

Executive Order 12866 (58 FR 51735, October 4, 1993);

- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

#### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

Dated: April 3, 2014.

**Susan Hedman,**

*Regional Administrator, Region 5.*

[FR Doc. 2014-08638 Filed 4-15-14; 8:45 am]

BILLING CODE 6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R08-OAR-2014-0241; FRL-9909-49-Region 8]

#### Partial Approval and Partial Disapproval and Promulgation of Air Quality Implementation Plans; South Dakota; Revisions to South Dakota Administrative Code; Permit: New and Modified Sources

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

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to partially approve and partially disapprove State Implementation Plan (SIP) revisions submitted by the State of South Dakota on June 14, 2010, June 20, 2011, and July 29, 2013. All three SIP revisions revise the Administrative Rules of South Dakota (ARSD) that pertain to the issuance of South Dakota air quality permits; in addition the June 14, 2010 submittal revises certain definitions and dates of incorporation by reference. The June 14, 2010 revisions contain new, amended and renumbered rules; the June 20, 2011 revisions contain new rules, and the July 29, 2013 revisions contain amended rules. In this proposed rulemaking, we are taking action on the entire June 14, 2010 submittal, except for those portions of the submittal which do not belong in the SIP. We are also taking action on portions of the June 20, 2011 submittal that were not acted on in other rulemaking regarding greenhouse gases and the State's Prevention of Significant Deterioration (PSD) program. We are taking action on portions of the July 29, 2013 submittal that supersede portions of the two previous submittals; the remainder of the July 29, 2013 submittal will be acted on at a later date. This action is being taken under section 110 of the Clean Air Act (CAA).

**DATES:** Comments must be received on or before May 16, 2014.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R08-OAR-2014-0241, by one of the following methods:

- [www.regulations.gov](http://www.regulations.gov). Follow the on-line instructions for submitting comments.
  - Email: [leone.kevin@epa.gov](mailto:leone.kevin@epa.gov)
  - Fax: (303) 312-6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** if you are faxing comments).
  - Mail: Carl Daly, Director, Air Program, Environmental Protection

Agency (EPA), Region 8, Mailcode 8P-AR, 1595 Wynkoop Street, Denver, Colorado 80202-1129.

- Hand Delivery: Carl Daly, Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P-AR, 1595 Wynkoop Street, Denver, Colorado 80202-1129. Such deliveries are only accepted Monday through Friday, 8:00 a.m. to 4:30 p.m., excluding federal holidays. Special arrangements should be made for deliveries of boxed information.

**Instructions:** Direct your comments to Docket ID No. EPA-R08-OAR-2014-0241. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at [www.regulations.gov](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 [www.regulations.gov](http://www.regulations.gov) or email. The [www.regulations.gov](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 email comment directly to EPA, without going through [www.regulations.gov](http://www.regulations.gov), your email 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. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>. For additional instructions on submitting comments, go to section I. General Information of the **SUPPLEMENTARY INFORMATION** section of this document.

**Docket:** All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov) index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly

available only in hard copy. Publicly-available docket materials are available either electronically in [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Kevin Leone, Air Program, Mailcode 8P-AR, Environmental Protection Agency, Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129, (303) 312-6227, or [leone.kevin@epa.gov](mailto:leone.kevin@epa.gov).

#### **SUPPLEMENTARY INFORMATION:**

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#### **Definitions**

For the purpose of this document, we are giving meaning to certain words or initials as follows:

- (i) The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.
- (ii) The initials *ARSD* mean or refer to the Administrative Rules of South Dakota.
- (iii) The words *EPA*, *we*, *us* or *our* mean or refer to the United States Environmental Protection Agency.
- (iv) The initials *NAAQS* mean or refer to National Ambient Air Quality Standard.
- (v) The initials *NESHAP* mean or refer to National Emission Standards for Hazardous Air Pollutant.
- (vi) The initials *NSPS* mean or refer to New Source Performance Standard.
- (vii) The initials *NSR* mean or refer to New Source Review.
- (viii) The initials *PSD* mean or refer to prevention of significant deterioration.
- (ix) The initials *SIP* mean or refer to State Implementation Plan.
- (x) The words *State* or *South Dakota* mean the State of South Dakota, unless the context indicates otherwise.

