

relevant statutory and regulatory requirements.

EPA is publishing this document without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in a separate document elsewhere in this **Federal Register**, the EPA is proposing to approve the SIP revision should adverse or critical comments be filed. This action will be effective November 6, 1995, unless, by October 6, 1995, adverse or critical comments are received.

If the EPA receives such comments, this action will be withdrawn before the effective date by publishing a subsequent notice that will withdraw the final action. All public comments received will then be addressed in a subsequent final rule based on this action serving as a proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time. If no such comments are received, the public is advised that this action will be effective November 6, 1995.

Regulatory Process

Unfunded Mandates

Under Sections 202, 203, and 205 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must undertake various actions in association with proposed or final rules that include a Federal mandate that may result in estimated costs of \$100 million or more to the private sector or to state, local, or tribal governments in the aggregate.

Through submission of this state implementation plan revision, the State and any affected local or tribal governments have elected to adopt the program provided for under part D of the Clean Air Act. These rules may bind state, local, and tribal governments to perform certain actions and also require the private sector to perform certain duties. The rules being approved by this action will impose no new requirements because affected sources are already subject to these regulations under state law. Therefore, no additional costs to state, local, or tribal governments or to the private sector result from this action. EPA has also determined that this direct final action does not include a mandate that may result in estimated costs of \$100 million or more to state, local, or tribal governments in the aggregate or to the private sector.

Small Businesses

Under the Regulatory Flexibility Act, 5 U.S.C. Section 600 et seq., EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. sections 603 and 604. Alternatively, EPA may certify 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 government entities with jurisdiction over populations of less than 50,000.

SIP approvals under section 110 and subchapter I, part D of the CAA do not create any new requirements, but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP-approval does not impose any new requirements, I certify that it does not have a significant impact on affected small entities. Moreover, due to the nature of the Federal-state relationship under the CAA, preparation of a regulatory flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The CAA forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co. v. U.S. E.P.A.*, 427 U.S. 246, 256-66 (S. Ct. 1976); 42 U.S.C. section 7410(a)(2).

The Office of Management and Budget has exempted this regulatory action from review under Executive Order 12866.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Nitrogen oxides, Ozone, Reporting and recordkeeping requirements, Volatile organic compound.

Dated: August 8, 1995.

Felicia Marcus,
Regional Administrator.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart F—California

2. Section 52.220 is amended by adding paragraph (c) (198)(i)(H)(I) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *
(198) * * *
(i) * * *

(H) South Coast Air Quality Management District.

(I) Rule 1146 and Rule 1146.1, adopted May 13, 1994.

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[FR Doc. 95-21877 Filed 9-5-95; 8:45 am]

BILLING CODE 6560-50-W

40 CFR Part 52

[SD6-1-6947a and SD5-1-6191a; FRL-5279-3]

Clean Air Act Approval and Promulgation of State Implementation Plan for South Dakota; Revisions to the Air Pollution Control Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA approves the State implementation plan (SIP) revisions submitted by the State of South Dakota on November 12, 1993 and March 7, 1995. EPA is replacing the existing rules approved in the SIP with the following chapters of the Administrative Rules of South Dakota (ARSD), as requested by the State: 74:36:01-74:36:04, 74:36:06; 74:36:07, 74:36:10-74:36:13, and 74:36:15, as in effect on January 5, 1995. The State's submittals included revisions to the State's definitions, minor source construction and federally enforceable state operating permit (FESOP) rules, source category emission limitations, sulfur dioxide (SO₂) rules, new source performance standards (NSPS), new source review (NSR) requirements for new and modified major sources impacting nonattainment areas, and enhanced monitoring and compliance certification requirements.

In addition, EPA is approving the State's construction and operating permit program under section 112(l) of the Clean Air Act (Act) for the purposes of creating federally enforceable permit conditions for sources of hazardous air pollutants (HAPs).

DATES: This final rule is effective on November 6, 1995 unless adverse comments are received by October 6, 1995. If the effective date is delayed, timely notice will be published in the **Federal Register**.

ADDRESSES: Copies of the State's submittal and other information are available for inspection during normal business hours at the following locations: Air Programs Branch, Environmental Protection Agency, Region VIII, 999 18th Street, suite 500,

Denver, Colorado 80202-2405; South Dakota Department of Environment and Natural Resources, Division of Environmental Regulation, Joe Foss Building, Pierre, South Dakota 57501; and The Air and Radiation Docket and Information Center, 401 M Street, SW, Washington, D.C. 20460.

Written comments should be addressed to Vicki Stamper, 8ART-AP, Environmental Protection Agency, Region VIII, 999 18th Street, suite 500, Denver, Colorado.

