

*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 rule 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**. This rule 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 Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 17, 2003. 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, establishing a VOC limit for an overprint varnish that is used in screen printing by the cosmetic industry in Maryland, 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, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: December 4, 2002.

**Thomas C. Voltaggio,**  
*Acting Regional Administrator, Region III.*

**PART 52—[AMENDED]**

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

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

**Subpart V—Maryland**

2. Section 52.1070 is amended by adding paragraph (c)(177) to read as follows:

**§ 52.1070 Identification of plan.**

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

(177) Revisions to the Code of Maryland Administrative Regulation (COMAR) 26.11.19.18 pertaining to the establishment of a VOC limit for overprint varnish used in the cosmetic industry, submitted on June 21, 2002, by the Maryland Department of the Environment:

(i) Incorporation by reference.

(A) Letter of June 21, 2002, from the Maryland Department of the Environment transmitting amendments to Regulation .18, Control of Volatile Organic Compound Emissions from Screen Printing and Digital Imaging, under COMAR 26.11.19, Volatile Organic Compounds from Specific Processes.

(B) Additions and Revisions to COMAR 26.11.19.18, Control of Volatile Organic Compound Emissions from Screen Printing and Digital Imaging under COMAR 26.11.19, Volatile Organic Compounds from Specific Processes, effective June 10, 2002:

(1) Revised COMAR 26.11.19.18A(4)(a) and added COMAR 26.11.19.18A(4)(b), revising the definition of the term "Clear coating."

(2) Added COMAR 26.11.19.18A(10-1), adding a definition for the term "Overprint varnish."

(3) Added COMAR 26.11.19.18C(1)(a) (General Requirements for Screen Printing). Former COMAR 26.11.19.18C(1)(a) through (c) is renumbered as 26.11.19.18C(1)(b) through (d).

(ii) Additional Material.—Remainder of the State submittal pertaining to the revisions listed in paragraph (c)(177)(i) of this section.

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**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 70**

[MD-T5-2002-01a; FRL-7440-2]

**Clean Air Act Full Approval of Operating Permit Program; Maryland**

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

**ACTION:** Final rule; final full approval.

**SUMMARY:** The EPA is taking final action to grant full approval of the State of Maryland's operating permit program. Maryland's operating permit program was submitted in response to the Clean Air Act Amendments of 1990 that required each state to develop, and submit to EPA, a program for issuing operating permits to all major stationary sources and to certain other sources

within the state's jurisdiction. The EPA granted final interim approval of Maryland's operating permit program on July 3, 1996. The State of Maryland amended its operating permit program to address the deficiencies identified in the final interim approval action, and this final rulemaking action approves those amendments. The EPA proposed full approval of Maryland's operating permit program in the **Federal Register** on September 10, 2002. This final rulemaking summarizes the comments EPA received on the September 10, 2002 proposal, provides EPA's responses, and promulgates final full approval of the State of Maryland's operating permit program.

**DATES:** This final rule is effective on February 14, 2003.

**ADDRESSES:** Copies of the documents relevant to this action are available 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 and Maryland Department of the Environment, 1800 Washington Boulevard, Suite 705, Baltimore, Maryland, 21230.

**FOR FURTHER INFORMATION CONTACT:** David Campbell, Permits and Technical Assessment Branch at (215) 814-2196 or by e-mail at *campbell.dave@epa.gov*.

**SUPPLEMENTARY INFORMATION:** On July 15, 2002, the State of Maryland submitted amendments to its State operating permit program. These amendments are the subject of this document and this section provides additional information on the amendments by addressing the following questions:

*What Is the State Operating Permit Program?*

*Why Is EPA Taking This Action?*

*What Action Is Being Taken by EPA?*

*What Were the Concerns Raised by the Commenters?*

*How Does This Action Affect the Part 71 Program in Maryland?*

**What Is the State Operating Permit Program?**

The Clean Air Act Amendments of 1990 required all states to develop operating permit programs that meet certain federal criteria. When implementing the operating permit programs, the states require certain sources of air pollution to obtain permits that contain all of their applicable requirements under the Clean Air Act. The focus of the operating permit program is to improve enforcement by issuing each source a permit that consolidates all of its

applicable Clean Air Act requirements into a federally enforceable document. By consolidating all of the applicable requirements for a given air pollution source into an operating permit, the source, the public, and the state environmental agency can more easily understand what Clean Air Act requirements apply and how compliance with those requirements is determined.

Sources required to obtain an operating permit under this program include "major" sources of air pollution and certain other sources specified in the Clean Air Act or in the EPA's implementing regulations. For example, all sources regulated under the acid rain program, regardless of size, must obtain operating permits. Examples of "major" sources include those that have the potential to emit 100 tons per year or more of volatile organic compounds, carbon monoxide, lead, sulfur dioxide, nitrogen oxides, or particulate matter (PM<sub>10</sub>); those that emit 10 tons per year of any single hazardous air pollutant (HAP) specifically listed under the Clean Air Act; or those that emit or have the potential to emit 25 tons per year or more of a combination of HAPs. In areas that are not meeting the national ambient air quality standards (NAAQS) for ozone, carbon monoxide, or particulate matter, major sources are defined by the gravity of the nonattainment classification.

#### Why Is EPA Taking This Action?

Where a title V operating permit program substantially, but not fully, met the criteria outlined in the implementing regulations codified at 40 CFR part 70, EPA granted interim approval contingent upon the state revising its program to correct the deficiencies. Because the Maryland operating permit program substantially, but not fully, met the requirements of part 70, EPA granted final interim approval of Maryland's program in a rule promulgated on July 3, 1996 (61 FR 34733). The interim approval notice described the conditions that had to be met in order for the Maryland operating permit program to receive full approval. Initially, Maryland's interim approval period, during which it was required to address its interim approval deficiencies, was scheduled to lapse two years after the effective date of the final interim approval action. However, EPA extended the interim approval period until December 1, 2001 for 86 operating permit programs, including Maryland's, in a rule promulgated on May 22, 2000 (65 FR 32035).

Maryland was unable to fully address each of the conditions it had to meet in

order to be considered for full approval by December 1, 2001. Therefore, Maryland's interim approval has lapsed and the State has suspended its implementation of an approved program pursuant to 40 CFR part 70. Lapse of the part 70 program did not cause the State's operating permit program regulations to become disapproved or rescinded, although Maryland has not implemented or enforced these provisions during the period of the lapse. On December 5, 2001 (66 FR 63236), EPA announced that the 40 CFR part 71 federal operating permit program became effective in Maryland on December 1, 2001. In that same announcement, EPA granted full delegation to Maryland to implement and enforce the 40 CFR part 71 program. The 40 CFR part 71 program will be effective in Maryland until the State is granted final full approval of its program.

On July 15, 2002, Maryland submitted to EPA amendments to its title V operating permit program. These amendments are intended to correct deficiencies identified by EPA when it granted final interim approval of Maryland's program in 1996. In addition, Maryland also made revisions to its operating permit program since its program received final interim approval in 1996. The revisions were not intended to address any of the identified interim approval deficiencies. Rather, the intent of these discretionary program changes was to improve implementation of the existing program. The approval of the discretionary program revisions is not necessary in order for Maryland to adequately address its interim approval deficiencies, nor must they be approved prior to Maryland receiving full approval.

The EPA proposed final full approval of Maryland's operating permit program on September 10, 2002 (67 FR 57496). On October 10, 2002, EPA received comments from Earthjustice pursuant to the September 10, 2002 notice of proposed rulemaking granting final full approval of Maryland's operating permit program.

It should be noted that in response to a separate, earlier action, Earthjustice provided EPA with comments regarding Maryland's permit program. As discussed above, in May 2002 EPA extended the interim approval period for Maryland, among others, until December 1, 2001. The extension was subsequently challenged by the Sierra Club and the New York Public Interest Research Group (NYPiRG). In settling the litigation, EPA agreed to publish a notice in the **Federal Register** that

would alert the public that they may identify and bring to EPA's attention alleged programmatic and/or implementation deficiencies in title V programs and that EPA would respond to their allegations within specified time periods if the comments were made within 90 days of publication of the **Federal Register** notice. That notice was published on December 11, 2000 (65 FR 77376).