#### **I. General Information**

##### *A. What should I consider as I prepare my comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through

[www.regulations.gov](http://www.regulations.gov) or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- a. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- b. Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- c. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- d. Describe any assumptions and provide any technical information and/or data that you used.
- e. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- f. Provide specific examples to illustrate your concerns, and suggest alternatives.
- g. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- h. Make sure to submit your comments by the comment period deadline identified.

#### **II. Background**

South Dakota's June 14, 2010, submittal consists of four groups of rule changes: (1) Revisions to the definitions associated with the Air Pollution Control Program to ensure the definitions are current and consistent with other chapters in the regulations. These revisions include: grammatical changes, renumbering, modified definitions, new definitions and deleted definitions; (2) Revisions to the date of federal regulations referenced throughout ARSD Article 74:36; (3) Addition of a construction permit program for new minor sources and minor modifications to existing sources, created by adding new Chapter 74:36:20 (Construction Permits for New Sources

or Modifications); and (4) Revisions to the minor source operating permit programs to incorporate the changes associated with the new proposed construction permit program.<sup>1</sup>

In South Dakota's current regulations in ARSD Article 74:36, the minor source construction permit and operating permit programs are combined so, in practice, a source receives one permit from the State which serves as both a construction and operating permit.<sup>2</sup> The revisions in the June 14, 2010 submittal separate the two programs into a new minor source construction permit program and a minor source operating permit program. Under the new revisions, a source would first apply for a construction permit before applying for an operating permit. A cross-walk table, which discusses the rule revisions in Article 74:36 individually, and the action we are proposing, is included in the docket for this rulemaking.

South Dakota's June 14, 2010, submittal also contains rule revisions that are generally not included in SIPs. These rules, which we are not taking action on here (i.e. New Source Performance Standards (NSPS), operating permits for part 70 sources, etc.), are outlined in the cross-walk table located in the docket for this rulemaking.

South Dakota's June 20, 2011, submittal includes the following rule revisions: (1) Revises Sections 74:36:01:01, 74:36:01:08, 74:36:01:15 and 74:36:09:02 to comply with EPA's Greenhouse Gas Tailoring Rule. Revisions to Sections 74:36:01:08, 74:36:01:15 and 74:36:09:02 have been proposed;<sup>3</sup> EPA is proposing action on 74:36:01:01 in this rulemaking; (2) Revises Chapter 74:36:20 by revising Section 74:36:20:02 (Construction Permits Required); and (3) Adds new Section 74:36:20:02.01 (Initiating Construction Prior to Permit Issuance). Section 74:36:20:02.01 allows sources who meet certain conditions to start construction prior to receiving a permit provided they meet the requirements in that section. EPA is proposing action on

<sup>1</sup> Under a proposed consent decree, by May 30, 2014, EPA is required to sign a notice of final action to approve, disapprove, approve in part and disapprove in part, or conditionally approve this June 14, 2010 SIP submittal. *WildEarth Guardians v. EPA*, Civil Action No. 1:12-cv-03307 (D. Colo.).

<sup>2</sup> For major sources and major modifications, the State already has two SIP-approved construction permit programs (PSD and nonattainment NSR) and, separately for major sources, a title V operating permit program that has been approved through the title V (not the SIP) process.

<sup>3</sup> On February 11, 2014 (79 FR 8130) EPA proposed action on these provisions. EPA signed a final action on March 24, 2014.

74:36:20:02 and 74:36:20:02.01 in this rulemaking.<sup>4</sup>

With respect to South Dakota's July 29, 2013 submittal, we are only proposing action on the following revisions: (1) Section 74:36:04:03.01 (Minor Source Operating Permit Variance); and (2) 74:36:10 (New Source Review).

### III. What action is EPA taking?

EPA is proposing to approve all revisions as submitted by South Dakota on June 14, 2010, except we are not acting on those portions of the submittal which do not belong in the SIP. EPA is proposing to partially approve and partially disapprove the revisions submitted on June 20, 2011. We are also proposing to approve portions of South Dakota's July 29, 2013, submittal as outlined in Section II of this rulemaking.