FOR FURTHER INFORMATION CONTACT:
Vicki Stamper, (303) 293-1765.

SUPPLEMENTARY INFORMATION:

I. Background

On November 12, 1993, the State of South Dakota submitted revisions to its SIP. Specifically, the State requested that the existing State rules approved in the SIP be replaced with the most recent codification of the ARSD, Chapters 74:36:01-04 and 74:36:06-13 inclusive. In addition to recodification, the State made numerous revisions to its air quality regulations, including definitions, minor source construction and operating permit rules, source category emission limitations, NSPS, national emission standards for hazardous air pollutants (NESHAPs), NSR requirements for new and modified sources impacting nonattainment areas, and other minor revisions.

In a July 13, 1994 letter, EPA noted many deficiencies in the State's November 12, 1993 submittal and requested that the State correct the major deficiencies before EPA would proceed with approval. The State made those corrections to its rules and submitted the rule corrections to EPA on March 7, 1995. In that submittal, the State also addressed EPA's July 7, 1994 call for revision of the South Dakota SIP to comply with the enhanced monitoring and compliance certification program requirements of sections 110, 113, and 114 of the Act. In addition, the State adopted other revisions to its rules, including its acid rain rules and updates to its incorporation by reference of the Federal requirements for NSPS and HAPs.

The March 7 submittal requested that the previous regulations approved in the SIP be replaced with ARSD Chapters 74:36:01-74:36:04, 74:36:06; 74:36:07, 74:36:10-74:36:13, and 74:36:15, as in effect on January 5, 1995. The following State regulations were not included in the State's March 7 SIP submittal: ARSD 74:36:05 Operating Permits for Part 70 Sources, for which EPA granted interim approval on March 22, 1995 (see 60 FR 15066-15069); ARSD 74:36:08 National

Emission Standards for Hazardous Air Pollutants, which the State has taken out of the SIP and has instead requested delegation of authority for these standards; ARSD 74:36:09 Prevention of Significant Deterioration (PSD), which incorporates by reference the corresponding Federal rules at 40 CFR 52.21 that EPA delegated authority to the State to implement on July 6, 1994 (see September 15, 1994 **Federal Register**, 59 FR 47260); ARSD 74:36:14 Variances, which the State did not include in the SIP because such a provision could not be approved as part of the SIP as it is inconsistent with section 110(i) of the amended Act; and ARSD 74:36:16 Acid Rain Program, which will be acted on by EPA separate from this SIP approval.

This document evaluates the State's submittal for conformity with the corresponding Federal regulations and the requirements of the Act.

II. This Action

A. Analysis of State Submissions

1. Procedural Background

The Act requires States to observe certain procedural requirements in developing implementation plans and plan revisions for submission to EPA. Section 110(a)(2) of the Act provides that each implementation plan submitted by a State must be adopted after reasonable notice and public hearing. Section 110(l) of the Act similarly provides that each revision to an implementation plan submitted by a State under the Act must be adopted by such State after reasonable notice and public hearing.

The EPA also must determine whether a submittal is complete and therefore warrants further EPA review and action [see section 110(k)(1) and 57 FR 13565, April 16, 1992]. The EPA's completeness criteria for SIP submittals are set out at 40 CFR part 51, appendix V. The EPA attempts to make completeness determinations within 60 days of receiving a submission. However, a submittal is deemed complete by operation of law under section 110(k)(a)(B) if a completeness determination is not made by EPA within six months after receipt of the submission.

The State of South Dakota held public hearings on February 18, 1993 and November 17, 1994 to entertain public comment on the SIP revisions, at which the rule revisions were adopted by the State. These rule revisions were formally submitted to EPA for approval in the SIP on November 12, 1993 and on March 7, 1995.

The SIP revisions were reviewed by EPA to determine completeness shortly after their submittal, in accordance with the completeness criteria referenced above. The submittals were found to be complete, and letters dated January 12, 1994 and June 28, 1995 were forwarded to the Governor indicating the completeness of the submittals and the next steps to be taken in the processing of the SIP submittals.

2. Evaluation of State's Submittals

The following summarizes the State's submittals and EPA's review for approvability:

a. ARSD 74:36:01 Definitions

The State made numerous revisions to its definitions in ARSD 74:36:01 in order to make the definitions consistent with other provisions in the State's rules and with the corresponding Federal regulations, including the State's recently adopted title V permitting program in ARSD 74:36:05 and the acid rain program in ARSD 74:36:16.

EPA has reviewed the definitions included in this chapter against the corresponding Federal definitions in 40 CFR parts 51, 60, and 70 and for conformity with the State's regulations. EPA believes the revised definitions are consistent with the corresponding Federal definitions, with the following clarifications.

