

III. EPA's Evaluation of SIP Revisions

A. Definitions

EPA has reviewed Virginia's new and revised definitions and has determined that they are consistent with the statutory provisions of the Virginia Air Pollution Control Law and the comparable requirements of the Clean Air Act and 40 CFR part 51. Virginia revised the wording of several definitions in order to improve their clarity and intent. Virginia also has substantially revised the definition of "Person" in order to comply with revisions to "Person" found in chapter 13, section 10.1.1300 of Virginia's Air Pollution Control Law. EPA has determined that the same groups covered by the current SIP definition of "Person" are still covered under the wording of the revised definition, and therefore concludes that the revised definition of "Person" is equivalent in scope to the current SIP definition. Virginia has also revised the definition of "Volatile Organic Compound" by including perchloroethylene to the list of exempt compounds. EPA has determined that Virginia's revised definition is consistent with the definition of "volatile organic compound" found at 40 CFR 51.100(s).

B. New and Revised Administrative Provisions

EPA has reviewed the revisions to the administrative regulations of 9 VAC 5, Chapter 170, and has determined that the revised wording improves the clarity and intent of the provisions, streamlines the process of enforcing regulations, permits and orders, and defines the procedures for determining the applicability of a provision where conflicts between provisions apply. The revised regulations strengthen the public hearing process which local agencies must follow, and provide additional assurances that local ordinances will conform with the applicable state requirements.

C. Revised General Conformity Provisions

Virginia had amended its general conformity provisions so that the general and administrative provisions in 9 VAC 5 Chapter 160 would be combined with the identical provisions of 9 VAC 5, Chapter 170. Many of the definitions and administrative provisions in the SIP-approved version of 9 VAC 5, Chapter 160 make specific references to Federal agencies and their obligation to comply with state requirements. The comparative requirements of 9 VAC 5 Chapter 170 make no reference to Federal agencies.

Instead, the term "Owner" is used in the place of "Federal Agencies". However, the term "Owner" refers to "Person" which by definition includes "Governmental Bodies." EPA has determined this to be an equivalent substitution for "Federal Agency." In addition, the term "Owner" also refers to "Bodies Politic," which EPA interprets to include the Federal Government and its individual agencies. The term "Department" found in the 9 VAC 5-160 provisions is not found in the consolidated 9 VAC 5-170 rules—only the term "Board." The SIP, however, has historically only conferred power to the Board. In addition, 40 CFR part 93 does not require "Department" to be included in Virginia's general conformity rules.

D. EPA's Evaluation of Revised Incorporation by Reference Provisions

In its support document accompanying the June 1999 SIP revision submittal, Virginia explained that the technical documents found in Regulation 9 VAC 5-20-21 are used to make technical evaluations related to new source review and emission standards for volatile organic compounds. Virginia revised the five documents listed above to reflect the latest available edition. EPA agrees that states should use the latest available technical documents to assist in their decisionmaking, and therefore finds these revisions to be acceptable.

E. Recodification of Virginia's Oxygenated Gasoline Regulations

The revisions to 2 VAC 5, Chapter 480, sections 2-480-10 and 2-480-30 through 2-480-80 consist only of changes to the citation format of Virginia's oxygenated gasoline rules. There are no substantive wording changes to the current SIP-approved provisions.

F. Impact of Virginia's Audit Privilege and Immunity Laws on These SIP Revisions

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 section 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