#### June 14, 2010 SIP Submittal

##### 74:36:01:01 (Definitions)

We are proposing to approve all changes in this section as outlined in the crosswalk table (see docket).

##### 74:36:01:02 (Ambient Air Quality)

We are proposing to approve changes in this section, which updates the federal reference.

##### 74:36:01:03 (Air Quality Episodes)

We are proposing to approve changes in this section, which updates the federal reference.

##### 74:36:04 (Operating Permits for Minor Sources)

We are proposing to approve all changes in this section. The modifications in this section were made to revise the minor source operating permit program to incorporate the changes associated with the new proposed construction permit program. As outlined in the crosswalk table, these changes include: (1) Grammatical changes which do not significantly change the meaning of the rule; (2) Updates to the federal references; and (3) re-organization of the rules. A few specific issues of note are discussed below:

##### 74:36:04:03 (Emission Unit Exemptions)

In 74:36:04:03(6), South Dakota added an emission unit exemption for "routine housekeeping or plant upkeep activities

such as painting buildings, retarring roofs or paving parking lots." EPA asked South Dakota to clarify that they consider these activities to be *de minimis* in nature. South Dakota sent a letter to EPA dated March 18, 2014, clarifying that they consider these activities to be *de minimis* in nature (see docket). As explained in the letter, before South Dakota adopted the requirements for an air quality construction permit program, the construction and operating permit programs were combined for those facilities not required to obtain a PSD preconstruction permit. When South Dakota decided to separate the two programs, the insignificant activity list was incorporated into both programs. Routine housekeeping and plant upkeep had not originally been listed in the combined construction and operating permit program for minor sources because these activities were considered fugitive sources which are not regulated under the minor source program. We interpret the State's listing of these activities as insignificant to characterize these emissions as *de minimis* with respect to attainment or maintenance of the National Ambient Air Quality Standards (NAAQS) and thus appropriate for permitting exemptions. Thus, when the State decided to separate the construction and operating permit program, it was decided to include exemptions for routine housekeeping and plant upkeep in the minor operating permit program as well as for the new construction permit program. In particular the example activities of painting buildings, retarring roofs, or paving parking lots appear to be *de minimis*. Based on the State's letter, EPA proposes to approve this exemption.

##### 74:36:04:03.01 (Minor Source Operating Permit Variance)

This rule was superseded by the subsequent July 29, 2013, submittal and we are proposing action on the rule elsewhere in this notice.

##### 74:36:04:32 (General Permits)

In 74:36:04:32, EPA asked the State to clarify how they can ensure that the issuance of a general permit does not interfere with the NAAQS or any other requirements of the CAA. South Dakota sent a letter to EPA clarifying how their regulations ensure that construction of a source which applied for a general permit will not interfere with the NAAQS or any other requirement of the CAA (see docket). When issuing a general permit, the State applies the standard in 74:36:04:04 to determine that the permit will not interfere with

the NAAQS. The permits are issued for a five-year period. Before renewing a general permit, the State considers whether renewal will interfere with the NAAQS or other applicable requirements. Based on this clarification, EPA proposes to approve South Dakota's general permit provisions. In particular, EPA notes that the limited lifespan of a general permit helps to protect the NAAQS from unanticipated growth in a source category.

##### 74:36:05 (Operating Permits for Part 70 Sources)

We are not taking action on this section because part 70 provisions are not a required component under section 110 of the CAA. Instead, we approve operating permit regulations under our operating permit regulations at 40 CFR part 70.

##### 74:36:07 (New Source Performance Standards)

We are not taking action on this section because NSPS are not a required component under section 110 of the CAA.

##### 74:36:08 (National Emission Standards for Hazardous Air Pollutants)

We are not taking action on this section because National Emission Standards for Hazardous Air Pollutants (NESHAPs) are not a required component under section 110 of the CAA.

##### 74:36:09 (Prevention of Significant Deterioration)

The proposed changes were acted on in 76 FR 43912 (July 22, 2011).

##### 74:36:10 (New Source Review)

The proposed changes are superseded by the July 29, 2013 submittal. We are acting on the proposed changes to 74:36:10 as submitted on July 29, 2013.

##### 74:36:11 (Performance Testing)

We are proposing to approve changes in this section, which updates the federal reference.

