

provided in the Direct Final action which is located in the Rules Section of this **Federal Register**.

Authority: 42 U.S.C. 7401–7671q.

Dated: August 22, 1997.

John Wise,

Acting Regional Administrator.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[NM–24–1–7102; FRL–5892–7]

Approval and Promulgation of Air Quality Implementation Plans; New Mexico; Proposed Approval of a Revision to the New Mexico State Implementation Plan—Enhanced Monitoring Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Pursuant to section 110 of the Clean Air Act (the Act), as amended in 1990, EPA is proposing to approve revisions to the New Mexico State Implementation Plan (SIP) addressing revisions to Air Quality Control Regulation (AQCR) 702 concerning permits. The State's revision expands the types of testing and monitoring data, including stack and process monitoring, which can be used directly for compliance certifications and enforcement.

DATES: Comments on this proposed action must be received in writing on or before October 16, 1997.

ADDRESSES: Comments should be mailed to Jole C. Luehrs, Chief, Air Permits Section (6PD–R), EPA, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. Copies of the documents relevant to this action are available for public inspection during normal business hours at the following locations:

EPA, Air Permits Section (6PD–R), 1445 Ross Avenue, Suite 700, Dallas, Texas, 75202–2377.

New Mexico Environmental Improvement Board, 1190 St. Francis Drive, Santa Fe, New Mexico 87502.

FOR FURTHER INFORMATION CONTACT: Mary Stanton, Air Permits Section (6PD–R), EPA, Dallas, Texas, 75202–2377, telephone (214) 665–8377.

SUPPLEMENTARY INFORMATION:

I. Background

The EPA has published a number of “reference test methods” and, in order

to assure uniformity in the application of emission standards, has required sources to establish compliance with emission standards by use of those reference test methods. In theory, a source would conduct testing on a periodic basis utilizing these methods and would rely on the comprehensive nature of this testing to assure compliance on a day to day basis.

In the interim, more accurate emission monitoring devices have been developed. In addition, EPA, the States, and the regulated community have gained a better understanding of the specific facility and pollution control device operating parameters that control emissions. Many sources currently determine compliance with permitted limits either through the use of continuous emission monitors or by monitoring key parameters of their production processes and pollution control devices.

Section 113(a) of the Act provides that the Agency may bring an enforcement action on the basis of any information available. However, in *United States versus Kaiser Steel Corporation*, the District Court ruled that, because of what it perceived to be limitations in EPA's regulations, only reference method stack testing could be used to establish violations of permit limits, notwithstanding irrefutable scientific evidence that otherwise demonstrated thousands of violations. In the 1990 amendments to the Act, Congress overrode the *United States versus Kaiser Steel Corporation* decision, providing that the duration of the violation could be established by any credible evidence (including evidence other than the applicable test method).

The EPA believes that existing SIPs (nationwide) are inadequate for States or EPA to fully implement the Act, because the SIPs may presently be interpreted to limit the types of testing or monitoring data that may be used for determining compliance and establishing violations. On June 9, 1994, EPA issued a call to the State of New Mexico to revise its SIP to clarify that any monitoring approved for the source (and included in a Federally enforceable operating permit) may form the basis of the compliance certification, and that any credible evidence may be used for purposes of enforcement in Federal court.

II. EPA Evaluation

On November 10, 1994, New Mexico made an official plan submission in response to EPA's SIP call. New Mexico submitted revisions to AQCR 702, which provides that data which has been collected under the enhanced monitoring and Operating Permit

programs can be used for compliance certifications and enforcement actions. Specifically, section R of the revisions to AQCR 702 authorizes this data to be used for compliance certifications, and section S authorizes this data to be considered for enforcement actions.

This revision will enhance the State's capability for determining compliance with, and for establishing violations of, the underlying emission limitations.

III. Proposed Action

The EPA reviewed these revisions to the New Mexico SIP and is proposing to approve sections R and S of AQCR 702 as submitted because they meet the requirements of section 110 of the Act. The EPA is requesting comments on all aspects of the requested SIP revision and EPA's proposed rulemaking action. The EPA will consider any timely submitted comments prior to EPA's taking final action on this proposed rule. Comments received by the date indicated above will be considered in the development of EPA's final rule.

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 the SIP shall be considered separately in light of specific technical, economic, and environmental factors, and in relation to relevant statutory and regulatory requirements.

IV. Administrative Requirements

A. Executive Order 12866

This action has been classified as a Table 3 action for signature by the Regional Administrator under the procedures published in the **Federal Register** (FR) 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 has exempted this regulatory action from Executive Order 12866 review.

B. Regulatory Flexibility Act

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. See 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant 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.

The SIP approvals under section 110 and subchapter I, part D of the 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 any small entities affected. Moreover, due to the nature of the Federal-State relationship under the Act, preparation of a flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The Act forbids EPA to base its actions concerning SIPs on such grounds. See *Union Electric Company v. U.S. E.P.A.*, 427 U.S. 246, 256-66 (1976); 42 U.S.C. 7410(a)(2).

C. Unfunded Mandates

Under sections 202 of the Unfunded Mandates Reform Act of 1995, signed into law on March 22, 1995, EPA must

prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of \$100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

The EPA has determined that the approval action proposed does not include a Federal mandate that may result in estimated costs of \$100 million or more to either State, local, or tribal

governments in the aggregate, or to the private sector. This Federal action approves preexisting requirements under State or local law, and imposes no new Federal requirements.

Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Enhanced monitoring, Incorporation by reference, Intergovernmental relations.

Authority: 42 U.S.C. sections 7401-76718.

Dated: August 15, 1997.

Jerry Clifford,

Acting Regional Administrator.

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