based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

For additional information, see the direct final rule which is located in the ''Rules and Regulations'' section of this **Federal Register**.

Dated: November 30, 2005.

Carl E. Edlund,

Acting Regional Administrator, Region 6.

[FR Doc. 05–23718 Filed 12–6–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R08–OAR–2005–CO–0004; FRL–8005–8]

Approval and Disapproval and Promulgation of Air Quality Implementation Plans; Colorado; Affirmative Defense Provisions for Startup and Shutdown; Common Provisions Regulation and Regulation No. 1

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to partially approve and partially disapprove a State Implementation Plan (SIP) revision submitted by the State of Colorado. The revision establishes affirmative defense provisions for source owners and operators for excess emissions during periods of startup and shutdown. The affirmative defense provisions are contained in the State of Colorado's Common Provisions regulation. The intended effect of this action is to propose to approve those portions of the rule that are approvable and to propose to disapprove those portions of the rule that are inconsistent with the Clean Air Act. This action is being taken under section 110 of the Clean Air Act. In addition, EPA is announcing that it no longer considers the State of Colorado's May 27, 1998 submittal of revisions to Regulation No. 1 to be an active SIP submittal. Those revisions, which we proposed to disapprove on September 2, 1999 and October 7, 1999, would have provided exemptions from existing limitations on opacity and sulfur dioxide (SO_2) emissions for coal-fired electric utility boilers during periods of startup, shutdown, and upset. Since our proposed disapproval, the State of Colorado has removed or replaced the provisions in Regulation No. 1 that we proposed to disapprove, and has instead pursued adoption of the affirmative defense provisions in the State of Colorado's Common Provisions regulation that we are considering today.

DATES: Comments must be received on or before January 6, 2006.

ADDRESSES: Submit your comments, identified by Docket ID No. R08–OAR–2005–CO–0004, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Agency Web site: http://docket.epa.gov/rmepub/index.jsp.* Regional Materials in EDOCKET (RME), EPA's electronic public docket and comment system for regional actions, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.
- *E-mail: long.richard@epa.gov* and *ostrand.laurie@epa.gov.*
- *Fax:* (303) 312–6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** section if you are faxing comments).
- *Mail:* Richard R. Long, Director, Air and Radiation Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 999 18th Street, Suite 200, Denver, Colorado 80202–2466.
- *Hand Delivery:* Richard R. Long, Director, Air and Radiation Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 999 18th Street, Suite 300, Denver, Colorado 80202–2466. Such deliveries are only accepted Monday through Friday, 8 a.m. to 4:55 p.m., excluding Federal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. R08–OAR–2005–CO–0004. EPA's policy is that all comments received will be included in the public docket without change and may be made available at *http://docket.epa.gov/rmepub/index.jsp,* 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 EDOCKET, regulations.gov, or e-mail. The EPA's Regional Materials in EDOCKET and Federal regulations.gov Web site are ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA, without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit EDOCKET online or see the **Federal Register** of May 31, 2002 (67 FR 38102). 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 Regional Materials in EDOCKET index at *http://docket.epa.gov/rmepub/index.jsp.* Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in Regional Materials in EDOCKET or in hard copy at the Air and Radiation Program, Environmental Protection Agency (EPA), Region 8, 999 18th Street, Suite 300, Denver, Colorado 80202–2466. 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 a.m. to 4 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Laurie Ostrand, Air and Radiation Program, Mailcode 8P–AR, Environmental Protection Agency (EPA), Region 8, 999 18th Street, Suite 200, Denver, Colorado 80202–2466, (303) 312–6437, *ostrand.laurie@epa.gov.*

SUPPLEMENTARY INFORMATION:

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Definitions

For the purpose of this document, we are giving meaning to certain words 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 words *EPA, we, us* or *our* mean or refer to the United States Environmental Protection Agency.

(iii) The initials *SIP* mean or refer to State Implementation Plan.

(iv) The words *State* or *Colorado* mean the State of Colorado, 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 Regional Materials in EDOCKET, regulations.gov or e-mail. 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 of State Submittal

On July 31, 2002, the State of Colorado submitted a SIP revision that added affirmative defense provisions for excess emissions during startup and shutdown. These affirmative defense provisions are contained in the Common Provisions Regulation at section II.J and were adopted by the Colorado Air Quality Control Commission (AQCC) on August 16, 2001.

