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Part IV

Environmental Protection Agency

40 CFR Part 69

**Special Exemption From Requirements of
the Clean Air Act for the Territory of
United States Virgin Islands; Final Rule
and Proposed Rule**

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 69**

[Region 2 Docket No. VI-5-265 B, FRL-7605-6]

Special Exemption From Requirements of the Clean Air Act for the Territory of United States Virgin Islands**AGENCY:** Environmental Protection Agency.**ACTION:** Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is announcing approval of a petition, from the Governor of the Virgin Islands (US VI), which seeks an exemption of the Clean Air Act (CAA) section 165(a) requirement to obtain a Prevention of Significant Deterioration (PSD) permit to construct prior to construction of a new gas turbine at the Virgin Islands Water and Power Authority (VIWAPA) St. Thomas facility. This exemption allows for construction, but not operation, of Unit 23 prior to issuance of a final PSD permit.

DATES: This direct final rule is effective on March 1, 2004, without further notice, unless EPA receives adverse comment by January 30, 2004. If any adverse comments are received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Comments may be submitted either by mail or electronically. Written comments should be mailed to Steven C. Riva, Chief, Permitting Section, Air Programs Branch, Environmental Protection Agency, Region 2 Office, 290 Broadway, New York, New York 10007-1866. Electronic comments could be sent either to Riva.Steven@epa.gov or to <http://www.regulations.gov> which is an alternative method for submitting electronic comments to EPA. Go directly to <http://www.regulations.gov>, then select "Environmental Protection Agency" at the top of the page and use the "go" button. Please follow the on-line instructions for submitting comments.

Copies of the Governor's petition and submittals relied upon in the approval process are available at the following addresses for inspection during normal business hours:

Environmental Protection Agency, Region 2 Office, Air Programs Branch, 290 Broadway, New York, New York 10007-1866, Attn: Umesh Dholakia.

Environmental Protection Agency, Region 2 Office, Caribbean Field Office, Centro Europa Building, Suite 417, 1492 Ponce de Leon Avenue, Stop 22, San Juan, Puerto Rico 00907-4127, Attn: John Aponte.

The U. S. Virgin Islands Department of Planning and Natural Resources (VIDPNR), Division of Environmental Protection, Cyril E. King Airport, Terminal Building, Second Floor, St. Thomas, U.S. Virgin Islands 00802, Attn: Leslie Leonard.

FOR FURTHER INFORMATION CONTACT: Umesh Dholakia, Environmental Engineer, Air Programs Branch, Division of Environmental Protection and Planning, Environmental Protection Agency, Region 2 Office, 290 Broadway, 25th Floor, New York, New York 10007-1866, (212) 637-4023 or at Dholakia.Umesh@epa.gov.

SUPPLEMENTARY INFORMATION: The following table of contents describes the format for the **SUPPLEMENTARY INFORMATION** section:

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I. What Action Is EPA Taking Today?

EPA is approving a petition from the U.S. VI Governor seeking an exemption of the CAA requirement to obtain a PSD permit to construct prior to commencing construction of a new gas turbine at the VIWAPA St. Thomas facility.

Pursuant to section 325(a) of the CAA, on July 21, 2003, the Governor of the U.S. VI filed a petition with the Administrator seeking an exemption from the CAA section 165(a) PSD requirement to obtain a PSD permit to construct prior to commencing construction. The Governor requested the exemption on behalf of VIWAPA so that it can proceed, as quickly as possible, to construct Unit 23, a 36 megawatt (MW) gas turbine at its St. Thomas facility.

This exemption will allow for construction, not operation, prior to issuance of a final PSD permit, of Unit 23 at the VIWAPA St. Thomas facility.

II. What Are the Regulatory Requirements for Authorizing an Exemption Under the CAA?

Section 325(a) of the CAA provides the Administrator of EPA the authority to exempt sources in the U.S. VI from any requirement under the Act other

than section 112 or any requirement under section 110 or part D necessary to attain or maintain National Ambient Air Quality Standard (NAAQS) provided the Administrator determines that compliance is not feasible due to unique geographical, meteorological or economic factors or such other factors deemed significant.