In response to the December 11, 2000 notice, EPA received a March 12, 2001 letter from Earthjustice identifying what it believed to be deficiencies with respect to the Maryland title V program. The EPA notified Earthjustice in a letter dated December 14, 2001 that the Agency would not respond to Earthjustice's March 12, 2001 comments at that time but that EPA would consider the comments and provide a written response to each comment at a later date.

In its September 10, 2002 **Federal Register** notice proposing to fully approve Maryland's operating permit program, EPA stated that we did not intend to take formal action on Earthjustice's March 12, 2001 comment letter in any final rulemaking action pertaining to the final full approval. In the proposed rulemaking notice, EPA announced that it would publish a notice of deficiency (NOD) pursuant to 40 CFR 70.4(i) and 70.10(b) when we determine that a deficiency exists, or we will notify the commenter, in writing, to explain our reasons for not making a finding of deficiency.

On September 23, 2002, EPA formally responded to Earthjustice's March 12, 2001 comments. In our response, we explain that we did not agree with the Earthjustice's assertions and detail our reasons for not issuing a notice of deficiency with regard to Maryland's program. In the near future, a notice of availability will be published in the **Federal Register** notifying the public that we have responded, in writing, to these comments and how the public may obtain a copy of our responses. The EPA's September 23, 2002 letter is currently available at the following web address: (<http://www.epa.gov/air/oaqps/permits/response/maryland.pdf>).

As mentioned above, on October 10, 2002, EPA received comments from Earthjustice pursuant to the September 10, 2002 notice of proposed rulemaking granting final full approval of Maryland's operating permit program. A number of the issues raised by Earthjustice are the same as those raised in its March 12, 2001 comment letter. The October 10, 2002 letter also raised a number of issues that previously had not been raised.

### What Action Is Being Taken by EPA?

EPA is granting final full approval to Maryland's revised part 70 operating permits program. For the reasons discussed below, EPA's final full approval is based on Maryland's satisfactory correction of the nine program deficiencies identified when EPA granted final interim approval of Maryland's operating permit program on June 3, 1996, and it also includes other revisions that Maryland has made to improve its program since receiving interim approval. The operating permit program amendments submitted by Maryland on July 15, 2002, considered together with that portion of Maryland's operating permit program that was earlier approved on an interim basis fully satisfy the minimum requirements of 40 CFR part 70 and the Clean Air Act. Furthermore, EPA has determined that Earthjustice's October 10, 2002 comments relating to Maryland's interim approval deficiencies do not identify deficiencies in Maryland's part 70 program.

In addition, EPA is responding to Earthjustice's October 10, 2002 comments alleging other deficiencies in Maryland's part 70 program, including comments related to those first made by Earthjustice on March 12, 2001 and addressed in EPA's September 23, 2002 response and comments first raised on October 10, 2002. While EPA believes it is not obligated to respond to comments that do not pertain to interim approval deficiencies in this rulemaking, EPA has concluded that none of the concerns raised in those comments constitute deficiencies in the Maryland operating permit program. If a court should determine that EPA is obligated to respond to those additional comments in order to grant final full approval to Maryland's part 70 program, then the responses set forth in this notice should be considered EPA's final action in response to those comments.

### What Were the Concerns Raised by the Commenters?

The EPA received one comment letter during the public comment period. In its October 10, 2002 letter, Earthjustice commented on the proper scope of EPA's full approval of Maryland's part 70 program. Earthjustice also commented on several specific aspects of Maryland's program, which can be grouped into three categories. First, Earthjustice commented on a number of the corrections Maryland made to its program in order to address the deficiencies that EPA previously determined must be corrected in order for the State to receive full approval of

its program. These program deficiencies, called interim approval deficiencies, were identified when EPA granted final interim approval of Maryland's program in 1996. As discussed in the notice of proposed rulemaking, Maryland was required to address each of the nine deficiencies identified by EPA in order to be eligible for full approval of its program. Second, Earthjustice commented on a number of alleged deficiencies that it first raised in its March 12, 2001 letter and that EPA addressed in the Agency's September 23, 2002 response. Finally, Earthjustice provided comments alleging, for the first time, that certain other issues constitute deficiencies in Maryland's program.

Earthjustice asserts that in order to fully approve Maryland's part 70 program, EPA must determine that the entire program complies with the Clean Air Act and part 70, and that EPA's proposal to grant full approval based solely on Maryland's correction of its interim approval deficiencies is inconsistent with section 502(d)(1) of the Clean Air Act, which authorizes EPA to approve a state operating permit program "to the extent that the program meets the requirements of [the Clean Air Act and EPA's implementing regulations]." Accordingly, Earthjustice asserts that EPA cannot grant full approval of Maryland's part 70 program without first addressing all alleged deficiencies identified by Earthjustice in its October 10, 2002 comment letter.

The EPA is aware that Earthjustice has alleged deficiencies other than those interim approval deficiencies listed in Maryland's June 3, 1996 final interim approval notice, and EPA agrees that those allegations must be addressed through appropriate actions by EPA and/or the State of Maryland. Indeed, EPA is responding to those allegations in this notice. For the reasons discussed below, however, we disagree that the deficiencies alleged in the October 10, 2001 comment letter that do not pertain to interim approval deficiencies prohibit EPA from granting full approval of Maryland's operating permit program at this time.

Title V of the Clean Air Act, 42 U.S.C. 7661-7661f, provides a framework for the development, submission and approval of state operating permit programs. Following the development and submission of a state program, the Act provides two different approval options that EPA may utilize in acting on state submissions. See 42 U.S.C. 7661a(d) and (g). Pursuant to section 502(d), EPA "may approve a program to the extent that the program meets the requirements of [the Clean Air Act and

implementing regulations]." The EPA may act on such program submissions by approving or disapproving, in whole or in part, the state program. If a program is disapproved, section 502(d) requires the Administrator to notify the Governor of the State of "any revisions or modifications necessary to obtain approval."

An alternative option for acting on state programs is provided by the interim approval provision of section 502(g), which states: "If a program . . . substantially meets the requirements of [title V], but is not fully approvable, the Administrator may by rule grant the program interim approval." This provision provides EPA with the authority to act on state programs that substantially, but do not fully, meet the requirements of title V and part 70. Only those program submissions that meet the requirements of eleven key program areas are eligible to receive interim approval. See 40 CFR 70.4(d)(3)(i)-(xi). Finally, section 502(g) directs EPA to "specify the changes that must be made before the program can receive full approval." 42 U.S.C. 7661a(g); 40 CFR 70.4(e)(3). This explicit directive encompasses another, implicit one: Once a state with interim approval corrects the specified deficiencies then it will be eligible for full program approval. The EPA believes this is so even if deficiencies have been identified sometime after final interim approval, either because the deficiencies arose after EPA granted interim approval or, if the deficiencies existed at that time, EPA failed to identify them as such in proposing to grant interim approval. Thus, the Clean Air Act clearly addresses initial title V program submissions by outlining the alternate mechanisms of sections 502(d) and 502(g). However, the statute does not specifically address Maryland's situation, where the State's interim approval has lapsed and the State has submitted a revised part 70 program, rather than an initial program.

The EPA believes that the interim approval provision, section 502(g), is not applicable to Maryland's current situation. Section 502(g) expressly provides that interim approval "shall expire" on a date certain and "may not be renewed." The EPA agreed in resolving the Sierra Club's interim approval litigation not to extend interim approvals beyond December 1, 2001, the date when Maryland's interim approval expired.