##### 74:36:12 (Control of Visible Emissions)

We are proposing to approve changes in this section, which updates the federal reference.

##### 74:36:13 (Continuous Emissions Monitoring)

We are proposing to approve changes in this section, which updates the federal reference.

##### 74:36:16 (Acid Rain Program)

We are not taking action on this section because the Acid Rain Program

<sup>4</sup>Under a proposed consent decree, by May 30, 2014, EPA is required to sign a notice of final action to approve, disapprove, approve in part and disapprove in part, or conditionally approve this June 20, 2011 SIP submittal. *WildEarth Guardians v. EPA*, Civil Action No. 1:12-cv-03307 (D. Colo.).

is not a required component under section 110 of the CAA.

**74:36:18 (Regulations for State Facilities in the Rapid City Area)**

We are proposing to approve changes in this section, which updates the visible emission test method to EPA Method 9 in 40 CFR part 60, Appendix A (July 1, 2009).

**74:36:19 (Mercury Budget Trading Program)**

We are not taking action on this section because it is not a required SIP component under section 110 of the CAA.

**74:36:20 (Construction Permits for New Sources or Modifications)**

We are proposing to approve this new section because it meets the requirements of the CAA and 40 CFR 51.160 and 161. In particular:

(1) 74:36:20:02 (Construction Permit Required) requires a construction permit before a source can construct, install, modify or operate a source or unit. Note that, as discussed separately below, this requirement was modified in the June 20, 2011 SIP submittal.

(2) 74:36:20:05 (Standard for issuance of construction permit) states that a construction permit will be issued only if it has been shown that the operation of the new source or modification to an existing source will not prevent or interfere with the attainment or maintenance of an applicable NAAQS.

(3) 74:36:20:06 (Timely and complete application for a construction permit required) allows the State or local agency to determine whether or not the construction or modification of a facility will interfere with the NAAQS or control strategy.

(4) 74:36:20:10 (Time period for department's recommendation) allows the State or local agency to prevent the construction or modification of a facility if it will interfere with the NAAQS or control strategy.

(5) 74:36:20:11 (Public participation in permitting process) allows for a 30-day period for submittal of public comment.

*June 20, 2011 SIP Submittal*

**74:36:01:01(73) (Subject to Regulation)**

We are proposing to approve the definition of "Subject to Regulation" to comply with EPA's Greenhouse Gas Tailoring Rule revisions published on June 3, 2010.

In our February 11, 2014 action (79 FR 8130), EPA proposed approval of revisions to the State's PSD program to incorporate the provisions of the federal PSD and Title V Greenhouse Gas

Tailoring Rule (Tailoring Rule). The SIP revisions incorporate by reference the federal Tailoring Rule's emission thresholds for determining which new stationary sources and modifications to existing stationary sources become subject to South Dakota's PSD permitting requirements for their greenhouse gas emissions.

Outside of the PSD program, the June 20, 2011 SIP submittal proposed in Section 74:36:01:01, Definitions, to add "(73) "Subject to regulation" as defined in 40 CFR 70.2 (July 1, 2009), as revised in publication 75 FR 31607 (June 3, 2010), in accordance with EPA requirements." We did not propose action on that part of the submittal as part of our February 11, 2014 proposal because it applies to the title V operating permit program, which is not part of the SIP. However, in reviewing the June 20, 2011 submittal for this proposed action, we realized that South Dakota intended for the definition of "subject to regulation" to be applied throughout its rules. In fact, the language "subject to regulation" is included in the updated definition of major sources that we proposed to approve in our February 11, 2014 action, so for consistency we propose to approve the definition at this time.

**74:36:04:20:01 (Initiating Construction Prior to Permit Issuance)**

*Does the new rule that allows for Initiating Construction Prior to Permit Issuance meet the CAA and regulatory requirements?*

The new South Dakota rule

74:36:20:02.01 "Initiating Construction Prior to Permit Issuance" allows certain projects to begin construction prior to receiving approval from the State, and contains some safeguards. Under new rule 74:36:20:02.01 an owner or operator may initiate construction without receiving a permit from the State as long as they have submitted a construction permit application and notified the Department of "its intentions to initiate construction prior to issuance of the construction permit five working days before initiating construction."