As discussed in EPA's January 12, 1995 **Federal Register** notice of proposed interim approval of South Dakota's title V program (see 60 FR 2919), EPA believes clarification regarding two of the State's definitions is necessary to ensure that the provisions are interpreted consistently with the Federal regulations:

(1) The definition of "federally enforceable" which appears at ARSD 74:36:01:01(28) reads as follows:

"Federally enforceable," all limits and conditions that are enforceable by the administrator of EPA pursuant to federal law. These limits and conditions include those requirements developed pursuant to this article, those appearing in 40 CFR 60 and 61 (July 1, 1993), requirements within the state implementation plan and permit requirements established pursuant to this article or 40 CFR 51 Subpart I (July 1, 1993). The use of this term does not impede the Department's authority under state law to enforce these limits and conditions.

This definition is significant for determining whether a source is subject to preconstruction and operating permitting requirements as a major source or as a minor source, because it is used in defining the "potential to emit" of a source. To be consistent with EPA's definition of "federally

enforceable," the second sentence of the above definition cannot and should not be read to expand on the first sentence of the definition. For example, requirements developed pursuant to ARSD Article 74:36 might be, but would not necessarily be, federally enforceable. Such Federal enforceability would depend on whether such requirements had been included in a source's preconstruction or operating permit issued under an EPA-approved program, whether such requirements had been approved by EPA as part of the SIP, or whether such requirements were already considered Federal regulations (such as NSPS promulgated in 40 CFR part 60 which South Dakota has incorporated by reference in ARSD 74:36:07). EPA's interpretation is that the requirements delineated in the second sentence of the definition are only federally enforceable if they are enforceable by the administrator of EPA pursuant to Federal law.

(2) The second sentence of the definition of "major source" in ARSD 74:36:01:08(1) reads as follows:

Emissions from any oil exploration or production well and its associated equipment and emissions from any pipeline compressor or pump station may not be aggregated with emissions from other similar units, whether or not such units are in a contiguous area or under common control, to determine whether such units or stations are major sources.

To be consistent with the Federal regulations, this sentence must be read as only being applicable to a determination of whether a source is major under section 112 of the Act. This language cannot be applied when determining whether a source is major under other sections of the Act.

With these interpretations, EPA believes the definitions in ARSD 74:36:01 are consistent with the corresponding Federal regulations. EPA is approving all of the definitions in ARSD 74:36:01, with the exception of two definitions related to the State's acid rain program which EPA will be acting on separately: "acid rain permit" and "acid rain program" in ARSD 74:36:01:01(2) and (3).

b. ARSD 74:36:02 Ambient Air Quality

This chapter was revised to refer to the Federal regulations for the National Ambient Air Quality Standards (NAAQS), methods of sampling and analysis, air quality monitoring networks, and ambient air monitoring in 40 CFR parts 50, 53, and 58. The State's regulation is consistent with the relevant Federal requirements and is approvable.

c. ARSD 74:36:03 Air Quality Episodes

This chapter was revised to refer to the Federal guidelines for emergency episode plans in 40 CFR 51.151-153 and appendix L. The State's regulation is consistent with the relevant Federal requirements and is approvable.

d. ARSD 74:36:04 Operating Permits for Minor Sources

This chapter was revised extensively to combine the State's existing minor source construction permit and FESOP requirements into one permitting system and to ensure compliance with the Federal requirements for both construction permit programs and FESOP programs. This chapter only applies to sources which are not considered to be 40 CFR part 70 sources (i.e., sources which are not required to obtain a title V operating permit). (Note that the State's construction permitting program for new and modified major sources is the State's PSD permitting program in ARSD 74:36:09.) Specifically, a new source in South Dakota must obtain an operating permit prior to construction, and an existing source must obtain a permit in order to operate the source. Such operating permits will be valid for five years and must be renewed.

(1) Construction Permit Program.

The minor source construction permit element of the State's permitting program must meet the corresponding Federal requirements in 40 CFR 51.160-164, in order to be approved by EPA. As detailed in the Technical Support Document (TSD) accompanying this notice, EPA believes the State's construction permit requirements meet all of the corresponding Federal requirements in 40 CFR 51.160-164.

(2) FESOP Program.

