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SUPPLEMENTARY INFORMATION:

I. Background and Purpose

A. Introduction

As required under title V of the 1990 Clean Air Act Amendments (sections 501-507 of the Clean Air Act ("the Act")), EPA has promulgated rules which define the minimum elements of an approvable State operating permits program and the corresponding standards and procedures by which the EPA will approve, oversee, and withdraw approval of State operating permits programs (see 57 FR 32250 (July 21, 1992)). These rules are codified at 40 CFR part 70. Title V requires States to develop, and submit to EPA, programs for issuing these operating permits to all major stationary sources and to certain other sources.

The Act requires that States develop and submit these programs to EPA by November 15, 1993, and that EPA act to approve or disapprove each program within 1 year after receiving the submittal. Based on material changes to the State's submission that consisted of regulations changes adopted by the State on November 17, 1994, EPA is extending the review period for an additional 3 months. EPA will act to approve or disapprove the submission by April 11, 1995. EPA's program review occurs pursuant to section 502 of the Act and the part 70 regulations, which together outline criteria for approval or disapproval. Where a program substantially, but not fully, meets the requirements of part 70, EPA may grant the program interim approval for a period of up to 2 years. If EPA has not fully approved a program by 2 years after the November 15, 1993 date, or by the end of an interim program, it must establish and implement a Federal program.

B. Federal Oversight and Sanctions

If EPA were to finalize this proposed interim approval, it would extend for two years following the effective date of final interim approval, and could not be renewed. During the interim approval period, the State would be protected from sanctions, and EPA would not be obligated to promulgate, administer and enforce a Federal permits program for the State. Permits issued under a program with interim approval have full

standing with respect to part 70, and the 1-year time period for submittal of permit applications by subject sources begins upon the effective date of interim approval, as does the 3-year time period for processing the initial permit applications.

Following final interim approval, if the State failed to submit a complete corrective program for full approval by the date 6 months before expiration of the interim approval, EPA would start an 18-month clock for mandatory sanctions. If the State then failed to submit a corrective program that EPA found complete before the expiration of that 18-month period, EPA would apply sanctions as required by section 502(d)(2) of the Act, which would remain in effect until EPA determined that the State had corrected the deficiency by submitting a complete corrective program.

If, following final interim approval, EPA were to disapprove the State's complete corrective program, EPA would be required under section 502(d)(2) to apply sanctions on the date 18 months after the effective date of the disapproval, unless prior to that date the State had submitted a revised program and EPA had determined that it corrected the deficiencies that prompted the disapproval.

In addition, discretionary sanctions may be applied where warranted any time after the end of an interim approval period if a State has not timely submitted a complete corrective program or EPA has disapproved a submitted corrective program. Moreover, if EPA has not granted full approval to a State program by the expiration of an interim approval and that expiration occurs after November 15, 1995, EPA must promulgate, administer and enforce a Federal permits program for that State upon interim approval expiration.

II. Proposed Action and Implications

A. Analysis of State Submission

1. Support Materials

The Governor of South Dakota's designee, Robert E. Roberts, Secretary of the Department of Environment and Natural Resources, submitted the State of South Dakota Title V Operating Permit Program (PROGRAM) to EPA on November 12, 1993. Amendments to the PROGRAM requested by EPA were received on January 11, 1994. EPA deemed the PROGRAM administratively and technically complete in a letter to the Governor's designee dated January 14, 1994. The PROGRAM submittal includes a legal opinion from the Attorney General of South Dakota

stating that the laws of the State provide adequate legal authority to carry out all aspects of the PROGRAM, and a description of how the State intends to implement the PROGRAM. The submittal additionally contains evidence of proper adoption of the PROGRAM regulations, a permit fee demonstration and a memorandum of agreement which defines how the PROGRAM will be administered by the State and reviewed by EPA.

2. Regulations and Program Implementation

The South Dakota PROGRAM, including the operating permit regulation (Administrative Rules of South Dakota (ARSD), Article 74:36, Air Pollution Control Program), substantially meets the requirements of 40 CFR 70.2 and 70.3 with respect to applicability; §§ 70.4, 70.5, and 70.6 with respect to permit content including operational flexibility; § 70.5 with respect to complete application forms (no insignificant activities were identified in the PROGRAM); § 70.7 with respect to public participation and minor permit modifications; and § 70.11 with respect to requirements for enforcement authority.

South Dakota has the authority to issue variances from requirements imposed by State law. Section 34A-1-24 of the South Dakota Codified Laws (SDCL) allows the Board of Minerals and Environment, the permitting board, discretion to grant relief from compliance with State rules and regulations governing the quality, nature, duration or extent of emissions. Succeeding sections of the SDCL specify under what circumstances a variance may be granted or denied. In its review of South Dakota's PROGRAM, EPA has previously taken the position that, in order to gain full approval for its PROGRAM, South Dakota would have to amend SDCL 34A-1-24 to make it clear that variances may not be granted to part 70 sources. EPA has reevaluated its position on this issue. Although EPA would support such an amendment to SDCL 34A-1-24, EPA has not required other states to change similar statutory variance provisions. Thus, EPA believes it would not be appropriate to require South Dakota to amend SDCL 34A-1-24 before full PROGRAM approval is granted. EPA's reasoning is as follows: EPA regards SDCL 34A-1-24 as wholly external to the PROGRAM submitted for approval under part 70, and consequently is proposing to take no action on this provision of State law. EPA has no authority to approve provisions of State law, such as the variance provision referred to, which