The EPA believes, however, that under section 502(d) and the notice of deficiency mechanism authorized by section 502(i), it is appropriate to grant Maryland's revised part 70 program full

approval based solely on Maryland's correction of its interim approval deficiencies and to separately address any deficiencies alleged or identified post-interim approval. Section 502(d) requires that the Administrator, upon disapproving a state's initial program submission, formally notify the state of changes that must be made prior to full approval. Similarly, while not directly applicable here, section 502(g) requires EPA to notify a state of changes needed as conditions of full approval. It would be inconsistent with the structure of these provisions for EPA to deny full approval to Maryland's revised part 70 program because of newly alleged deficiencies, where Maryland's interim approval has lapsed but EPA has not yet had an opportunity to evaluate the allegations or provide notice of any identified deficiencies to the State.

Furthermore, the notice of deficiency mechanism authorized by section 502(i) provides a means for EPA to require a state to correct any newly identified deficiencies while granting full approval to the state's program. Section 502(i)(4) of the Act and 40 CFR 70.4(i) and 70.10 authorize EPA to issue a notice of deficiency (NOD) whenever EPA makes a determination that a permitting authority is not adequately administering or enforcing an approved part 70 program, or that the state's permit program is inadequate in any other way. Consistent with these provisions, any NOD issued by EPA will specify a reasonable time-frame for the permitting authority to correct the identified deficiency. Requiring Maryland to correct deficiencies that have been alleged or identified as recently as October 2002 in order to receive full approval would run counter to the statutory and regulatory process that is already in place to deal with newly identified program deficiencies.

As discussed above, the interim approval status of Maryland's title V operating permit program lapsed on December 1, 2001. Since that time, Maryland has been implementing the delegated federal operating permit program pursuant to 40 CFR part 71. Maryland has also addressed all of the interim approval deficiencies and has fulfilled the conditions identified by EPA in order for the State to be eligible for full approval. Denying the State's program full approval because of issues alleged as recently as October 2002 would cause disruption and further delay in the issuance of title V permits to major stationary sources in Maryland. As explained above, we do not believe that title V of the Clean Air Act requires such a result. Rather, EPA believes that in the case of Maryland, where interim

approval lapsed, the appropriate mechanism for dealing with additional deficiencies that are identified after the program received interim approval but prior to a revised program receiving full approval is twofold: full approval based solely on the State's correction of its interim approval deficiencies and, if necessary, issuance of a notice of deficiency to address any newly identified deficiencies. It should be noted that NODs may also be issued by EPA after a program has been granted full approval. Following the defined process for the identification of deficiencies and the issuance of NODs will provide the State an adequate amount of time after such findings to implement any necessary changes without unduly disrupting the entire State operating permit program. At the same time, addressing any newly identified problems separately from the full approval process will not cause these issues to go unaddressed. To the contrary, if EPA determines that any of the alleged deficiencies in Maryland's program are well-founded, it will issue a NOD and place Maryland on notice that it must promptly correct the non-interim approval deficiencies within a specified time period or face Clean Air Act sanctions and withdrawal of program approval.

Therefore, EPA disagrees with Earthjustice that the Agency must consider all alleged deficiencies prior to granting full approval of Maryland's operating permit program. Through EPA's full approval rulemaking, interested parties have had an opportunity to identify any concerns they may have with the various aspects of Maryland's title V operating permit program. In light of the above discussion, the Agency has grouped Earthjustice's comments into three categories. The first category of comments are those related to deficiencies identified by EPA when we granted final interim approval of Maryland's program in 1996. The second category are those comments that address issues regarding Maryland's program that Earthjustice raised on March 12, 2001 and for which EPA provided formal responses in a letter to Earthjustice on September 23, 2002. The final category pertains to comments raised by Earthjustice regarding portions of Maryland's program that were approved by EPA when the Agency granted final interim approval in 1996 and that were not the subject of the proposed full approval rulemaking action published on September 10, 2002. As noted above, Maryland also made regulatory amendments to its

program in addition to changes it made to address the program deficiencies identified by EPA. Earthjustice did not provide comments on any of these regulatory amendments.

Only EPA's responses to the comments related to interim approval corrections are integral to EPA's full approval of its operating permit program announced in this rulemaking. Should it be determined that EPA's consideration of the other two categories of comments in Earthjustice's October 10, 2002 letter as being outside the scope of the full approval action is inconsistent with the Clean Air Act, its implementing regulations, and the Administrative Procedures Act, 5 U.S.C. 551 *et seq.*, the Agency's responses to those comments provided below shall be considered EPA's final action in response to those comments.

#### *A. Comments Related to Interim Approval Corrections*

The following discussion responds to comments provided by Earthjustice on October 10, 2002 that pertain directly to the corrections Maryland made in order to address issues identified by EPA when it granted the State final interim approval in 1996. As discussed above, EPA believes it must respond to these comments because they are germane to this action to grant final full approval of Maryland's program. The EPA finds that Maryland has corrected all of its interim approval deficiencies.

*Comment:* The commenter believes Maryland's operating permit program regulations violate 40 CFR 70.5(c) and 40 CFR 70.5(c)(3)(i) by granting the State unfettered discretion to exempt units from permit application requirements even though they are not identified on a "list" that is approved by EPA as part of the State's program.

*Response:* The EPA disagrees with the commenter's assertion that Maryland's program does not meet the minimum requirements of 40 CFR 70.5(c) regarding permit application content. Maryland's regulations at Code of Maryland Regulations (COMAR) 26.11.03.04(A) exempt permittees from the obligation to provide in their permit applications detailed emissions and operational information for specific types or categories of emission units. Maryland's regulations enumerate 13 emission units or categories that are not required to be included in permit applications. These so-called "insignificant activities" represent emission units that are expected to have very low potential emissions and are not likely to be subject to any applicable requirements. The commenter has not raised a concern with the insignificant

activities listed in Maryland's regulations. However, the commenter expresses concern that Maryland may employ COMAR 26.11.03.04(A)(14) to expand the approved list of 13 enumerated insignificant activities without the appropriate level of EPA review and approval.

Maryland revised the language of the COMAR 26.11.03.04(A)(14) in order to address a deficiency identified by EPA when the State's program was granted interim approval. Originally, Maryland's regulations exempted from permit applications emission units without applicable requirements of the Clean Air Act. The EPA was concerned that the exemption was too broad because permittees exercising the exemption did not have to identify the specific emission units or activities to the State, EPA and the public and that the exempted units may not be part of an EPA-approved insignificant activity list. In response to EPA's concerns, Maryland modified the language of COMAR 26.11.03.04(A)(14) to require the State to agree with any recommendation that an emission unit or activity be considered an insignificant activity. Therefore, Maryland may amend the list of 13 insignificant activities enumerated in its regulations by supplementing its regulatory insignificant activity list with a non-regulatory list of activities. The EPA expects that activities added to Maryland's list pursuant to COMAR 26.11.03.04(A)(14) will be consistent with the activities included in COMAR 26.11.03.04(A)(1)-(13) and with EPA's criteria for insignificant activities.

The title V implementing regulations at 40 CFR 70.5(c) do not require insignificant activity lists to be codified as part of a state's operating permit program regulations. However, the federal regulations do require insignificant activity lists to be approved by EPA as part of a state's program. Although Maryland's regulations do not explicitly require that EPA approve of any insignificant activities added by the State using the authority of COMAR 26.11.03.04(A)(14), EPA interprets Maryland's regulations as expressing the State's intent and obligation to submit such added activities to EPA for approval as part of the Maryland operating permit program. This interpretation is consistent with the State's ongoing obligation to keep EPA apprised of any changes to its program as required by 40 CFR 70.4(i). Thus, 40 CFR 70.5(c) requires any insignificant activity list employed by Maryland to be approved as part of its program by EPA and 40 CFR 70.4(i) requires the State to keep EPA informed

of any changes it intends to make to its approved program. If Maryland were to fail to seek EPA approval of amendments to its insignificant activity list, EPA could determine, pursuant to 40 CFR 70.10(b), that the State was failing to administer and enforce its approved program. Were EPA to make such a determination, Maryland would be obligated to submit the necessary program revisions and could face program withdrawal and sanctions as articulated by 40 CFR 70.10. It should be noted that the requirement of the State to implement its approved program applies generically and at all times and not only to the insignificant activity provisions.