74:36:20:2.01 (1)–(2). Only "true minor" sources and modifications can construct prior to receiving a permit.

74:36:20:2.01 (3)–(4). The source is not allowed to operate equipment "in any way that may emit any air pollutant prior to receiving a construction permit." 74:36:20:2.01(5). The rule provides that the owner or operator must assume liability for construction conducted before the permit is issued, and must cease construction if the department demonstrates that construction of the new source or

modification will interfere with the attainment or maintenance of a NAAQS or increment. 74:36:20:2.01 (5)–(6). Finally, the owner or operator is required to make any change to the source that may be imposed in the issued construction permit.

**74:36:20:2.01(7).**

We are proposing to disapprove this section in its entirety because it allows complete construction of a true minor source before any type of State review, which is inconsistent with the requirements in 40 CFR 51.160(a) and (b) and Section 110(a)(2)(C) of the Act; because it would also create "equity in the ground" issues that might compromise compliance with 40 CFR 51.160(a) and (b); and because it is inconsistent with the public comment requirements in 40 CFR 51.161.

**Summary of the Federal Clean Air Act and Regulatory Requirements**

Section 110(a)(2)(C) of the Act contains the requirements for preconstruction review programs for minor sources and requires that each SIP include a program to regulate the construction and modification of stationary sources as necessary to assure that the NAAQS are achieved.

EPA's minor source implementing regulations are in 40 CFR 51.160–51.164. The regulations require that a SIP include "legally enforceable procedures that enable" the permitting agency to determine whether construction "will result in" interference with the NAAQS, 40 CFR 51.160(a). The SIP must also include the means by which a state or local agency can "prevent" construction that "will interfere with the attainment or maintenance of a national standard." 40 CFR 51.160(b). 40 CFR 51.161(a) requires that the legally enforceable procedures in 40 CFR 51.160 must also require the state or local agency to provide opportunity for public comment on information submitted by owners or operators. The public information must include the agency's analysis of the effect of construction or modification on ambient air quality, including the agency's proposed approval or disapproval. 40 CFR 51.161(b) requires a minimum 30-day public comment period.

**What Is EPA's evaluation?**

We propose to find that the State's new rule that allows construction of certain projects subject to the minor source program prior to permit issuance is inconsistent with the requirements of the CAA and implementing regulations. EPA expressed concern about the State's proposed approach in our comments on

South Dakota's proposed rule in January 2011 because as proposed the rules were inconsistent with 40 CFR 51.160(b), explaining that<sup>5</sup>:

"EPA has concerns that chapter 74:36:20:02.01 does not require some type of administrative approval from the State prior to allowing pre-permit construction activities. EPA has approved minor NSR programs in several states that do not require permits prior to construction, but instead require sources to submit a notice and receive authorization for sources to begin construction after a specified time if the permitting authority does not issue an order preventing construction. Chapter 74:36:20:02.01 only requires the owner or operator to submit a construction permit application; the rule references a department evaluation, but does not require written approval from the State prior to construction ensuring that sources that are subject to federal requirements do not commence construction prior to permit issuance. This is not consistent with 40 CFR 51.160(b), which requires states to have legally enforceable procedures to prevent construction or modification of a source, if it would violate any SIP control strategies or interfere with attainment or maintenance of the NAAQS."

The final rule as adopted by the State was not revised to address these concerns and allows complete construction of a true minor source before any type of State review. The rule does not require the permitting authority to take affirmative action and approve construction before construction permit approval. Therefore, neither the State, public, nor EPA can determine whether the project will be in compliance with the CAA and implementing regulations before construction.

In addition to being inconsistent with the requirements of 40 CFR 51.160(a), the rule is inconsistent with Section 110(a)(2)(C) of the Act because the rule lacks provisions to protect the NAAQS and prohibit any source from emitting air pollutants which will interfere with the NAAQS. Notwithstanding the fact that the owner or operator is required to provide a five day notice to the State before commencing construction, there is no procedure in the State's rule to determine prior to construction, if the construction or modification will violate a control strategy or interfere with attainment and maintenance of the NAAQS, which is required under 40 CFR 51.160(a).

