

#### **IV. Implementation of Virginia's State Operating Permit Program as a Federally-Enforceable State Operating Permit Program**

Virginia's operating permit program regulations became effective on April 1, 1998. The Commonwealth has been implementing this program since that date. Upon the effective date of EPA's approval of this program, all permits issued by Virginia pursuant to, and in adherence with, the requirements of 9 VAC 5-80-800 through 1040, in general, and meeting the specific requirements of 9 VAC 5-80-1020, specifically, shall be considered federally enforceable state operating permits. Likewise, any permits issued after the effective date of this action may be considered federally enforceable provided they meet the same conditions.

Each permit that meet the requirements of 9 VAC 5-80-800 through 1040, including 9 VAC 5-80-1020 are to be considered federally enforceable in their entirety. The EPA does not interpret Virginia's regulations to allow for an individual operating permit to have both federal enforceable and state-only enforceable conditions or sections. The EPA does not believe it is the Commonwealth's intention to attempt to implement its program in such a manner.

Since Virginia's operating permit program provides for the issuance of federal enforceable permits and state-only enforceable permits, EPA believes it is important for the Commonwealth to clearly identify the enforceability status of each permit it issues within the body of the permit. Such identification is critical for the proper implementation of this program and other programs such as the Commonwealth's title V operating permit program. When it issues a federally enforceable operating permit, Virginia should also ensure that the proper and appropriate documentation associated with fulfilling the requirements of 9 VAC 5-80-1020 are maintained as an intrinsic part of the permit document.

#### **V. Virginia's Voluntary Environmental Assessment Privilege Law**

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, 1997, 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, 1997 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 operating permits 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 Clean Air Act, 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 Clean Air Act is likewise unaffected by this, or any, state audit privilege or immunity law.

#### **VI. Final Action**

The EPA is approving the Commonwealth of Virginia's state operating permit program pursuant to sections 110 and 112 of the Clean Air Act.

The EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comment. However, in the "Proposed Rules" section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision and section 112(l) approval if adverse comments are filed. This rule will be effective on August 26, 2003 without further notice unless EPA receives adverse comment by July 28, 2003. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. The EPA will address all public comments in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

You may submit comments either electronically or by mail. To ensure proper receipt by EPA, identify the appropriate rulemaking identification number VA087-5057 in the subject line on the first page of your comment. Please ensure that your comments are