The EPA confirmed Maryland's understanding of the State's ongoing obligation to inform EPA of all proposed program modifications and to seek EPA approval of such program changes. As documented in a December 12, 2002 memorandum from David Campbell, Air Protection Division, EPA Region III to the docket file for this action (hereafter, the December 12, 2002 memorandum), Maryland confirmed EPA's interpretation of COMAR 26.11.03.04 and related that it understands its duty to seek approval of revisions to its operating permit program, including any changes to the insignificant activity list.

*Comment:* The commenter believes Maryland's operating permit program regulations do not require general permits to be issued in accordance with the mandatory public participation procedures provided by 40 CFR 70.7(h). The commenter also expresses concern that Maryland's program does not clearly provide for adequate review by EPA and affected states and does not affirm citizens' authority to petition EPA to object to general permits.

*Response:* Maryland's regulations at COMAR 26.11.07(A)(3) require general permits to complete "all of the public, affected State, and EPA notification, comment, and review procedures required by this regulation." The EPA did not correctly interpret the full scope of the public participation procedures of COMAR 26.11.07 when it reviewed the regulation as part of Maryland's original program submittal in 1995. At that time, EPA incorrectly believed that the provisions of COMAR 26.11.07 applied only to permits or permit modifications for individual sources and not to general permits. As a result, EPA identified the lack of adequate public participation for general permits as a program deficiency when it granted Maryland interim approval. In its interim approval actions, EPA directed Maryland to revise its program to add requirements

to its general permit provisions to clarify that general permits must undergo appropriate EPA and affected state review and that the State shall maintain records of public comments raised during the public participation process for general permits.

It is important to note that the public participation procedures of COMAR 26.11.07 were approved by EPA as meeting the minimum requirements of 40 CFR 70.7(h). As discussed above, when EPA granted interim approval of Maryland's program in 1996 it interpreted the requirements of COMAR 26.11.07 as applying only to permits for individual sources. In that context, the Agency found the provisions acceptable and no comments were received pertaining to the public participation provisions at that time. The EPA now understands that the public participation provisions of COMAR 26.11.07 also apply to general permits and has confirmed its interpretation of these provisions with Maryland. (*See* December 12, 2002 memorandum.) The federal requirements for general permits at 40 CFR 70.6(d) requires that general permits must be subject to public participation procedures consistent with 40 CFR 70.7(h) and must comply with all requirements applicable to other part 70 permits. The provisions of COMAR 26.11.07 and COMAR 26.11.03.21 satisfy these requirements.

The provisions of COMAR 26.11.03.21 that apply specifically to general permits should be interpreted to be additional requirements on these type of permits above and beyond those that apply to permits for individual sources. This interpretation is supported by the language of COMAR 26.11.03.21(A) that states that "[a]ny general permit shall comply with all requirements applicable to other part 70 permits. \* \* \*" It should be noted that COMAR 26.11.03.21(A) indicates that general permits must also satisfy the public participation requirements of Maryland's Administrative Procedure Act, State Government Article, section 10-101 *et seq.*

With regard to citizens' authority to petition EPA, COMAR 26.11.03.07(G) and COMAR 26.11.03.10 affirm the authority of citizens to petition EPA to object to a permit. The provisions of these regulations apply to both permits for individual sources and general permits. Likewise, the provisions of COMAR 26.11.03.08 and 26.11.03.09 regarding affected state and EPA review, respectively, apply to permits for individual sources and general permits. Each of these provisions have been previously determined to be consistent

with the relevant requirements of 40 CFR part 70.

While EPA now understands that such changes were not necessary, Maryland made the changes to its regulations as recommended when EPA granted final interim approval in 1996. The changes made by Maryland simply underscore the requirement that general permits must be subject to the public participation procedures and EPA and affected state review afforded permits for individual permits.

*Comment:* The commenter believes that the permit modification procedures that apply to Maryland's general permits violate 40 CFR part 70. The applicable federal regulations do not allow an individual source operating under a general permit to unilaterally request a change to the general permit and proceed to make operational changes prior to modification of the terms of the general permit.

*Response:* Maryland's regulations do not allow an individual source operating under a general permit to formally request a change to the general permit and to proceed to make operational changes prior to modification of the general permit. As discussed above, Maryland must follow all of the public participation procedures as required by the rulemaking provisions of the State's Administrative Procedures Act prior to making a change to the general permit. Subsequent to making the change to the general permit, the State would have to revise the general permit by following all of the public participation requirements required of such actions by its operating permit regulations, namely COMAR 26.11.03.07. Therefore, it is impractical for an individual source that is covered by an existing general permit to appropriately apply for a modification of the general permit that would effect that source as well as any other source covered by the general permit.

Since Maryland must initiate any action to revise the general permit, the only available mechanism for such revisions are derived from COMAR 26.11.03.20 which governs the reopening of operating permits by Maryland. Maryland's regulations indicate that such permit revision procedures as administrative amendments and minor and significant permit modifications may only be initiated by permittees. As mentioned above, individual permittees may not initiate the rulemaking procedures that are necessary to revise general permits in Maryland. It should be noted that Maryland's Administrative Procedures Act allows the public to petition the

State to request a specific rulemaking action. Thus, an individual source may petition the State to make a revision to an existing general permit, however, Maryland is not obligated in any way by its operating permit regulations to respond to such petitions.

As part of its interim approval action, EPA identified concerns with the manner in which Maryland's regulations addressed general permit modifications. Maryland's regulations had provided the State with the authority to define the appropriate permit modification procedures on a case-specific basis or within the legal construction of a general permit. EPA felt that these provisions provided too much discretion to Maryland in terms of how future modifications to general permits would proceed. In order to address the interim approval deficiency, Maryland removed the authority to define general permit modification procedures on an informal basis or as part of the framework of a general permit. In its interim approval action, EPA further directed Maryland to clarify that the procedures for making revisions to general permits are consistent with 40 CFR 70.7(e) which governs permit modifications. Maryland addressed this issue by stating in its regulations at COMAR 26.11.03.21(L) that the permit revisions procedures that apply to permits for individual sources also apply to general permits. The EPA determined in the final interim approval action that the permit modification procedures that apply to permits for individual sources are consistent with 40 CFR 70.7(e) and the minimum requirements of part 70.

The regulations at 40 CFR 70.6(d) governing general permits provide limited discussion regarding the expected or required permit modification procedures for general permits other than requiring general permits to "comply with all requirements applicable to other part 70 permits." From this reference, it is inferred in the absence of more specific regulatory language regarding general permit modification procedures, that the permit modification procedures for permits for individual sources articulated at 40 CFR 70.7(e) would be applicable to general permits. Therefore, Maryland has amended its regulations regarding the modification procedures for general permits as directed by EPA and in a manner consistent with the minimum requirements of part 70.

As discussed above, EPA did not have a complete understanding of Maryland's regulations with regard to the general permit provisions when it granted final interim approval in 1996. The

requirements of COMAR 26.11.03.21(L) are, as a practical matter, not applicable to modifications of general permits since only the State of Maryland may revise general permits by initiating its rulemaking procedures and then using its authority to reopen the existing general permit.

It should be noted that if an affected individual source were to attempt to seek a revision to an existing general permit, there would be a number of safeguards and negative ramifications that should minimize the potential for erroneous implementation of the permit revision process on the source's part. First, it is assumed that the source would submit some form of application or formal request seeking a modification to the general permit. As part of that request, Maryland's permit modification procedures requires applicants to certify that they are using the appropriate permit revision process when filing a revision request. Upon receipt of the modification request, Maryland would deny the application on grounds that the source was not authorized to request such a change to a general permit. Furthermore, if the applicant proceeded to make the change it is requesting prior to the State responding to the request, the applicant would not be operating consistent with its approved permit and could face associated enforcement and penalty ramifications. The EPA confirmed this understanding of COMAR 26.11.03.21 and how Maryland would implement its general permit provisions. (See December 12, 2002 memorandum.)