On June 28, 1989, EPA published criteria for approving and incorporating into the SIP regulatory programs for the issuance of FESOPs (see 54 FR 27282). Permits issued pursuant to an operating permit program approved into the SIP as meeting these criteria may be considered federally enforceable. The EPA has encouraged States to develop such FESOP programs in conjunction with title V operating permit programs to enable sources to limit their potential to emit to below the title V applicability thresholds. (See the September 18, 1992 guidance document entitled, "Limitation of Potential to Emit with Respect to Title V Applicability Thresholds," from John Calcagni, Director, Air Quality Management Division, Office of Air Quality Planning and Standards (OAQPS), Office of Air and Radiation, U.S. EPA.) In addition,

on November 3, 1993, EPA announced in a guidance document entitled, "Approaches to Creating Federally Enforceable Emissions Limits," from John S. Seitz, Director, OAQPS, that this mechanism could be extended to create federally enforceable limits for emissions of HAPs if the program were approved pursuant to section 112(l) of the Act. (See Section III. below for further details on EPA's section 112(l) approval of South Dakota's FESOP program.)

As detailed in the TSD, EPA has reviewed the State's permitting program for conformity with the FESOP criteria outlined in the June 28, 1989 **Federal Register** notice and believes the State's program adequately meets those requirements, although one clarification regarding their rules needs to be made:

South Dakota's rules do not specifically provide for submittal of each proposed and final permit to EPA on a timely basis. However, EPA has established procedures in the annual State-EPA agreement requiring the State to submit to EPA proposed and final permits which would limit the potential to emit of a source so that it would not be considered major. EPA reiterates that requirement in this document. That is, for any operating permit issued by the State to be considered federally enforceable, the State must submit the proposed and final permit to EPA in a timely manner, as well as meet all of the other requirements of its program and the June 28, 1989 **Federal Register**.

Thus, EPA is approving South Dakota's construction permit/FESOP program because it adequately meets the requirements of the June 28, 1989 **Federal Register** and 40 CFR 51.160-164. Permits issued by the State that conform to the State's rules and corresponding Federal requirements will be considered federally enforceable. See the TSD accompanying this document for further details.

e. ARSD 74:36:06 Regulated Air Pollutants

In this chapter, the State combined its Control of Particulate Emissions regulation previously codified in ARSD 74:26:06 and its Control of Sulfur Compound Emissions regulation previously codified in ARSD 74:26:07 into one chapter. The State made minor revisions to simplify its particulate matter emission regulations, which EPA believes are consistent with the Act and approvable.

In addition, the State made revisions to its regulations controlling SO₂ emissions in this chapter, as a result of EPA's nationwide effort to have SO₂ enforceability deficiencies identified

and corrected in SIPs before title V operating permit programs become effective. Because the title V operating permits will initially incorporate underlying SIP requirements, it is important that the underlying SIP is enforceable so that the permits themselves will be enforceable. Thus, on March 8, 1991, EPA provided a list of enforceability deficiencies in South Dakota's SO₂ emission control rules. The Region used the "SO₂ SIP Enforceability Checklist" when reviewing South Dakota's SO₂ rules for enforceability deficiencies. This checklist was included as an attachment to the November 28, 1990 memorandum from Robert Bauman and Rich Biondi to the Air Branch Chiefs, and it focused on the following topics:

- (1) Clarity;
- (2) Averaging times consistent with protection of the SO₂ NAAQS;
- (3) Clear compliance determinations;
- (4) Continuous emission monitoring;
- (5) Adequate reporting and recordkeeping requirements;
- (6) Director's discretion issues; and
- (7) Stack height issues.

The State of South Dakota subsequently adopted revisions to address the deficiencies outlined in EPA's March 8, 1991 letter. Those revisions include: clarifying the applicability of this chapter to include units required to be permitted under article 74:36; specifying a 3-hour rolling averaging time, consistent with the SO₂ NAAQS, for the SO₂ emission limitations of this chapter; and referring to test methods listed in chapter 74:36:11 and including appropriate reference methods in that chapter. Recordkeeping and reporting requirements are addressed through the operating permit rules in ARSD 74:36:05:16.

EPA believes the State has adequately addressed the SO₂ deficiencies identified in EPA's March 8, 1991 letter. Therefore, EPA is approving the State's SO₂ regulations.

f. ARSD 74:36:07 New Source Performance Standards

In this chapter, the State has adopted new NSPS by incorporating by reference the Federal NSPS for subparts Dc, QQ, RR, VV, XX, AAA, JJJ, NNN, and SSS of 40 CFR part 60, as in effect on July 1, 1993. Also, the State updated the incorporation by reference citations of its existing NSPS to reflect the July 1, 1993 version of 40 CFR part 60. In addition, the State added a provision clarifying that the term "administrator," as used in the Federal regulations incorporated into the State's regulations, means the State except for those

authorities which cannot be delegated to the State, in which case "administrator" means both EPA and the State. Since this chapter incorporates by reference the Federal NSPS in 40 CFR part 60, it is consistent with Federal requirements and approvable.