The State rule also does not satisfy the public participation requirements in 40 CFR 51.161, which require a minimum

<sup>5</sup> The State also received public comments from 13 individuals on this issue and related concerns. State of South Dakota SIP Submittal, these comments appear in the SIP starting at PDF page 80. (June 14, 2011, part 2 of 2).

30-day period for public comment on the information submitted by the owner or operator prior to construction, as well as an opportunity for the public to review the State's analysis and recommendations regarding construction approval or disapproval.

74:36:20:02.01 also allows for complete construction of a true minor source, which would create equity in the ground issues. Allowing for complete construction could compromise compliance with 40 CFR 51.160(a) and (b) because, although 74:36:20:02.01 requires that the owner or operator must assume any liability for construction conducted on a source before a permit is issued, the economic impact of denying a permit after complete construction of a source could influence the decision to approve or deny a permit. Additionally, once fully constructed, there may be fundamental design issues that cannot be overcome should the State seek required modifications from the owner or operator.

EPA's review of other states, which have EPA approved pre-permit construction regulations found that most of the other state SIPs require some type of permitting agency review and preauthorization/administrative approval prior to construction.

We understand South Dakota's goals in promulgating rule 74:36:20:02.01, as expressed during the State's rulemaking, were to "expedite the construction of specific facilities that will have minimal impact to the ambient air and for those projects that may be impacted by inclement weather (i.e. winter months),"<sup>6</sup> "and to ensure that new businesses and existing businesses looking to expand are permitted in an expedited manner."<sup>7</sup> If requested by South Dakota, EPA will work with the State to develop revised rules that are consistent with the State goals and also consistent with the CAA and implementing regulations.<sup>8</sup> We acknowledge that EPA may have approved some state minor source programs with approaches/requirements similar to those proposed by South

<sup>6</sup> State of South Dakota SIP Submittal, at PDF pages 170–171 (June 14, 2011, part 1 of 2).

<sup>7</sup> State of South Dakota SIP Submittal, at PDF page 105 (June 14, 2011, part 2 of 2) (Board of Minerals and Environment Minutes, February 17, 2011).

<sup>8</sup> One option for South Dakota, which is consistent with its stated goals, is to amend its pre-permit construction regulations to allow certain limited, seasonal, pre-permit construction activities and specify which activities are allowed, and exclude construction of any emitting unit. An example of this type of pre-permit construction language can be found in the Administrative Rules of Montana (ARM) 17.8.743(2), which EPA approved on August 8, 2011 (76 FR 40237).

Dakota, which may warrant EPA evaluation in the future.

In conclusion, although 74:36:20:02.01 has some safeguards as noted above, it is not in compliance with Section 110(a)(2)(C) of the Act, 40 CFR 51.160(a) and (b), and 40 CFR 51.161. Therefore, for the reasons outlined above, we are proposing to disapprove 74:36:20:02.01.

#### 74:36:04:20:02 (Construction Permit Required)

Because EPA is disapproving 74:36:20:02.01, we are also disapproving the phrase: "unless it meets the requirements in 74:36:20:02.01" in 74:36:04:20:02.

#### July 29, 2013 SIP Submittal

#### 74:36:04:03.01 (Minor Source Operating Permit Variance)

We are proposing to approve the deletion of this section.

#### 74:36:10 (New Source Review)

We are proposing to approve changes in this section, which updates the federal references and deletes obsolete provisions regarding clean units and pollution control projects. We note that the State clarified that it is not adopting any provisions in 40 CFR 51.165 that were marked as stayed as of the date of incorporation by reference. We also note that, as mentioned in the State's letter, that there are currently not any nonattainment areas designated in South Dakota. If in the future any are designated for a particular pollutant, the State will then be obliged to review and if necessary revise its nonattainment NSR program to meet all applicable requirements for that pollutant, including proper treatment of relevant precursors.

#### IV. What authorities apply to EPA's proposed action?

In determining whether SIP revisions submitted by the State of South Dakota on June 14, 2010, June 20, 2011 and July 29, 2013, are approvable or not approvable, EPA applied the following authorities:

The CAA at Section 110(a)(2)(C) requires states to include a minor NSR program or alternative measures in their SIP to regulate modifications and new construction of stationary sources within the area as necessary to assure the NAAQS are achieved. In particular, section 110(a)(2)(C) was applied to determine approvability of all three submittals we are proposing action on in this rulemaking.