*B. Comments Pertaining to Issues Raised in Earthjustice's March 12, 2002 Letter*

The following discussion responds to comments provided by Earthjustice on October 10, 2002 regarding issues that Earthjustice initially raised as part of its March 12, 2002 letter to EPA. As discussed above, EPA provided its formal responses regarding these issues to Earthjustice on September 23, 2002 and has made those responses available to the public. The Agency does not believe it is required to respond to these comments as part of its action to grant final full approval to Maryland. Nonetheless, the following responses are provided to clarify our original responses and to respond to additional points raised by Earthjustice regarding these matters in its October 10, 2002 letter.

*Comment:* The commenter believes that EPA made unequivocally determine that Ann. Code Md. 2-106 does not interfere with the public's ability to enforce permit conditions in federal

court under section 304 of the Clean Air Act, 42 U.S.C. 7604. The commenter also asserts that EPA's determination must, at a minimum, be supported by an opinion from the Maryland Attorney General's office.

*Response:* Ann. Code Md. 2-106 states:

2-106—Rights of persons other than this State.

(a) Presumption and finding of fact.—A determination by the Department that air pollution exists or that a rule or regulation has been disregarded or violated does not create any presumption of law or finding of fact for the benefit of any person other than this State.

(b) Proceedings.—Any proceedings under this title shall be brought by the Department for the benefit of the people of this State.

(c) Actionable rights.—No person other than this State acquires actionable rights by virtue of this title.

While this State statute does prevent citizens from bringing suit in federal or state court to enforce provisions of Maryland's air quality control law, the plain and unambiguous language of Ann. Code Md. 2-106 limits its scope to proceedings brought "under this title" or "by virtue of this title" (the "title" in question being Maryland's Title 2, entitled "Ambient Air Quality Control"). Therefore, the statute does not affect any right conferred by any federal law. Section 304 of the Clean Air Act, 42 U.S.C. 7604, is federal law, and beyond the self-limiting reach of the language of Ann. Code Md. 2-106.

Our previous response cited *Maryland Waste Coalition v. SCM Corp.*, 616 F. Supp. 1474, 1477 (D. Md. 1985). While we cited this case because the court specifically observed that Ann. Code Md. 2-106(c) allows only the State, and not private citizens, to bring an action to enforce the Maryland air pollution laws, it is worth noting that the *SCM* court did not cite Ann. Code Md. 2-106 as a bar to the citizen suit brought by the plaintiff pursuant to section 304 of the Clean Air Act. (The court did find that certain of the plaintiff's claims were barred by section 304 to the extent that the plaintiff claims overlapped those in a previously filed enforcement action brought by EPA.)

Furthermore, as we also pointed out in our prior response, "had Maryland attempted to prescribe the types, kinds and weights to be ascribed to evidence entered in a federal forum, such an action would have obvious implications on the system of federalism established by the United States' Constitution."

Had Maryland attempted with Ann. Code Md. 2-106 to divest a right to bring a citizen suit under federal law in a federal court, the federalism

implications would be just as apparent. Such a stark conflict with the federal statute would be nullified by the Supremacy Clause of the United States Constitution, which provides, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof \* \* \* shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding." U.S. Const. art. VI, Paragraph 2.

Under the Supremacy Clause, everyone must follow federal law in the face of conflicting state law. "It is basic to this constitutional command that all conflicting state provisions be without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981), citing *McCulloch v. Maryland*, 4 Wheat. 316, 427 (1819). "[A] state statute is void to the extent it conflicts with a federal statute—if, for example, 'compliance with both federal and state regulations is a physical impossibility' or where the law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (internal citations omitted).

Ann. Code Md. 2-106 does not on its face conflict with or present an obstacle to the full purpose and objective of Section 304 of the Clean Air Act. Even if such a conflict existed, the statute would be unconstitutional based on the Supremacy Clause as interpreted by the Supreme Court. Therefore, EPA can unequivocally state that Ann. Code Md. 2-106 does not conflict with or affect any rights conferred by Section 304 of the Clean Air Act, including the public's ability to enforce title V permit conditions in federal court. The EPA does not believe that obtaining an opinion from the Maryland Attorney General would add anything to this analysis.

*Comment:* The commenter believes that a provision of Maryland law, Ann. Code Md. 2-611, illegally shields violators from enforcement so long as they operate in compliance with a compliance plan.

*Response:* The EPA disagrees with this comment. On September 23, 2002, EPA responded to a comment submitted on March 12, 2001 with respect to Ann. Code Md. 2-611. The original comment erroneously stated that this statutory provision "amounts to a blanket waiver or suspension of applicable requirements, and an amendment of the permit without following required modification procedures, all in violation of title V, and that "the provision could preclude citizens and EPA from enforcing permit requirements \* \* \*"

The EPA's response was based in part on the Maryland Attorney General's interpretation of this provision. To give the proper context to the current comment, we believe that it is helpful to set forth EPA's response to the original comment in full below:

EPA Response to Comment 6: Ann. Code Md. 2-611 provides:

A person is not subject to action for a violation of this title or any rule or regulation adopted under this title so long as the person acts in accordance with a plan for compliance that (1) the person has submitted to the Secretary; and (2) the Secretary has approved, with or without amendments, on the recommendation of the Air Management Administration. The Secretary shall act on any plan for compliance within 90 days after the plan for compliance is submitted to the Secretary.

When a State is diligently prosecuting a facility for violations of its permit, it is typical and reasonable to give a facility a compliance schedule to bring a facility into compliance with its permit conditions. Indeed, EPA's regulations at 40 CFR 70.5(c)(8)(iii)(C) and 70.6(c)(3) require that a title V permit application and permit include a compliance plan containing a compliance schedule for requirements for which the covered source is not in compliance at the time of permit issuance. If a facility must modify its permit due to the conditions of a compliance plan, then that facility should follow all proper procedures to modify its permit as needed. This Maryland law does not allow a title V source to bypass the permit modification process. In addition, the State law does not prevent EPA from enforcing permit requirements (as noted in response to Comment 2, Maryland law does not contain a general citizen suit provision to enforce violations of its air pollution regulations, including permit requirements; however, this is not a legal deficiency in the Maryland program).

Further, neither EPA nor MDE [Maryland Department of Environment] interprets Ann. Code Md. 2-611 as a blanket waiver or suspension of any other applicable requirements for a source. Maryland has submitted to EPA an opinion from the Maryland Attorney General that affirms MDE and EPA's position that the law applies only to violations that are expressly addressed by the compliance plan. See Attachment 4. EPA does not agree that Ann. Code Md 2-611 represents a deficiency in the State's part 70 program.

The commenter apparently accepts EPA's explanation with respect to the points addressed above, but now asserts



a new defect with Ann. Code Md. 2-611, namely that "it exempts a person from enforcement action for a violation of an air pollution limitation 'so long as the person acts in accordance with a plan for compliance.'" Such an exemption, the commenter asserts "explicitly violates Part 70's prohibition against a compliance schedule that 'sanction[s] noncompliance with, the applicable requirements on which it is based.'" 40 CFR 70.5(c)(8)(iii)(C).

However, the commenter has alleged a conflict between 40 CFR 70.5(c)(8)(iii)(C) and Ann. Code. Md. 2-611 that does not exist either explicitly or implicitly. The language of 40 CFR 70.5(c)(8) speaks to the contents of the compliance schedule. Under 70.5(c)(8) any compliance schedule must meet certain criteria. For example, 40 CFR 70.5(c)(8)(iii)(C) requires that the schedule "include a schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance with any applicable requirements \* \* \*" (Emphasis added.) Further, the schedule must be "at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject." The last requirement is that "the schedule shall be supplemental to, and shall not sanction noncompliance with, the applicable requirements on which it is based."