g. ARSD 74:36:10 New Source Review

In this chapter, the State adopted provisions for new and modified major stationary sources proposing to locate in attainment/unclassified areas but which cause or contribute to a violation of the NAAQS, in accordance with the requirements in 40 CFR 51.165(b). The State currently has no areas designated nonattainment for the NAAQS, so the State is currently not required to adopt nonattainment NSR provisions. EPA has reviewed the provisions in this chapter against the corresponding Federal requirements in 40 CFR 51.165 and found it to be consistent and therefore approvable.

h. ARSD 74:36:11 Stack Performance Testing

This chapter was revised to refer to the Federal test methods in 40 CFR part 51, appendix M, and 40 CFR part 60 as the test methods required to be used by sources and to make other minor revisions. EPA has reviewed the revisions to this chapter and has found they are consistent with the corresponding Federal requirements and approvable.

i. ARSD 74:36:12 Control of Visible Emissions

Minor revisions were made to this chapter, mainly to update the incorporation by reference of 40 CFR part 60, appendix A to reflect the July 1, 1993 version. EPA has reviewed the revisions to this chapter and has found they are consistent with the corresponding Federal requirements.

j. ARSD 74:36:13 Continuous Emission Monitoring Systems

(1) Continuous Emission Monitoring Requirements.

This new chapter was added to authorize the State to require major sources to install continuous emission monitors (CEMs) and to require that such CEMs meet the Federal performance specifications in 40 CFR part 60. EPA has reviewed these requirements adopted in ARSD 74:36:13:01-05 and has found these rules to be consistent with the corresponding Federal requirements and approvable.

(2) Enhanced Monitoring and Compliance Certification.

This regulation also address EPA's nationwide SIP call regarding the new enhanced monitoring and compliance certification requirements of the amended Act. On October 22, 1993, EPA announced in the **Federal Register** that SIP calls pursuant to section 110(k)(5) of the Act would be issued in order to implement the enhanced monitoring requirements of section 114(a)(3) of the Act and the periodic monitoring requirements for operating permits under sections 502(b)(2) and 504 of the Act (see 58 FR 54677). This SIP call is required because existing SIPs are inadequate in that they may be interpreted to limit the types of testing or monitoring data that may be used for determining compliance and establishing violations.

On July 7, 1994, the EPA notified the Governor of South Dakota that a SIP revision was necessary to meet the aforementioned requirements of the Act. EPA's letter provided the States with two options for regulatory language that, if adopted by the State and submitted to EPA for approval in the SIP, would satisfy the requirements of this SIP call. In Sections 74:36:13:06-07 of the ARSD, the State has adopted provisions which are essentially identical to the regulatory language provided in option 2 of the attachment to EPA's July 7, 1994 letter, as follows:

(a) In ARSD 74:36:13:06, the State has added a provision stating that, when submitting compliance certifications, an owner or operator of a source may use monitoring as required under 40 CFR 70.6(a)(3) in addition to any specified compliance methods. The practical effect of this provision is that the SIP is now more flexible and inclusive and does not preclude the use of enhanced monitoring.

(b) In ARSD 74:36:13:07, the State has added provisions stating that any credible evidence may be used to determine if a violation has occurred at a source. The rule provides that information from monitoring methods approved in a federally enforceable operating permit or in the SIP, as well as from any other federally enforceable monitoring and testing methods (including those in 40 CFR Parts 51, 60, 61, and 75), may be used by the State as credible evidence to determine compliance.

EPA believes the State has adequately satisfied the requirements of that SIP call letter and, therefore, is approving Sections 74:36:13:06-07 regarding enhanced monitoring and compliance certifications.

k. ARSD 74:36:15 Open Burning

The State made revisions to this chapter by further detailing those items that could not be disposed of by open burning, and by providing ability for small municipalities to burn solid wastes. Other minor revisions were also made. EPA has reviewed the revisions and believes they are consistent with the requirements of the Act and approvable.

III. Approval of South Dakota's Construction and Operating Permit Program Under Section 112(l) of the Act.

In this action, EPA is also approving South Dakota's combined construction/FESOP permit program in ARSD 74:36:04 under section 112(l) of the Act for the purpose of creating federally enforceable limits on the potential to emit of HAPs listed pursuant to section 112(b) of the Act. Approval under section 112(l) is necessary to allow the State to create federally enforceable limits on the potential to emit of HAPs, because SIP approval of this permitting program only extends to the control of HAPs which are photochemically reactive organic compounds or particulate matter. Federally enforceable limits on photochemically reactive organic compounds or particulate matter may have the incidental effect of limiting certain HAPs.¹ As a legal matter, no additional program approval by EPA is required in order for these "criteria" pollutant limits to be recognized as federally enforceable. However, section 112 of the Act provides the underlying authority for controlling all HAP emissions.

