

Authority: 33 U.S.C. 981-990, 1231 and 1232; and 49 CFR 1.52.

#### § 401.102 [Amended]

2. Paragraph (a) of § 401.102 is amended by removing the number "\$25,000" and adding, in its place, the number "\$27,500".

Issued at Washington, D.C. on October 17, 1996.

Saint Lawrence Seaway Development Corporation.

Gail McDonald,

Administrator.

[FR Doc. 96-27032 Filed 10-21-96; 8:45 am]

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[WV017-6003a; WV040-6005a; FRL-5619-8]

#### Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Prevention of Significant Deterioration: NO<sub>2</sub> and PM-10 Increments

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

**ACTION:** Direct final rule.

**SUMMARY:** EPA is approving two State Implementation Plan (SIP) revisions submitted by the State of West Virginia. The first revision amends West Virginia's Prevention of Significant Deterioration (PSD) regulation by amending definitions, establishing the maximum increase in ambient nitrogen dioxide concentrations allowed in an area above the baseline concentration (the increment) and updating the references to federal air quality modeling procedures. The second revision removes increment provisions for total suspended particulates (TSP) and replaces them with increment provisions for particulate matter with an aerodynamic diameter of less than or equal to a nominal 10 micrometers (PM-10). The second revision also updates the references to federal air quality modeling procedures and adds provisions for pollution control projects at electric utilities. The intended effect of this action is to approve revisions to West Virginia's PSD regulation as it meets federal requirements. This action is being taken under section 110 of the Clean Air Act.

**DATES:** This action is effective December 23, 1996 unless notice is received on or before November 21, 1996 that adverse or critical comments will be submitted. If the effective date is delayed, timely

notice will be published in the Federal Register.

**ADDRESSES:** Comments may be mailed to Kathleen Henry, Chief, Permit Programs Section, Mailcode 3AT23, U.S. Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, Pennsylvania 19107. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air, Radiation, and Toxics Division, U.S. Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, Pennsylvania 19107; the Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460; and West Virginia Department of Environmental Protection, Office of Air Quality, 1558 Washington Street, East, Charleston, West Virginia 25311.

**FOR FURTHER INFORMATION CONTACT:** Lisa M. Donahue, (215) 566-2062, donahue.lisa@epamail.epa.gov.

**SUPPLEMENTARY INFORMATION:** On August 10, 1993, the State of West Virginia submitted formal revisions to its State Implementation Plan (SIP). Only the revisions to Title 45 Code of State Rules Series 14, Permits for Construction and major Modification of Major Stationary sources of Air Pollution for the Prevention of Significant Deterioration (45 CFR 14) are the subject of this rulemaking notice. The other portions of the August 10, 1993 submittal, including amendments to 45 CSR 5, 19, 21, and 29, are the subjects of separate rulemaking notices. West Virginia submitted another formal revision to 45 CSR 14 on May 20.

The August 10, 1993 SIP revision consists of changes to 45 CSR 14 which amend definitions, establish the maximum increase in ambient nitrogen dioxide concentrations allowed in an area above the baseline concentration (the increment) and update the references to federal air quality modeling procedures. The May 20, 1996 revision consists of additional changes to 45 CSR 14 which add provisions for a PM-10 increment, further update the federal modeling guideline reference, and add provisions to facilitate pollution control projects at electric utilities.

EPA evaluated West Virginia's SIP revisions and concluded that the revised regulations strengthen the SIP by providing for the protection of the PSD increments for nitrogen dioxide and PM-10, and meet the federal PSD requirements of 40 CFR 51.166.

The revised regulations are enforceable by EPA, with the exception

of the definition of "potential to emit". In the definition of "Potential to Emit" (§ 45-14-2.6), the language is written to allow use of limitations on potential to emit (PTE) that would be enforceable by the West Virginia Chief of Air Quality, but not EPA. Two recent court decisions (*National Mining Association v. EPA*, 59 F.3d 1351 (D.C. Cir. 1995) and *Chemical Manufacturers Ass'n v. EPA*, No. 89-1514 (D.C. Cir. Sept. 15, 1995)) spoke to the limitations in the capacity of a source to emit a pollutant and whether those limitations must be federally enforceable. Since the *Chemical Manufacturers Ass'n v. EPA* ruling vacated the federally enforceable portion of the definition of PTE, EPA cannot require it in West Virginia's PSD program.