III. What Are the Bases for the Petitioner's Request?

The Petitioner contends that granting this exemption will not impact upon compliance with any requirement under sections 112, 110, or part D of the Act necessary to attain or maintain National Ambient Air Quality Standards. To support this contention, petitioner first acknowledges that because the exemption will not authorize operation of the unit until after receipt of the PSD permit, the exemption will not result in any violations of sections 112, 110, or part D of the Act necessary to attain or maintain a NAAQS. In addition petitioner contends that modeling, submitted in support of the permit application for the unit and supplemented since that application, demonstrates that NAAQS and PSD increments will continue to be preserved if both the new unit and all other existing units on St. Thomas are operating at maximum permitted capacity burning.

Petitioner further asserts that the exemption should be granted because of severe geographic constraints on the U.S. VI power system and because of a power crisis on St. Thomas. A summary of these assertions appears below:

a. Geographic Constraints

The petitioner contends that the exemption is necessary because of severe geographic constraints on the U.S. VI power system. The petition states that the VIWAPA St. Thomas facility is unable to interconnect with a larger power supply grid. Furthermore, the petition states that the distance between St. Thomas and St. Croix prohibit interconnection between the two VIWAPA plants. Thus, the petitioner explains, St. Thomas is serviced by a single power plant.

The petitioner also contends that when significant problems occur units must be shipped off-island for inspection and repair because vendors who provide such services are not located within the U.S. VI. The reasons it provides for this are that vendors do not have inspection and repair facilities in the U.S. VI. Thus, the petition states, major outages extend longer and cost more to correct than they would on the mainland. The petitioner explains that

to account for the need to send units off-island for repair, VIWAPA developed a policy and practice of attempting to maintain sufficient reserve capacity. The petitioner goes on to state that because of the long-term loss of one unit (Unit 11) for major repairs and the imminent major repair of another unit (Unit 22), the maximum capacity of all remaining units on St. Thomas is about to drop significantly and therefore the petitioner anticipates a number of scenarios in which there will not be sufficient reserve capacity for powering St. Thomas. The petitioner points out that this will exacerbate an already problem-ridden power supply.

b. Power Crisis on St. Thomas

The petition claims that VIWAPA “no longer has sufficient capacity to ensure a continuous power supply sufficient to meet public needs. Consequently the island has been experiencing frequent power outages whenever a major unit is forced out or is taken out of service for maintenance.”

The petitioner states that with Units 11 and 22 unavailable, whenever there is an outage of Unit 13 alone, or an outage of a combination of any two remaining units except 12 and 14, a serious power outage will occur. The petitioner claims the age and unreliability of a number of VIWAPA’s units resulted in significant blackouts over the past 12 months even though Units 11 and 22 were available for service. These assertions are documented in three tables attached to the petition.

IV. What Is EPA’s Analysis of the Petition?

EPA has reviewed the modeling submitted by VIWAPA in support of its application for a permit to construct and operate Unit 23 and in support of this petition and has determined that authorizing this exemption will not impact upon compliance with any requirement under sections 112, 110, or part D of the Act necessary to attain or maintain a NAAQS or PSD increment.

Upon consideration of VIWAPA’s contentions, EPA has determined that the petition presents unique geographic and economic circumstances which meet the section 325 criteria for authorizing an exemption from the CAA section 165(a) requirement to obtain a PSD permit to construct prior to commencing construction of Unit 23 at the VIWAPA St. Thomas facility.

V. What Is EPA’s Conclusion?

The EPA is approving the petition for an exemption of the CAA section 165(a) requirement to obtain a PSD permit to

construct prior to commencing construction of a new gas turbine, Unit 23, at the VIWAPA St. Thomas facility. This exemption will allow for the construction, but not the operation, of Unit 23 prior to issuance of a final PSD permit.

EPA is relying on the Governor’s assertion that the construction and ultimate operation of Unit 23 should provide a reliable baseload which will give VIWAPA flexibility to meet electrical demand and that the additional capacity provided by this unit would be sufficient to allow for both planned and unplanned outages of generating units at the VIWAPA St. Thomas facility. EPA believes that by accelerating the time period by which this unit can be constructed, this rulemaking may increase VIWAPA’s potential to provide more reliable power in St. Thomas.