The federal regulations at 40 CFR 70.5(c)(8)(iii)(C) contemplate that a compliance schedule may be little more than the recitation of requirements set forth in a judicial consent decree or an administrative order that has been agreed to between the source and a state or federal enforcement agency to fully and finally settle a dispute with the source. Any such compliance schedule necessarily would be supplemental to the existing applicable requirements on which it is based. The title V permits, judicial consent decree or administrative order that defines the schedule may not, in of themselves, amend the underlying legal instruments such as state regulations or permits that establish the subject applicable requirements. Indeed, the regulatory language makes clear that a compliance plan must lead to compliance with all applicable requirements. The commenter seems to suggest that the requirement that the compliance schedule "shall be supplemental to, and shall not sanction noncompliance with, the applicable requirements on which it is based," essentially means that is mandatory that such schedules reopen concluded matters. The Agency does not believe that ever was the intent of this provision.

Instead, when all provisions of 40 CFR 70.5(c)(8)(iii)(C) are read in *pari materia* the prohibition of sanctioning noncompliance with underlying applicable requirements necessarily must refer to *all* applicable requirements, including judicial consent decrees and administrative orders (a term broad enough to easily encompass the type of plan for compliance contemplated by Ann. Code. Md. 2-611) with which a source is legally obligated to comply.

*Comment:* The commenter believes that Maryland has failed to adequately implement its operating permit program because the State did not issue all of its initial permits in accordance with the statutory three-year schedule.

*Response:* On December 1, 2001, EPA's interim approval of Maryland's title V operating permit program lapsed because the State was unable to submit all of the program revisions necessary to satisfactorily address the deficiencies identified by EPA when it granted the State final interim approval. At the time of program lapse, Maryland had not taken final action on all of its initial operating permit program applications. Also on December 1, 2001, EPA granted to Maryland the full delegation of authority to implement and enforce the federal operating permit program requirements established at 40 CFR part 71. Once the requirements of 40 CFR part 71 took effect, the State of Maryland could no longer issue federally enforceable permits pursuant to its own program regulations. The part 71 permit program established a new schedule for the submittal of permit applications and issuance of permits by Maryland. That schedule required Maryland to issue part 71 permits to the remaining initial permit applicants by December 1, 2004. As of December 1, 2001, 47 sources had not received initial title V permits in Maryland.

As discussed in the September 23, 2002 letter, the State of Maryland has committed to EPA that it will issue the remaining 47 permits within two years of receiving final full approval of its operating permit program. The two year time frame is consistent with the time provided other states that had failed to issue all of their initial operating permits within the statutory time-frame. As noted by the commenter, a number of states provided letters to EPA in December 2001 committing to issue their remaining permits within two years. The EPA believes Maryland is capable of achieving or surpassing its commitment and will closely monitor the State's permit issuance rates once the final full approval of its program is effective. Should Maryland fail to make

adequate progress toward meeting its commitment, the Agency will pursue options to address the situation, including the issuance of a notice of deficiency.

*Comment:* The commenter believes that Maryland has inadequately implemented is operating permit program with respect to the operating permit program reporting requirements for required monitoring.

*Response:* As discussed in our September 23, 2002 response, EPA disagrees with Earthjustice's assertion that Maryland is not implementing its monitoring report requirements in a manner consistent with the minimum requirements of part 70. Maryland's regulations with respect to requiring permittees to submit reports of any required monitoring at least every six months (hereafter, "six-month monitoring reports") are consistent with the requirements of 40 CFR 70.6(a)(3)(iii)(A). The provisions of 40 CFR 70.6(a)(iii)(A) do not specify the form or content of acceptable six-month monitoring reports other than the requirement that all deviations from permits requirements must be clearly identified in the reports. Therefore, considerable latitude has been provided to permitting authorities to develop specific reporting requirements in individual permits in order to satisfy the six-month monitoring report requirements. The EPA believes that Maryland has issued permits that reasonably provide adequate monitoring information to assess compliance in a timely fashion and that the permit requirements meet the minimum requirements of 40 CFR 70.6(a)(3)(iii)(A).

As noted in EPA's September 23, 2002 letter, Maryland has committed to modifying the manner in which it implements the six-month monitoring report requirements in individual permits. Upon the effective date of the final full approval, Maryland has committed to issue permits that clarify that six-month monitoring reports are required over all periods, including those when no deviations or excess emissions occurred. This change will affirm that the permits meet the requirement to submit monitoring reports every six months. The EPA believes Maryland is capable of meeting this commitment and will monitor the permits issued by Maryland once final full approval of its program becomes effective. The Agency feels it is prudent to allow Maryland an opportunity to demonstrate its ability to meet its commitment prior to determining whether a notice of deficiency is warranted.



The EPA also does not believe it is necessary at this time to require Maryland to reopen all existing permits to further clarify the six-month monitoring report requirements. If the Agency becomes aware of a particular existing permit that, based on the facts specific to that permit, warrants reopening to clarify the six-month monitoring reporting requirements, EPA will proceed with the appropriate actions to ensure the permit is revised. At this time, the Agency believes that Maryland should focus its resources on reestablishing its program and issuing the remaining initial permits.

*Comment:* The commenter believes Maryland's minor permit modification procedures apply to changes that must be subject to significant permit modification procedures. Specifically, the commenter is concerned that Maryland could inappropriately add new requirements to a permit or change the required test method specified in a permit via the minor modification process when such modifications could represent significant modifications.

*Response:* Maryland's regulations at COMAR 26.11.03.16 specify the types of changes that may qualify to be processed as minor permit modifications. One of the requirements a proposed change must meet in order to be considered a minor permit modification is that the change is not required to be processed as a significant modification. While other provisions of COMAR 26.11.03.16 identify specific types of modifications that could be processed as minor permit modifications, COMAR 26.11.03.16(B)(6) requires that all minor modifications must also meet the test that they do not represent significant permit modifications. Therefore, it is important to evaluate Maryland's regulations with respect to the criteria for significant permit modification. Maryland's criteria for significant permit modifications at COMAR 26.11.03.17 are consistent with 40 CFR 70.7(e)(4). In summary, Maryland's and EPA's regulations require any changes to a permit that represent a significant change in existing monitoring conditions and any relaxation of reporting or recordkeeping conditions must be treated as a significant modification.

According to COMAR 26.11.03.16, the addition of a new applicable monitoring, reporting, and recordkeeping requirement or the specification of a different approved test method must not be considered a significant change or relaxation of existing permit conditions in order to be considered a minor modification. If

such changes constitute a significant change or relaxation, Maryland's regulations requires the such changes to be processed as significant permit modifications.

In constructing its minor permit modification procedures, it appears that Maryland has attempted to provide more direction to permittees in terms of the types of changes that may be considered minor modifications than is provided in the federal regulations at 40 CFR 70.7(e). Other than this added specificity, COMAR 26.11.03.16 is consistent with the minor permit modification procedures expressed at 40 CFR 70.7(e)(2). As discussed above, this added detail does not authorize sources to make changes using the minor modification procedures that would otherwise be considered significant permit modifications. Furthermore, 40 CFR 70.4(b)(13) and 70.7(e) do not require permit programs to establish modification procedures that are identical to the federal requirements. Rather, state procedures must be substantially equivalent to procedures outlined in 40 CFR 70.7(e). The EPA believes that Maryland's permit modification procedures are substantially equivalent to 40 CFR 70.7(e) and provide adequate safeguards to prevent inappropriate application of the permit modification procedures.

#### *C. Comments Related to Issues Raised in Earthjustice's October 10, 2002 Letter*

The following discussion responds to comments provided by Earthjustice on October 10, 2002 regarding issues that are being identified for the first time. Earthjustice's October 10, 2002 letter raises concerns with portions of Maryland's program that were approved by EPA in 1996 and that were not the subject of the proposed full approval rulemaking action published on September 10, 2002. The Agency does not believe it is required to respond to these comments in order to grant final full approval to Maryland. Nonetheless, the following responses are provided to reinforce the merits of our approval of the relevant program provisions in 1996. In the event that a court finds that EPA is obligated to respond to these comments in order to grant final full approval to Maryland's program, then the following responses should be considered EPA's final action on the issues raised.

*Comment:* The commenter believes that Maryland's operating permit program regulations are unclear regarding whether all emissions units, including "insignificant" emissions units, are included in operating permits. The commenter is particularly

concerned that only "relevant" emission units are covered by operating permits.