As discussed above and in the TSD, the criteria which are used in approving minor source construction permit programs are located in 40 CFR 51.160-164. EPA believes the most significant criteria in 40 CFR part 51 for creating federally enforceable limits through construction permits are those in 40 CFR 51.160-162. Further, as discussed in EPA's January 25, 1995 memorandum from John S. Seitz, Director of the Office of Air Quality Planning and Standards, and Robert I. Van Heuvelen, Director of the Office of Regulatory Enforcement, entitled "Options for Limiting the

¹ EPA issued guidance addressing the technical aspects of how these criteria pollutant limits may be recognized for purposes of limiting a source's potential to emit of HAPs to below section 112 major source levels. Please refer to the January 25, 1995 EPA policy from John Seitz and Robert Van Heuvelen entitled "Options for Limiting the Potential to Emit of a Stationary Source under Section 110 and Title V of the Clean Air Act," available at the EPA office listed at the beginning of this document.

Potential to Emit of a Stationary Source Under Section 112 and Title V of the Clean Air Act," in order for EPA to consider any construction permit terms federally enforceable, such permit conditions must be enforceable as a practical matter. South Dakota's permitting program will allow the State to issue permits that are enforceable as a practical matter. Thus, any permits issued in accordance with South Dakota's construction permit program and which are practically enforceable would be considered federally enforceable.

EPA believes that the five approval criteria for approving FESOP programs into the SIP, as specified in the June 28, 1989 **Federal Register** notice, are also appropriate for evaluating and approving such programs under section 112(l). The requirements outlined in the June 28, 1989 notice need not be unique to criteria pollutants since the reason that the notice does not address HAPs is simply that it was written prior to the 1990 Amendments to section 112.

In addition to meeting the criteria in 40 CFR 51.160-164 for construction permits and the criteria in the June 28, 1989 **Federal Register** notice for FESOPs, a permitting program that addresses HAPs must meet the statutory criteria for approval under section 112(l)(5). Section 112(l) allows EPA to approve a program only if it: (1) Contains adequate authority to assure compliance with any section 112 standards or requirements; (2) provides for adequate resources; (3) provides for an expeditious schedule for assuring compliance with section 112 requirements; and (4) is otherwise likely to satisfy the objectives of the Act.

EPA plans to codify the approval criteria for programs limiting potential to emit of HAPs through amendments to subpart E of 40 CFR part 63, the regulations promulgated to implement section 112(l) of the Act. (See 58 FR 62262, November 26, 1993.) EPA believes it has the authority under section 112(l) to approve programs to limit the potential to emit of HAPs directly under section 112(l) prior to this revision to subpart E of 40 CFR part 63. Given the timing problems posed by impending deadlines under section 112 and title V, EPA believes it is reasonable to read section 112(l) to allow for approval of programs to limit potential to emit prior to promulgation of a rule specifically addressing this issue. EPA is therefore approving South Dakota's combined construction permit/FESOP program now so that South Dakota may begin to issue federally enforceable synthetic minor permits as soon as possible. EPA also plans to codify

programs approved under section 112(l) without further rulemaking once the revisions to subpart E are promulgated.

As discussed in Section II.A.2.d. above and in the TSD, EPA believes South Dakota's combined construction permit/FESOP program meets the applicable Federal criteria for approval of such programs in the SIP. In addition, South Dakota's construction and operating permit program meets the statutory criteria for approval under section 112(l)(5), as follows:

Regarding the statutory criteria of section 112(l)(5), EPA believes South Dakota's permitting program contains adequate authority to assure compliance with section 112 requirements since the third criterion of the June 28, 1989 notice is met, i.e., since the State's program does not provide for waiving any section 112 requirement. Sources that become minor through a permit issued pursuant to these programs would still be required to meet section 112 requirements applicable to non-major sources.

Regarding the requirement for adequate resources, the State has committed to provide for adequate resources to implement and enforce the program. EPA will monitor the State's implementation of the program to assure that adequate resources continue to be available.

EPA also believes that South Dakota's construction and operating permit program provides for an expeditious schedule for assuring compliance with section 112 requirements. This program will be used to allow a source to establish a voluntary limit on potential to emit so as to avoid being subject to a Federal requirement applicable on a particular date. Nothing in the State's program would allow a source to avoid or delay compliance with the Federal requirement if it fails to obtain the appropriate federally enforceable limit by the relevant deadline.