Previously, on September 2, 1999 (64 FR 48127) and October 7, 1999 (64 FR 54601), EPA proposed to disapprove a May 27, 1998 SIP submittal from the State of Colorado. The May 27, 1998 SIP submittal consisted of revisions to Colorado Regulation No. 1 to provide exemptions from the existing limitations on opacity and sulfur dioxide (SO_2) emissions for coal-fired electric utility boilers during periods of startup, shutdown, and upset. These revisions included changes to sections II.A.1, II.A.4, and VI.B.2 of Regulation No. 1, and the addition of section II.A.10 and VI.B.4.a(iv) to Regulation No. 1. The Colorado AQCC adopted the revisions on December 23, 1996. For most sources they became effective at the state level on March 2, 1997.[1]

On July 31, 2002, the State of Colorado submitted additional revisions to Colorado Regulation No. 1; these were adopted by the Colorado AQCC on August 16, 2001. Among other things, the July 2002 submittal removed from Regulation No. 1 the revisions and additions that EPA proposed to disapprove in September and October 1999. The July 2002 submittal deleted Regulation No. 1 sections II.A.10 and VI.B.4.a(iv), and the revisions to sections II.A.1, II.A.4, and VI.B.2 that the Governor submitted on May 27, 1998. The July 2002 submittal also made other revisions to Regulation No. 1.

Because the State of Colorado has removed from its regulations the provisions that we proposed to disapprove in September and October 1999, we no longer consider the May 27, 1998 Regulation No. 1 submittal to be an active submittal, and at this point, do not intend to finalize our proposed disapprovals. We have not acted on the July 31, 2002 Regulation No. 1 submittal, but will do so in the future.

We mention these changes to Regulation No. 1 at this time because of the link between the Regulation No. 1 changes and the affirmative defense provisions in the Common Provisions regulation. The August 16, 2001 Statement of Basis, Specific Authority, and Purpose for Revisions to Regulation No. 1 (that was later submitted on July 31, 2002) indicates that ''as an alternative approach, the Commission has proposed adoption of Affirmative Defense Provisions to be added to the Common Provisions Regulation to recognize the issues related to periods of excess emissions during startup and shutdown conditions of coal-fired utility boilers and other sources.''

III. EPA Analysis of State Submittal

EPA's interpretations of the Act regarding excess emissions during malfunctions, startup and shutdown are contained in, among other documents, a September 20, 1999 memorandum titled ''State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown,'' from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator for Air and Radiation.[2] That memorandum indicates that because excess emissions might aggravate air quality so as to prevent attainment and maintenance of the national ambient air quality standards (NAAQS) or jeopardize the prevention of significant deterioration (PSD) increments, all periods of excess emissions are considered violations of the applicable emission limitation. However, the memorandum recognizes that in certain circumstances states and EPA have enforcement discretion to refrain from taking enforcement action for excess emissions. In addition, the memorandum also indicates that states can include in their SIPs provisions that would, in the context of an enforcement action for excess emissions, excuse a source from penalties (but not injunctive relief) if the source can demonstrate that it meets certain

[1] However, for coal-fired electric utility boilers located within the Denver Metro PM–10 nonattainment area, the AQCC specified that the provisions would not become state effective until EPA issued a final rule approving them.

[2] Earlier expressions of EPA's interpretations regarding excess emissions during malfunctions, startup, and shutdown are contained in two memoranda, one dated September 28, 1982, the other February 15, 1983, both titled ''Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions'' and signed by Kathleen M. Bennett. However, the September 1999 memorandum directly addresses the creation of affirmative defenses in SIPs and, therefore, is most relevant to this action.

objective criteria (an ''affirmative defense'').[3] Finally, the memorandum indicates that EPA does not intend to approve SIP revisions that would recognize a state director's decision to bar EPA's or citizens' ability to enforce applicable requirements.

We have evaluated Colorado's affirmative defense provisions for startup and shutdown and find that, except for one paragraph, they are consistent with our interpretations under the Act regarding the types of affirmative defense provisions we can approve in SIPs. The Affirmative Defense provisions in the Common Provisions Regulation, sections II.J.1 through II.J.4 are consistent with the provisions for startup and shutdown we suggested in our September 20, 1999 memorandum. Thus, these provisions will provide sources with appropriate incentives to comply with their emissions limitations and help ensure protection of the NAAQS and increments and compliance with other Act requirements.

However, we cannot approve the provisions in section II.J.5 of the Common Provisions regulation. Section II.J.5 reads as follows:

> II.J.5. Affirmative Defense Determination: In making any determination whether a source established an affirmative defense, the Division shall consider the information within the notification required in paragraph 2 of this section and any other information the division deems necessary, which may include, but is not limited to, physical inspection of the facility and review of documentation pertaining to the maintenance and operation of process and air pollution control equipment.