*Response:* Maryland's operating permit program regulations require, pursuant to numerous provisions, that all applicable requirements be identified in permit applications and permits. The federal regulations at 40 CFR 70.3(c) indicate that permits for major sources shall include "all applicable requirements for all relevant emission units." Maryland's regulations at COMAR 26.11.03.05(A) are virtually identical to the federal regulations, including the reference to "relevant" emission units. Maryland's regulations, like the federal regulations, do not ascribe further meaning to the term "relevant" emission units. COMAR 26.11.02.01(B)(18) defines the term "emission unit" to include "a part or activity of a stationary source, including an installation, that emits or has the potential to emit a regulated air pollutant or hazardous air pollutant listed under § 112(b) of the Clean Air Act." In other words, Maryland does not limit the applicability of its operating permit program to certain types of units at major sources. In addition, like EPA's regulations at 40 CFR 70.6(a)(1), Maryland's regulations at COMAR 26.11.03.06(A)(1) require that part 70 permits assure compliance with all applicable requirements of the Clean Air Act. Thus, under the Clean Air Act, part 70 and Maryland's regulations, any permit for a major source must assure compliance with all applicable requirements for any and all emission units at that source. Maryland's regulations meet the minimum federal requirements.

Furthermore, Maryland's regulations governing permit application content at COMAR 26.11.03.03(B)(14), 26.11.03.03(E), and 26.11.04(C) require applicants to provide all information to implement and enforce any applicable requirements or determine the applicability of such requirements; determine if a source is subject to all applicable requirements; and, ensure that all applicable requirements of the Clean Air Act are included in the permit, regardless of whether or not the emission unit is a "relevant" unit or an insignificant activity as defined in Maryland's regulations. Maryland's regulations at COMAR 26.11.03.04(D) further confirms that insignificant activities or emission units are not exempt from any applicable requirements of the Clean Air Act other than those related to the amount of information applicants must provide in permit applications regarding those activities.

The commenter expressed a concern with a specific provision of Maryland's permit regulations, COMAR 26.11.03.01(G), that affects the general applicability of the title V operating permit program. This provision indicates that major sources with title V operating permits are not required to also obtain a State operating permit for those emission units at the source covered by the title V operating permit. The commenter suggests that the language of this provision in some way implies that there are emission units at major sources that may not be "covered" by the title V operating permit even if they have applicable requirements of the Clean Air Act. In this context, the term "covered" should be interpreted to indicate that the title V operating permit reflects federally-enforceable applicable requirements of the Clean Air Act for the emission unit in question. Maryland's regulations are indicating that if an emission unit does not have any applicable requirements of the Clean Air Act that emission unit would not be "covered" by the title V permit for purposes of the major source's obligation to also obtain a State operating permit. As discussed above, Maryland's title V regulations require permits to reflect all applicable requirements of the Clean Air Act for all emission units.

In other words, an emission unit at a major source may not have any Clean Air Act requirements, but it may be subject to State-only enforceable requirements. If that is the case, the major source must seek a State operating permit to "cover" that emission unit and to reflect its State-only enforceable applicable requirement. Maryland wants to ensure that all emission units at major sources are covered by either a title V operating permit or State operating permit, with all federal applicable requirements contained in the title V operating permit and any State-only enforceable requirements reflected in the State operating permit. Pursuant to COMAR 26.11.03.05(C), Maryland may also include State-only enforceable conditions in title V permits.

*Comment:* The commenter believes Maryland's operating permit program regulations improperly allow a facility to operate pursuant to a general permit prior to the State's approval of its application.

*Response:* The federal regulations at 40 CFR 70.5(a)(2) and 70.7(a)(4) that describe the permit application review procedures indicate that, among other things, permit applications that have not been formally deemed incomplete by the permitting authority within 60 days

of receipt shall be deemed complete. These procedures as they are applied to general permits are modified by 40 CFR 70.7(a)(1)(i) in that complete applications for general permits do not have to be received prior to issuance of the subject general permit. Maryland's regulations at COMAR 26.11.03.02(C) are consistent with the federal regulations because they provide that a permit application is deemed complete within 60 days of receipt if the State has not informed the applicant that the application is incomplete or that additional information is required.

As discussed earlier, 40 CFR 70.6(d) and COMAR 26.11.03.21 which establish the procedural requirements applicable to general permits clearly indicate that general permits shall comply with all requirements applicable to permits for individual sources. This includes the application procedures of 40 CFR 70.5(a)(2) and 70.7(a)(4) and COMAR 26.11.03.02(C) that apply to permits for individual sources. The commenter points out that COMAR 26.11.03.21(H) provides that a response to each general permit application may not be provided and that the general permit may specify a reasonable time after which the application is deemed acceptable. This provision is consistent with 40 CFR 70.5(a)(2) and 70.7(a)(4) which allows for applications to be deemed acceptable after a fixed period of time if no response is provided by the permitting authority. It should be noted that COMAR 26.11.03.21(G) indicates that the State may grant a determination that a particular applicant qualifies for a general permit. Also, COMAR 26.11.03.21(I) indicates that Maryland may issue an applicant for a general permit a letter or other document approving or deny the application. Likewise, Maryland is required by COMAR 26.11.03.13(A)(4) to take action on an application for a general permit as specified in the framework of the general permit. These provisions establish the authority and expectation that the State intends to actively respond to applications for general permits much in the same manner Maryland responds to permit applications for individual sources.

In further support of this interpretation, the granting of a major source's application request for authorization to operate under a general permit does not, according to 40 CFR 70.7(d)(6)(2) and COMAR 26.11.03.21(G), represent a final permit action for purposes of judicial review. In other words, the State takes final permit action when it issues the final general permit and not when individual sources subsequently request to be covered by

the general permit. Thus, the requirements of 42 U.S.C. 7661b(c), 40 CFR 70.4(b)(6) and 70.7(a)(2) regarding the permitting authorities' obligation to take action on permit applications by issuing or denying permits within the specified time periods are not directly applicable to the general permit process. As noted above, the federal requirements for general permits anticipate that permitting authorities will take final action on permits prior to individual sources applying for coverage under the general permit. It would be impractical to expect permitting authorities to act on permit applications in a certain time frame when no such applications may be submitted. In other words, sources requiring permits would not submit applications to be covered by a general permit before the general permit exists, therefore, the permitting authority would not have permit applications to respond to until it had already fulfilled its obligation by taking final action on the general permit. Again, practical application of the procedures for general permits do not clearly align with all of the applicable requirements established for permits for individual sources.

The commenter is concerned that an applicant for a general permit that does not qualify may operate under the terms of the general permit if the State fails to respond to its general permit application in a timely fashion. The construction of Maryland's general permit provisions require the State to explicitly define the criteria by which sources may qualify for the general permit. Further, COMAR 26.11.03.21(E) limits general permits to major sources that qualify and COMAR 26.11.03.21(C) stipulates that applicants are subject to enforcement action for operating without a permit if it is determined that they do not qualify for coverage under the general permit.

The EPA appreciates the apparent tension between a number of the provisions in Maryland's regulations governing general permits, particularly with regard to COMAR 26.11.03.21(H) and the obligation of the State to actively respond to permit applications. While EPA interprets Maryland's regulations to meet the minimum requirements of the Clean Air Act and 40 CFR part 70, the Agency expects the State to employ its authority to ensure that only qualified applicants are covered by any general permits issued by Maryland. No general permits have been issued by Maryland to date and the State has indicated informally that the prospects of such issuance in the future are minimal. (See December 12, 2002 memorandum.) Should the State

develop a general permit, the EPA expects that Maryland would use its authority under COMAR 26.11.03.13(A)(1)(a) and 26.11.03.21(F), (G) and (I) to provide procedures in the general permit that expressly require an applicant to obtain an affirmative determination from the State that it qualifies for the general permit prior to being considered covered by the general permit.