Finally, EPA believes it is consistent with the intent of the section 112 and the Act for States to provide a mechanism through which sources may avoid classification as a major source by obtaining a federally enforceable limit on potential to emit.

Accordingly, EPA finds that South Dakota's construction permit/FESOP program satisfies the applicable criteria for establishing federally enforceable limitations on potential to emit both criteria and hazardous air pollutants. Thus, EPA is approving South Dakota's construction permit/FESOP program in ARSD 74:36:04 under section 112(l) of the Act.

IV. Final Action

EPA is approving the revisions to the South Dakota SIP which were submitted by the State on March 7, 1995 and on November 12, 1993. Specifically, EPA is replacing the existing State regulations approved in the SIP with the following chapters of the ARSD, effective on January 5, 1995: 74:36:01-74:36:04, 74:36:06; 74:36:07, 74:36:10-74:36:13, and 74:36:15. However, EPA is not taking action at this time on two definitions in ARSD 74:36:01 related to the State's acid rain program which EPA will be acting on separately: "acid rain permit" and "acid rain program" in ARSD 74:36:01:01(2) and (3).

In addition to approving South Dakota's construction permit/FESOP program in ARSD 74:36:04 as part of the SIP, EPA is also approving this program under section 112(l) of the Act for the purposes of creating federally enforceable permit conditions on HAPs. Note that in order for EPA to consider operating permits issued under ARSD 74:36:04 to be federally enforceable, the State must submit the proposed and final permits to EPA in a timely manner, as well as meet the other requirements of its program and the June 28, 1989 **Federal Register**.

This approval provides the State with the authority for implementation and enforcement of the following subparts of 40 CFR part 60: A, D, Da, Db, Dc, E, Ea, F, I, K, Ka, Kb, O, Y, DD, GG, HH, LL, QQ, RR, VV, XX, AAA, JJJ, NNN, OOO, and SSS, effective July 1, 1993. However, the State's NSPS authorities do not include those authorities which cannot be delegated to the states, as defined in 40 CFR part 60.

EPA is publishing this action without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in a separate document in this **Federal Register** publication, EPA is proposing to approve the SIP revision should adverse or critical comments be filed. Under the procedures established in the May 10, 1994 **Federal Register** (59 FR 24054), this action will be effective November 6, 1995 unless, by October 6, 1995, adverse or critical comments are received.

If such comments are received, this action will be withdrawn before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will then be addressed in a subsequent final rule based on this action serving as a proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting

on this action should do so at this time. If no such comments are received, the public is advised that this action will be effective on November 6, 1995.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any SIP. Each request for revision to a SIP shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

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

Approvals of SIP submittals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements, but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP-approval does not impose any new requirements, I certify that it does not have a significant impact on small entities affected. Moreover, due to the nature of the Federal-state relationship under the Clean Air Act, preparation of a regulatory flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co. v. U.S. E.P.A.*, 427 U.S. 246, 256-66 (1976); 42 U.S.C. 7410(a)(2).

Under Sections 202, 203, and 205 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must undertake various actions in association with proposed or final rules that include a Federal mandate that may result in estimated costs of \$100 million or more to the private sector, or to State, local, or tribal governments in the aggregate.

Through submission of this state implementation plan or plan revision, the State and any affected local or tribal governments have elected to adopt the program provided for under Section 110 of the Clean Air Act. These rules may bind State, local and tribal governments to perform certain actions and also require the private sector to perform certain duties. The rules being approved by this action will impose no new

requirements; such sources are already subject to these regulations under State law. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action. EPA has also determined that this final action does not include a mandate that may result in estimated costs of \$100 million or more to State, local, or tribal governments in the aggregate or to the private sector.

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 November 6, 1995. 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 must 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)).

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

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: August 10, 1995.

Jack W. McGraw,
Acting Regional Administrator.

Chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart QQ—South Dakota

2. Section 52.2170 is amended by adding paragraph (c)(16) to read as follows:

§ 52.2170 Identification of plan.

* * * * *

(c) * * *

(16) On November 12, 1993 and March 7, 1995, the designee of the Governor of South Dakota submitted revisions to the plan, which included revised regulations for definitions, minor source construction and federally enforceable state operating permit (FESOP) rules, source category emission limitations, sulfur dioxide rule corrections, new source performance standards (NSPS), new source review (NSR) requirements for new and modified major sources impacting nonattainment areas, and enhanced monitoring and compliance certification requirements. The State also requested that the existing State regulations approved in the South Dakota SIP be replaced with the following chapters of the recently recodified Administrative Rules of South Dakota (ARSD): 74:36:01–74:36:04, 74:36:06; 74:36:07, 74:36:10–74:36:13, and 74:36:15, as in effect on January 5, 1995.

