

solicited comment regarding any other appropriate and legally permissible implementation approach.

DoD issued a final rule March 17, 2009 (74 FR 11279–93), which was similar to the proposed rule. The preamble to the final rule discussed DoD's effort, particularly in the use of voluntary agreements tied to formulary status, to find "common ground" with the drug industry, which opposes FCPs. The preamble also stated that DoD interpreted the statute as automatically capping the price manufacturers may charge for those drugs that enter into the commercial chain of transactions that end up as TRICARE-paid prescriptions, resulting in the conclusion that the amount above the FCP was an overpayment by DoD, which in turn required a refund of the overpayment. After the final rule became effective, May 26, 2009, drug companies signed voluntary agreements covering approximately 99 percent of TRICARE retail prescriptions.

However, at the same time, there was a litigation challenge to the validity of the final rule in a case called *Coalition for Common Sense in Government Procurement v. U.S.*, U.S. District Court for the District of Columbia, Civ. No. 08–996 (JDB), 2009 U.S. Dist. LEXIS 110746. The Court issued a decision November 30, 2009. This decision had four major points:

- Although 10 U.S.C. 1074g(f) requires that FCPs shall apply, the statute does not specify *how* they will apply. DoD incorrectly interpreted the statute as *requiring* manufacturer refunds, to the exclusion of other possible approaches. DoD must reconsider the implementation of the statute as a function of its discretionary judgment, rather than only as a legal interpretation. For example, DoD should exercise its discretion to consider "which of the five parties that participate in the retail pharmacy program—manufacturers, wholesalers, network pharmacies, private pharmacy benefit managers, and TRICARE beneficiaries—must bear any costs associated with imposing the Federal Ceiling Prices."

- While DoD considers whether to readopt the final rule as it currently stands or to change it, the final rule will remain in effect, as will the manufacturer agreements that cover approximately 99 percent of TRICARE retail prescriptions. (This is the effect of the Court's Order that the final rule is "remanded without vacatur.")

- DoD correctly interpreted the statute as applying FCPs to all prescriptions filled on or after January 28, 2008.

- The Court ordered that DoD file a status report with the Court by not later than March 1, 2010, "documenting its consideration on remand."

B. Invitation of Additional Public Comments

Although the Court did not specifically require more public comments, DoD invites public comments on the final rule issued March 17, 2009, as well as additional comments regarding any other appropriate and legally permissible implementation approach. DoD recommends that interested parties focus their comments on those matters that the Court addressed as requiring DoD reconsideration on the remand of the final rule. In considering alternative approaches, DoD intends to use at least the following three criteria (and welcomes comment on other suggested criteria): (1) Harmony with the statute and legislative history; (2) consistency with best business practice; and (3) practicability of administration. In addition to the citations noted above, to assist interested parties, the final rule and the Court's Order and Memorandum Opinion are posted on the TRICARE Pharmacy Program Web site at: http://www.tricare.mil/pharm_mfg/default.cfm.

Dated: February 3, 2010.

Patricia L. Toppings,
OSD Federal Register Liaison Officer,
Department of Defense.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2009–0706; FRL–9111–6]

Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Removal of NO_x SIP Call Rules

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to approve the State Implementation Plan (SIP) revision submitted by the State of West Virginia that removes West Virginia's nitrogen oxides (NO_x) SIP Call rules. In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse

comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing by March 11, 2010.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2009–0706 by one of the following methods:

A. <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

B. *E-mail:*
fernandez.cristina@epa.gov.

C. *Mail:* EPA–R03–OAR–2009–0706, Cristina Fernandez, Associate Director, Office of Air Program Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2009–0706. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your

name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the West Virginia Department of Environmental Protection, Division of Air Quality, 601 57th Street SE., Charleston, West Virginia 25304.

FOR FURTHER INFORMATION CONTACT: Marilyn Powers, (215) 814-2308, or by e-mail at powers.marilyn@epa.gov.

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action, with the same title, that is located in the "Rules and Regulations" section of this **Federal Register** publication. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

Dated: January 22, 2010.

W. C. Early,

Acting Regional Administrator, Region III.

[FR Doc. 2010-2674 Filed 2-8-10; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2010-0010; FRL-9111-8]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; Control of Carbon Monoxide Emissions from Basic Oxygen Furnaces

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to approve the State Implementation Plan (SIP) revision submitted by the State of Maryland for the purpose of replacing the existing requirements for the control of carbon monoxide (CO) emissions from basic oxygen furnaces (BOFs) at steel mills with a new CO standard for BOFs at steel mills. In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing by March 11, 2010.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA-R03-OAR-2010-0010 by one of the following methods:

A. <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

B. *E-mail:* fernandez.cristina@epa.gov.

C. *Mail:* EPA-R03-OAR-2010-0010, Cristina Fernandez, Associate Director, Office of Air Program Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-R03-OAR-2010-0010. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at Maryland Department of the Environment, 1800 Washington Boulevard, Suite 705, Baltimore, Maryland 21230.

FOR FURTHER INFORMATION CONTACT: Maria A. Pino, (215) 814-2181, or by e-mail at pino.maria@epa.gov.