

placed at least 20 meters from the drip line of trees. Since the scavenging effect of trees is greater for O<sub>3</sub> than for the other criteria pollutants, strong consideration of this effect must be given in locating the PAMS probe or monitoring path to avoid this problem. Therefore, the probe or at least 90 percent of the monitoring path must be at least 10 meters from the drip line of trees that are located between the urban city core area and

the probe or monitoring path along the appropriate wind direction.

\* \* \* \* \*

12. Summary

Table 5 presents a summary of the general requirements for probe and monitoring path siting criteria with respect to distances and heights. It is apparent from Table 5 that different elevation distances above the ground are shown for the various pollutants. The discussion in the text for each of the

pollutants described reasons for elevating the monitor, probe, or monitoring path. The differences in the specified range of heights are based on the vertical concentration gradients. For CO, the gradients in the vertical direction are very large for the microscale, so a small range of heights has been used. The upper limit of 15 meters was specified for consistency between pollutants and to allow the use of a single manifold or monitoring path for monitoring more than one pollutant.

TABLE 5.—SUMMARY OF PROBE AND MONITORING PATH SITING CRITERIA

| Pollutant                                  | Scale [maximum monitoring path length, meters]          | Height from ground to probe or 80% of monitoring path <sup>A</sup> (meters) | Horizontal and vertical distance from supporting structures <sup>B</sup> to probe or 90% of monitoring path <sup>A</sup> (meters) | Distance from trees to probe or 90% of monitoring path <sup>A</sup> (meters) | Distance from roadways to probe or monitoring path <sup>A</sup> (meters) |
|--|---|---|---|--|--|
| SO <sub>2</sub> <sup>CDEF</sup>            | Middle [300m] Neighborhood, Urban, and Regional [1km].  | 3-15  | >1  | >10  | N/A.   |
| CO <sup>DEG</sup>                          | Micro, Middle [300m], Neighborhood [1km].               | 3±0.5, 3-15   | >1  | >10  | 2-10, See Table 1 for middle and neighborhood scales.                    |
| O <sub>3</sub> <sup>CDE</sup>              | Middle [300m], Neighborhood, Urban, and Regional [1km]. | 3-15  | >1  | >10  | See Table 2 for all scales.  |
| Ozone precursors (for PAMS) <sup>CDE</sup> | Neighborhood and Urban [1 km]                           | 3-15  | >1  | >10  | See Table 4 for all scales.  |
| NO <sub>2</sub> <sup>CDE</sup>             | Middle [300m], Neighborhood and Urban [1km].            | 3-15  | >1  | >10  | See Table 2 for all scales.  |
| Pb <sup>CDEFH</sup>                        | Micro; Middle, Neighborhood, Urban and Regional.        | 2-7 (Micro), 2-15 (All other scales).                                       | >2 (All scales, horizontal distance only).  | >10 (All scales)   | 5-15 (Micro), See Table 3 for all other scales.                          |
| PM-10 <sup>CDEFH</sup>                     | Micro; Middle, Neighborhood, Urban and Regional.        | 2-7 (Micro), 2-15 (All other scales).                                       | >2 (All scales, horizontal distance only).  | >10 (All scales)   | 2-10 (Micro), See Figure 2 for all other scales.                         |

<sup>A</sup> Monitoring path for open path analyzers is applicable only to middle or neighborhood scale CO monitoring and all applicable scales for monitoring SO<sub>2</sub>, O<sub>3</sub>, O<sub>3</sub> precursors, and NO<sub>2</sub>.

<sup>B</sup> When probe is located on a rooftop, this separation distance is in reference to walls, parapets, or penthouses located on roof. N/A—Not applicable.

<sup>C</sup> Should be >20 meters from the dripline of tree(s) and must be 10 meters from the dripline when the tree(s) act as an obstruction.

<sup>D</sup> Distance from sampler, probe, or 90% of monitoring path to obstacle, such as a building, must be at least twice the height the obstacle protrudes above the sampler, probe, or monitoring path. Sites not meeting this criterion may be classified as middle scale (see text).

<sup>E</sup> Must have unrestricted airflow 270° around the probe or sampler; 180° if the probe is on the side of a building.

