maintenance plan for a certain date for the purpose of meeting reasonable further progress milestones or demonstrating attainment or maintenance of the NAAQS, for any criteria pollutant or its precursors, allocated to highway and transit vehicle use and emissions (40 CFR 93.101)."

Under the conformity rule, LMP areas may demonstrate conformity without a regional emission analysis (40 CFR 93.109(e)). However, because LMP areas are still maintenance areas, certain aspects of transportation conformity

determinations still will be required for transportation plans, programs, and projects. Specifically, for such determination, RTPs, TIPs and transportation projects still will have to demonstrate that they are fiscally constrained (40 CFR 93.108), meet the criteria for consultation (40 CFR 93.105 and 93.112) and transportation control measure implementation in the conformity rule provisions (40 CFR 93.113).

Additionally, conformity determinations for RTPs and TIPs, must be determined no less frequently than every four years, and conformity of transportation plan and TIP amendments and transportation projects is demonstrated in accordance with the timing requirements specified in 40 CFR 93.104. In addition, for projects to be approved, they must come from a currently conforming RTP and TIP (40 CFR 93.114 and 93.115). The Hampton Roads Area remains under the obligation to meet the applicable conformity requirements for the 1997 ozone NAAQS.

#### **III. Proposed Action**

EPA's review of VADEQ's September 9, 2022 submittal indicates that Hampton Roads Area second maintenance plan meets the CAA section 175A and all applicable CAA requirements. EPA is proposing to approve the second maintenance plan for the Hampton Roads Area as a revision to the Virginia SIP. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

#### **IV. 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. 10.11198, 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 that: (1) are generated or developed before the commencement of a voluntary environmental assessment; (2) are prepared independently of the assessment process; (3) demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) 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. 10.11198, 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. 10.11199, 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.

#### V. Statutory and Executive Order Reviews

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 proposed action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
  - 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
- The SIP is not approved to apply on any Indian reservation land as defined in 18 U.S.C. 1151 or in any other area

where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule pertaining to Virginia's 1997 8-Hour Ozone National Ambient Air Quality Standard Second Maintenance Plan for the Hampton Roads Area does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994) directs Federal agencies to identify and address "disproportionately high and adverse human health or environmental effects" of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. EPA defines environmental justice (EJ) as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." EPA further defines the term fair treatment to mean that "no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies."

VADEQ did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. EPA did not perform an EJ analysis and did not consider EJ in this action. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

#### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Volatile organic compounds.

**Adam Ortiz,**

*Regional Administrator, Region III.*

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 180

[EPA-HQ-OPP-2023-0409; FRL-11232-01-OCSPP]

RIN 2070-ZA16

### Phenol; Revoking Exemption From the Requirement of a Pesticide Tolerance

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to revoke the tolerance exemption for residues of the antimicrobial pesticide ingredient phenol when used as an inert ingredient (solvent/cosolvent) in pesticide formulations applied to growing crops. This rulemaking is proposed on the Agency's own initiative under the Federal Food, Drug, and Cosmetic Act (FFDCA) to implement a tolerance action the Agency determined was appropriate during the registration review conducted under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) for phenol. EPA is proposing to revoke this tolerance exemption because it corresponds to a use no longer current or registered under FIFRA in the United States.

**DATES:** Comments must be received on or before October 23, 2023.

**ADDRESSES:** The docket for this action, identified by docket identification (ID) number EPA-HQ-OPP-2023-0409, is available at <https://www.regulations.gov> or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460-0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room and the OPP Docket is (202) 566-1744. Please review the visitor instructions and additional information about the docket available at <https://www.epa.gov/dockets>.

#### FOR FURTHER INFORMATION CONTACT:

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**SUPPLEMENTARY INFORMATION:**