Under this language, the Division could make a determination outside the context of an enforcement action, or at any time during an enforcement action, that a source has established the affirmative defense. If we were to approve section II.J.5, a court might conclude that we had ceded the authority to the Division to make this determination, not just for the State, but on behalf of EPA and citizens as well. Consequently, a court might also view the Division's determination that a source had established the affirmative defense as barring an EPA or citizen action for penalties.

As we stated in the September 1999 memoranda, we do not intend to approve SIP language that would allow a state's decision to constrain our or citizens' enforcement discretion. To do so would be inconsistent with the regulatory scheme established in Title I of the Act, which allows independent EPA and citizen enforcement of violations, regardless of a state's decisions regarding those violations and any potential defenses.[4]

IV. Proposed Action

We are proposing to approve sections II.J.1 through II.J.4 of the Common Provisions Regulation submitted on July 31, 2002 for the reasons expressed above. We are proposing to disapprove section II.J.5 of the Common Provisions Regulation submitted on July 31, 2002 because this section is inconsistent with the Clean Air Act.

V. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

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

B. Paperwork Reduction Act

Under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, OMB must approve all ''collections of information'' by EPA. The Act defines ''collection of information'' as a requirement for ''answers to * * * identical reporting or recordkeeping requirements imposed on ten or more persons * * * '' 44 U.S.C. 3502(3)(A). Because this proposed rule does not impose an information collection burden, the Paperwork Reduction Act does not apply.

C. Regulatory Flexibility Act

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

This proposed rule will not have a significant impact on a substantial number of small entities because SIP approvals and disapprovals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply approve or disapprove requirements that the State is already imposing. Therefore, because the Federal SIP approval/disapproval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities.

Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of 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. EPA,* 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

D. Unfunded Mandates Reform Act

Under sections 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the 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 proposes to partially approve and partially disapprove pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875

[3] EPA's September 20, 1999 memorandum indicates that the term *affirmative defense* means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding. See footnote 4 of the attachment to the memorandum.

[4] Section II.J.5 may be confusing the concept of affirmative defense with the concept of enforcement discretion. By definition, an affirmative defense is a defense that may be raised in the context of an enforcement proceeding before an independent trier of fact. Before pursuing an enforcement action, the state might evaluate the likelihood that an owner/operator could prove the elements of the affirmative defense, but this would go to the state's exercise of enforcement discretion. While the state might decide not to pursue an enforcement action based on such an evaluation, if EPA or citizens were to pursue enforcement action, an independent trier of fact might reach a conclusion different from the state's, i.e., that the owner/operator had not proved the elements of the affirmative defense.

(Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This proposed rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely proposes to partially approve and partially disapprove state rules implementing a federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

F. Executive Order 13175, Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This proposed rule does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. This action does not involve or impose any requirements that affect Indian Tribes. Thus, Executive Order 13175 does not apply to this rule.

EPA specifically solicits additional comment on this proposed rule from tribal officials.

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

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

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

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

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use ''voluntary consensus standards'' (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

The EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, 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: November 28, 2005.

Robert E. Roberts,

Regional Administrator, Region 8.

[FR Doc. 05–23715 Filed 12–6–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R08–OAR–2005–CO–0003; FRL–8005–6]

Approval and Promulgation of Air Quality Implementation Plans; Colorado; Revisions to New Source Review Rules

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve those revisions adopted by Colorado on April 16, 2004 to Regulation No. 3 (Stationary Source Permitting and Air Pollutant Emission Notice Requirements) that incorporate EPA's December 31, 2002 NSR Reforms. Colorado submitted the request for approval of these rule revisions into the State Implementation Plan (SIP) on July 11, 2005 and supplemented its request on October 25, 2005. At this time, EPA is proposing to approve only the portions of Colorado's revisions to Regulation Number 3 that relate to the prevention of significant deterioration (PSD) and non-attainment new source review (NSR) construction permit programs of the State of Colorado. Other revisions, renumberings, additions, or deletions to Regulation No. 3 made by Colorado as part of the April 16, 2004 final rulemaking will be acted on by EPA in a separate action. Colorado has a Federally approved New Source Review (NSR) program for new and modified sources impacting attainment and non-attainment areas in the State.

On December 31, 2002, EPA published revisions to the federal Prevention of Significant Deterioration (PSD) and non-attainment NSR regulations. These revisions are commonly referred to as ''NSR Reform'' regulations and became effective nationally in areas not covered by a SIP on March 3, 2003. These regulatory