EPA's implementing regulations at 40 CFR 51.160–164 are intended to ensure that new source growth is consistent

with maintenance of the NAAQS. The authorities in EPA's implementing regulations which we are applying in this rulemaking are: (1) 40 CFR 51.160(a), which requires that the SIP include legally enforceable procedures that enable a state or local agency to *determine* whether construction or modification of a facility, building, structure or installation, or combination of these will result in a violation of applicable portions of the control strategy or interference with attainment or maintenance of a national standard in the state in which the proposed source (or modification) is located or in a neighboring state; (2) 40 CFR 51.160(b) requires these procedures must include a means by which the state or local agency can *prevent* a construction or modification if the construction or modification will result in a violation of applicable portions of the control strategy or interference with attainment or maintenance of a national standard. 40 CFR 51.162–164 are not applicable to the SIP revisions we are proposing action on in this rulemaking. We applied 40 CFR 51.160(a), 40 CFR 51.160(b) and 40 CFR 51.161 to determine the approvability of 74:36:04:20:02.

Section 110(i) of the CAA specifically precludes states from changing the requirements of the SIP except through SIP revisions approved by EPA. SIP revisions will be approved by EPA only if they meet all requirements of section 110 of the CAA and the implementing regulations at 40 CFR part 51. See CAA section 110(l); and 40 CFR 51.104.

## V. Summary

In this proposed rulemaking, we are proposing partial approval and partial disapproval of the new and revised rules and renumbering of rules as outlined in section III above and in the crosswalk table located in the docket. In particular, we are proposing the following actions:

### June 14, 2010 Submittal

We are proposing to approve the following: 74:36:01:01 (*Definitions*); 74:36:01:02 (*Ambient Air Quality*); 74:36:01:03 (*Air Quality Episodes*); 74:36:04 (*Operating Permits for Minor Sources*); 74:36:11 (*Performance Testing*); 74:36:12 (*Control of Visible Emissions*); 74:36:13 (*Continuous Emissions Monitoring*); 74:36:18 (*Regulations for State Facilities in the Rapid City Area*); and 74:36:20 (*Construction Permits for New Sources or Modifications*).

We are not taking action on the following: 74:36:05 (*Operating Permits for Part 70 Sources*); 74:36:07 (*New*

*Source Performance Standards*); 74:36:08 (*National Emission Standards for Hazardous Air Pollutants*); 74:36:09 (*Prevention of Significant Deterioration*); 74:36:16 (*Acid Rain Program*); and 74:36:19 (*Mercury Budget Trading Program*).

### June 20, 2011 Submittal

We are proposing to approve the following: 74:36:01:01(73) (*Subject to Regulation*).

We are proposing to disapprove the following: 74:36:04:20:01 (*Initiating Construction Prior to Permit Issuance*), the phrase: “unless it meets the requirements in 74:36:20:02:01” in 74:36:04:20:02 (*Construction Permit Required*).

### July 29, 2013 Submittal

We are proposing to approve deletion of the following: 74:36:04:03:01 (*Minor Source Operating Permit Variance*).

We are proposing to approve the following: 74:36:10 (*New Source Review*).

We are proposing partial approval and partial disapproval based on the authorities as outlined in section IV of this rulemaking. As explained in this rulemaking, the South Dakota rules we are proposing to approve meet the statutory requirements of CAA section 110(a)(2)(C), the regulatory requirements of 40 CFR 51.160 and 40 CFR 51.161. We are proposing to disapprove the revisions which do not meet the statutory requirements of CAA section 110(a)(2)(C) and the regulatory requirements of 40 CFR 51.160 and 40 CFR 51.161. For additional information, see the cross-walk table and South Dakota’s letter of clarification located in the docket.

## VI. Statutory and Executive Orders Review

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA’s role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this proposed action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);

- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and

- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

## List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: April 3, 2014.

**Shaun L. McGrath,**

*Regional Administrator, Region 8.*

[FR Doc. 2014–08500 Filed 4–15–14; 8:45 am]

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