(i) Incorporation by reference.

(A) Revisions to the Administrative Rules of South Dakota, Air Pollution Control Program, Chapters 74:36:01 (except 74:36:01:01(2) and (3)); 74:36:02–74:36:04, 74:36:06; 74:36:07, 74:36:10–74:36:13, and 74:36:15, effective April 22, 1993 and January 5, 1995.

3. A new section 52.2184 is added to read as follows:

§ 52.2184 Operating permits for minor sources.

Emission limitations and related provisions established in South Dakota minor source operating permits, which are issued in accordance with ARSD 74:36:04 and which are submitted to EPA in a timely manner in both proposed and final form, shall be enforceable by EPA. EPA reserves the right to deem permit conditions not federally enforceable. Such a determination will be made according to appropriate procedures and will be based upon the permit, permit approval procedures, or permit requirements which do not conform with the operating permit program requirements of EPA's underlying regulations.

[FR Doc. 95–21879 Filed 9–5–95; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Part 417

[OMC–014–FC]

Medicare Program; Payments to HMOs and CMPs and Appeals: Technical Amendments

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Final rule with comment period.

SUMMARY: This rule clarifies and updates portions of the HCFA regulations that pertain to payment for services furnished to Medicare enrollees by health maintenance organizations (HMOs) and competitive medical plans (CMPs); appeals by Medicare enrollees concerning payment for those services; and appeals by HMOs and CMPs with regard to their Medicare contracts.

This rule completes the special project aimed at the total technical revision of part 417. Part 417 contains the regulations applicable to all prepaid health care organizations, that is, HMOs, CMPs, and health care prepayment plans (HCPPs).

These are technical and editorial changes that do not affect the substance of the regulations. They are intended to make it easier to find particular provisions, to eliminate needless repetition and remove obsolete content, and to better ensure uniform understanding of the rules.

DATES: *Effective dates:* These rules are effective as of October 1, 1995.

Comment date: We will consider comments received by October 6, 1995.

ADDRESSES: Mail written comments (1 original and 3 copies) to the following address: Health Care Financing Administration, Department of Health and Human Services, Attention: OMC–014–FC, PO Box 26688, Baltimore, MD 21207.

If you prefer, you may deliver your written comments (1 original and 3 copies) to one of the following addresses:

Room 309–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, or Room C5–09–26, 7500 Security Boulevard, Baltimore, MD 21244–1850

Due to staffing and resource limitations, we cannot accept comments by facsimile (FAX) transmission. In commenting, please refer to file code OMC–014–FC.

Written comments received timely will be available for public inspection as

they are received—generally beginning approximately 3 weeks after publication of the document, in Room 309–G of the Department's offices at 200 Independence Avenue, SW., Washington, DC, Monday through Friday, from 8:30 a.m. to 5 p.m. (phone: (202) 690–7890).

Although we cannot respond to individual comments, if we revise this rule as a result of comments, we will discuss all timely comments in the preamble to the revised rule.

FOR FURTHER INFORMATION CONTACT: Tracy Jensen, (410) 786–1033.

SUPPLEMENTARY INFORMATION:

A. Background

The previous 4 technical regulations of the special project have—

- Removed obsolete content;
 - Designated the remaining text under 17 subparts that identify the different program aspects so that it is easier to refer to those aspects and to find particular rules;
 - Through nomenclature and definition changes, established certain terms to be used throughout part 417, so as to preclude confusion, make clear that responsibility for the prepaid health care programs has been delegated to HCFA, and ensure use of the most precise terms available;
 - Redesignated certain portions of part 417 to free section numbers needed so that new rules can be incorporated in logical order; and
 - Established a separate subpart C to set forth the many requirements for the organization and operation of HMOs. Under previous rules, these were compressed into a single section (§ 417.107).
- As a result of the redesignations, §§ 417.107 through 417.119 were made available for new rules that are required because of statutory amendments that affect the furnishing of services by Federally qualified HMOs, or may be needed because of future changes in the statute. Similarly, §§ 417.128 through 417.139 are available for additional rules on the organization and operation of those HMOs.

B. Changes made by this rule

This technical rule affects the following subparts:

- Subpart N—Medicare Payment to HMOs and CMPs—General Rules
- Subpart O—Medicare Payment: Cost Basis;
- Subpart P—Medicare Payment: Risk Basis;
- Subpart Q—Beneficiary Appeals; and
- Subpart R—Contract Appeals.

Changes to the first three subparts reflect a general change of approach—