The EPA is publishing this direct final rule without prior proposal because the Agency views this as a noncontroversial approval and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve this same petition should adverse comments be filed. This final rule will be effective March 1, 2004, without further notice unless the Agency receives relevant adverse comments by January 30, 2004.

If the EPA receives any adverse comments, EPA will publish a notice withdrawing the final rule and inform the public that the rule did not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period on the proposed rule. Parties interested in commenting on the proposed rule should do so at this time. If no such comments are received, the public is advised that this rule will be effective on March 1, 2004, and no further action will be taken on the proposed rule.

VI. Statutory and Executive Order Review.

A. Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, entitled “Regulatory Planning and Review.”

B. Paperwork Reduction Act

Under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, OMB must approve all “collections of information”

by EPA. The Act defines “collection of information” as a requirement for “answers to * * * identical reporting or recordkeeping requirements imposed on ten or more persons * * *” 44 U.S.C. 3502(3)(A). Because the exemption only applies to one company, the Paperwork Reduction Act does not apply.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

This rule will not have a significant impact on a substantial number of small entities because the exemption applies to only one source and does not create any new requirements but simply postpones requirements that will be met. This Federal exemption does not create any new requirements; therefore, I certify that this action will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act

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 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 proposes to approve an exemption under Federal law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (*Federalism*) and 12875 (*Enhancing the Intergovernmental Partnership*). Executive Order 13132 requires EPA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” is defined in the Executive Order to include regulations that 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.” Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule 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, because it merely approves an exemption from a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

F. Executive Order 13175, Coordination With Indian Tribal Governments

Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” This proposed rule does not have tribal implications, as specified in Executive Order 13175.

Today’s rule does not significantly or uniquely affect the communities of Indian tribal governments. This action does not involve or impose any requirements that affect Indian tribes. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be “economically significant” as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to Executive Order 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to 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.

I. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use “voluntary consensus standards” (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical. The EPA believes that VCS are inapplicable to this action. Today’s action does not require the public to perform activities conducive to the use of VCS.

J. Congressional Review Act

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. Section 804 exempts from section 801 the following types of rules: (1) Rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). EPA is not required to submit a rule report regarding this action under section 801 because this is a rule of particular applicability exempting Virgin Islands Water and Power Authority’s St. Thomas facility, Unit 23 from obtaining a PSD permit to construct.

K. Other

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 1, 2004. 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 69

Environmental protection, Air pollution control.

Dated: December 23, 2003.

Michael O. Leavitt,
Administrator.

■ Part 69 of chapter I, title 40 of the Code of Federal Regulations is amended to read as follows:

PART 69—[AMENDED]

■ 1. The authority citation for part 69 continues to read as follows:

Authority: Section 325, Clean Air Act, as amended (42 U.S.C. 7625–1).

■ 2. Section 69.41 is amended by adding paragraph (h) to read as follows:

§ 69.41 New exemptions.

* * * * *

(h) Pursuant to Section 325(a) of the Clean Air Act (CAA) and a petition submitted by the Governor of United States Virgin Islands on July 21, 2003, (“2003 Petition”), the Administrator of EPA conditionally exempts Virgin Islands Water and Power Authority

(“VIWAPA”) from certain CAA requirements.

(1) A waiver of the requirement to obtain a PSD permit prior to construction is granted for the electric generating unit identified in the 2003 Petition as Unit 23, St. Krum Bay plant in St. Thomas with the following condition:

(i) Unit 23 shall not operate until a final PSD permit is received by VIWAPA for this unit;

(ii) Unit 23 shall not operate until it complies with all requirements of its PSD permit, including, if necessary, retrofitting with BACT;

(iii) If Unit 23 operates either prior to the issuance of a final PSD permit or

without BACT equipment, Unit 23 shall be deemed in violation of this waiver and the CAA beginning on the date of commencement of construction of the unit.

(2) [Reserved]

[FR Doc. 03-32207 Filed 12-30-03; 8:45 am]

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