*Comment:* The commenter believes that Maryland's operating permit program regulations are inconsistent with 40 CFR part 70 with respect to the administrative amendment procedures. Specifically, the commenter is concerned that Maryland and EPA, on an ad hoc basis, may approve permit changes as qualifying for processing as administrative amendments even though they do not meet the regulatory criteria for processing as administrative amendments. The commenter asserts that because the public receives no notice of administrative amendments, the public must receive an opportunity to evaluate whether particular types of administrative amendments are appropriate.

*Response:* Maryland's regulations at COMAR 26.11.03.15 define six types or categories of permit changes that may be processed as administrative amendments in a manner consistent with 40 CFR part 70.7(d). In large part, the language of Maryland's regulations is identical to the federal regulations governing administrative amendments. The last category in both regulations indicate that other unspecified permit changes may be considered administrative amendments provided the changes are similar to those explicitly defined in the regulation and that EPA approves the types of changes as being similar to the other approved changes. Specifically, the federal provisions at 40 CFR 70.7(d)(1)(vi) state that only changes that EPA "has determined as part of the approved program to be similar to those in paragraphs (d)(1)(i) through (iv) of this section," may be considered administrative amendments. Maryland's regulation at COMAR 26.11.03.15(B)(6) states that any change "as approved by the EPA, which is similar to those in Section B(1)—(4) of this regulation" may be considered an administrative amendment.

The EPA does not share the commenter's concern that EPA or Maryland will use the slightly different phrasing of COMAR 26.11.03.15(B)(6) to informally change the approved list of changes that may be processed as administrative amendments under 40 CFR 70.6(d)(1). The EPA would

consider any proposed change to the approved list of administrative amendment categories as a revision to Maryland's approved program as defined by 40 CFR 70.4(i). As such, the revision would have to be approved by EPA consistent with 40 CFR 70.4(i)(2). Should Maryland attempt to modify its approved list of changes qualifying for processing as administrative amendments and implement the modified list without first seeking EPA approval, the Agency would find pursuant to 40 CFR 70.10(b) that the State was failing to implement and enforce its approved program. Such a finding would require the State to submit the necessary program revisions or face program withdrawal and other sanctions provided by the Clean Air Act and part 70.

The intended effect of 40 CFR 70.7(d)(1)(vi) is to provide EPA with the authority to approve as part of a state's program additional types of permit changes that qualify for processing as administrative amendments. The expectation is that the state would specifically list the types of changes that the state proposes to be eligible for processing as administrative amendments as part of the state's operating permit regulations and submit those regulations to EPA for approval as revisions to the state's program. Maryland's regulation is simply reiterating the authority of the State to propose additional types of changes and the requirement that EPA must approve such changes. Maryland's regulations can in no way amend or alter the means by which EPA can approve changes to the State's approved program as provided by the Clean Air Act and 40 CFR part 70.

*Comment:* The commenter believes Maryland's operating permit program regulations impermissibly allow changes at a source to occur without a permit revision even when such change constitutes a modification under title I of the Clean Air Act.

*Response:* EPA stated its interpretation of what constitutes a "title I modification" under the current 40 CFR part 70 in the preamble to proposed revisions to 40 CFR parts 70 and 71 that were published in the **Federal Register** on August 31, 1995 (60 FR 45530). In particular, EPA stated that the term "title I modifications" under the current regulations should be read to exclude changes subject to the minor new source review program in section 110(a)(2)(C) of the Clean Air Act. The rationale for this interpretation is set forth at 60 FR at 45545–45546.

Prior to the lapse of interim approval, Maryland was implementing its

program consistent with EPA's current interpretation of what represents a title I modification. EPA fully expects that Maryland will implement its fully-approved operating permit program consistent with its past practices and EPA's current interpretation of what represents a title I modification.

#### **How Does This Action Affect the Part 71 Program in Maryland?**

The EPA is fully approving Maryland's title V operating permit program. Upon the effective date of this action, the part 71 program will no longer be effective in Maryland. Likewise, the delegation of the authority to implement and enforcement the part 71 program to Maryland will be terminated. However, a part 71 program could become effective at a future date if EPA makes a finding that Maryland's title V program fails to meet the requirements of part 70. If such a finding is made, the Agency will use its authority and follow the procedures under section 502(i) of the Clean Air Act and 40 CFR 70.10.

#### **Statutory and Executive Order Reviews**

Under Executive Order 12866, "Regulatory Planning and Review" (58 FR 51735, October 4, 1993), this final approval is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) the Administrator certifies that this final approval will not have a significant economic impact on a substantial number of small entities because it merely approves state law as meeting federal requirements and imposes no additional requirements beyond those imposed by state law. This rule does not contain any unfunded mandates and does not significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) because it approves pre-existing requirements under state law and does not impose any additional enforceable duties beyond that required by state law. This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000). This rule also does not have Federalism implications because it will not have

substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, "Federalism" (64 FR 43255, August 10, 1999). This rule merely approves existing requirements under state law, and does not alter the relationship or the distribution of power and responsibilities between the State and the Federal government established in the Clean Air Act. This final approval also is not subject to Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) or Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866. This action will not impose any collection of information subject to the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, other than those previously approved and assigned OMB control number 2060-0243. For additional information concerning these requirements, see 40 CFR part 70. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

In reviewing State operating permit programs submitted pursuant to title V of the Clean Air Act, EPA will approve State programs provided that they meet the requirements of the Clean Air Act and EPA's regulations codified at 40 CFR part 70. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a State operating permit program for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews an operating permit program, to use VCS in place of a State program that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 *note*) do not apply.

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. The EPA will

submit 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 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). This rule will be effective on February 14, 2003.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 17, 2003. 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 granting final full approval of Maryland's title V operating permit program may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

#### List of Subjects in 40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Operating permits, Reporting and recordkeeping requirements.

Dated: January 9, 2003.

**Donald S. Welsh,**  
*Regional Administrator, Region III.*

Appendix A of part 70 of title 40, chapter I, of the Code of Federal Regulations is amended as follows:

#### PART 70—[AMENDED]

1. The authority citation for part 70 continues to read as follows:

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

2. Appendix A to part 70 is amended by adding paragraph (b) in the entry for Maryland to read as follows:

#### Appendix A to Part 70—Approval Status of State and Local Operating Permits Programs

\* \* \* \* \*

Maryland

\* \* \* \* \*

(b) The Maryland Department of Environmental Quality submitted operating permit program amendments on July 15, 2002. The program amendments contained in the July 15, 2002 submittal adequately addressed the conditions of the interim approval effective on August 2, 1996. The

State is hereby granted final full approval effective on February 14, 2003.

\* \* \* \* \*

[FR Doc. 03-959 Filed 1-14-03; 8:45 am]

BILLING CODE 6560-50-P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

[DA 03-43, MM Docket No. 01-306, RM-10152]

### Digital Television Broadcast Service; Hartford, CT

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commission, at the request of Fox Television Stations, Inc., substitutes DTV channel 31 for DTV channel 5 for Tribune Television Corporation's station WTIC-TV at Hartford, Connecticut. See 66 FR 54970, October 31, 2001. DTV channel 31 can be allotted to Hartford, Connecticut, in compliance with the principle community coverage requirements of Section 73.625(a) at reference coordinates 41-42-13 N. and 72-49-57 W. with a power of 500, HAAT of 492 meters and with a DTV service population of 3641 thousand. Since the community of Hartford is located within 400 kilometers of the U.S.-Canadian border, concurrence from the Canadian government has been obtained for this allotment. With this action, this proceeding is terminated.

**DATES:** Effective February 24, 2003.

**FOR FURTHER INFORMATION CONTACT:** Pam Blumenthal, Media Bureau, (202) 418-1600.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MM Docket No. 01-306, adopted January 7, 2003, and released January 8, 2003. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., CY-B402, Washington, DC, 20554, telephone 202-863-2893, facsimile 202-863-2898, or via e-mail [qualexint@aol.com](mailto:qualexint@aol.com).

### List of Subjects in 47 CFR Part 73

Digital television broadcasting, Television.