A more detailed evaluation of the submitted revisions, including a discussion of the court rulings, is provided in two Technical Support Documents, which are available upon request from the Regional EPA office listed in the **ADDRESSES** section of this document.

EPA is approving these SIP revisions without prior proposal because the Agency views these as noncontroversial amendments and anticipates no adverse comments. However, in a separate document in this Federal Register publication, EPA is proposing to approve the SIP revisions should adverse or critical comments be filed. This action will be effective December 23, 1996 unless, by November 21, 1996, adverse or critical comments are received.

If EPA receives such comments, this action will be withdrawn before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will then be addressed in a subsequent final rule based on this action serving as a proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time. If no such comments are received, the public is advised that this action will be effective on December 23, 1996.

#### Final Action

EPA is approving the State of West Virginia's revisions to 45CSR14 "Permits for Construction and Major Modification of Major Stationary Sources of Air Pollution for the Prevention of Significant Deterioration" submitted on August 10, 1993 and May 20, 1996.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future

request for revision to any state implementation plan. Each request for revision to the state implementation plan shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

Under the Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

SIP approvals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not impose any new requirements, the Administrator certifies that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the Federal-State relationship under the CAA, preparation of a flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co. v. U.S. EPA*, 427 U.S. 246, 255-66 (1976); 42 U.S.C. 7410(a)(2).

Under Section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of \$100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval action proposed/promulgated does not include a Federal mandate that may result in estimated costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the

private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new Federal requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted 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 General Accounting Office prior to publication of this rule in today's Federal Register. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

This action has been classified as a Table 3 action for signature by the Regional Administrator under the procedures published in the Federal Register on January 19, 1989 (54 FR 2214-2225), as revised by a July 10, 1995 memorandum from Mary Nichols, Assistant Administrator for Air and Radiation. The Office of Management and Budget (OMB) has exempted this regulatory action from E.O. 12866 review.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action to approve revisions to West Virginia's Prevention of Significant Deterioration program (45 CSR 14) must be filed in the United States Court of Appeals for the appropriate circuit by December 23, 1996. 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 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, Intergovernmental relations, Nitrogen dioxide, Particulate matter.

Dated: September 20, 1996.

Stanely L. Laskowski,

Acting Regional Administrator, Region III.

40 CFR part 52, subpart XX of chapter I, title 40 is amended as follows:

## PART 52—[AMENDED]

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

Authority: 42 U.S.C. 7401-7671q.

### Subpart XX—West Virginia

2. Section 52.2520 is amended by adding paragraphs (c)(39) and (c)(40) to read as follows:

#### § 52.2520 Identification of plan.

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(c) \* \* \*

(39) Revisions to the West Virginia Regulations 45 CSR 14 submitted on August 10, 1993 by the West Virginia Department of Commerce, Labor & Environmental Resources:

(i) Incorporation by reference.

(A) Letter of August 10, 1993 from the West Virginia Department of Commerce, Labor & Environmental Resources transmitting revisions to 45 CSR 14 "Permits for Construction and Major Modification of Major Stationary Sources of Air Pollution for the Prevention of Significant Deterioration".

(B) Revisions to 45 CSR 14, effective July 7, 1993, including revisions to definitions and the addition of NO<sub>2</sub> increment provisions. Not included in this incorporation by reference are 45 CSR 14 paragraphs 1.1, 1.2, 2.1, 2.4, 2.9, 2.11, 2.13, 2.13, 2.22, 2.26, 2.27, 2.32, 2.33 to 2.38, 3.2, 4.1 to 4.3, 5.1, 7.1 to 7.4, 8.1, 10.1, 10.4, 10.7, and 11.1.

(40) Revisions to the West Virginia Regulations 45 CSR 14 submitted on May 20, 1996 by the West Virginia Division of Environmental Protection:

(i) Incorporation by reference.

(A) Letter of May 20, 1996 from the West Virginia Division of Environmental Protection transmitting revisions to 45 CSR 14 "Permits for Construction and Major Modification of Major Stationary Sources of Air Pollution for the Prevention of Significant Deterioration".

(B) Revisions to 45 CSR 14, effective May 1, 1995, including the addition of PM-10 increment provisions, revisions to definitions, and preconstruction review requirements for electric steam generating units. Not included in this incorporation by reference are 45 CSR 14 paragraphs 4.1 to 4.3, 7.3, 8.1, 10.1, 10.2, 10.4, and 11.1.

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