<sup>F</sup> The probe, sampler, or monitoring path should be away from minor sources, such as furnace or incineration flues. The separation distance is dependent on the height of the minor source's emission point (such as a flue), the type of fuel or waste burned, and the quality of the fuel (sulfur, ash, or lead content). This criterion is designed to avoid undue influences from minor sources.

<sup>G</sup> For microscale CO monitoring sites, the probe must be >10 meters from a street intersection and preferably at a midblock location.

<sup>H</sup> For collocated Pb and PM-10 samplers, a 2-4 meter separation distance between collocated samplers must be met.

\* \* \* \* \*  
[FR Doc. 94-20042 Filed 8-17-94; 8:45 am]  
BILLING CODE 6560-50-P

40 CFR Part 70

[WA-TV-1, AD-FRL-5040-1]

Clean Air Act Proposed Interim Approval or Disapproval of Operating Permit Programs in the State of Washington

AGENCY: U.S. Environmental Protection Agency (EPA).

ACTION: Proposed interim approval.

SUMMARY: EPA proposes interim approval of the operating permit

programs submitted by the Washington Department of Ecology (Ecology), the Washington Energy Facility Site Evaluation Council (EFSEC), the Northwest Air Pollution Authority (NWAPA), the Olympic Air Pollution Control Authority (OAPCA), the Puget Sound Air Pollution Control Agency (PSAPCA), the Spokane County Air Pollution Control Authority (SCAPCA), and the Southwest Air Pollution Control Authority (SWAPCA) for the purpose of complying with Title V of the Federal Clean Air Act which mandates that States develop and submit to EPA programs for issuing operating permits to all major stationary sources and to certain other sources.

EPA proposes two alternative actions on the operating permit programs submitted by the Benton-Franklin Counties Clean Air Authority (BFCCAA) and the Yakima County Clean Air Authority (YCCAA): disapproval or, if these permitting authorities make certain specified changes to their operating permit programs by the time EPA takes final action on this proposed rulemaking, interim approval. In the event of disapproval, Ecology's operating permit program will apply to sources located in Benton and Franklin Counties and Yakima County, respectively.

DATES: Comments on this proposed action must be received in writing by September 19, 1994.

**ADDRESSES:** Comments should be sent to Elizabeth Waddell, U.S. Environmental Protection Agency, Region 10, 1200 Sixth Avenue, AT-082, Seattle, Washington 98101.

Copies of the State and local agencies' submittals and other supporting information used in developing the proposed rule are available for inspection during normal business hours at the following location: U.S. Environmental Protection Agency, Region 10, 1200 Sixth Avenue, Seattle, Washington.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Waddell, (206) 553-4303.

#### SUPPLEMENTARY INFORMATION:

### I. Background and Purpose

#### A. Introduction

As required under Title V of the Clean Air Act (Act) as amended (1990), EPA has promulgated rules which define the minimum elements of an approvable State operating permit program and the corresponding standards and procedures by which the EPA will approve, oversee, and withdraw approval of State operating permit programs (see 57 FR 32250 (July 21, 1992)). These rules are codified at 40 Code of Federal Regulations (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 one year after receiving the submittal. EPA's program review occurs pursuant to section 502 of the Act and Part 70 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 two years. If EPA has not fully approved a program by two years after the November 15, 1994 date, or by the end of an interim program, it must establish and implement a federal program.

### II. Proposed Action and Implications

#### A. Analysis of Submission by State and Local Authorities

##### 1. Support Materials

The program submittal by the State of Washington includes submissions by Ecology, EFSEC and the seven local air pollution control authorities (local air authorities). Collectively, these submissions meet the requirements of 40 CFR Part 70, § 70.4, for a complete

program submittal including a letter of submittal from the Washington Governor's designee requesting program approval, complete program descriptions, the legal opinions of the Attorney General and the attorneys of the local air authorities, permit program documentation, and fully adopted implementing regulations of Ecology, EFSEC and the local air authorities. An implementation agreement is currently being developed between Ecology, EFSEC, and the local air authorities (collectively, the permitting authorities) and EPA.

##### 2. Regulations and Program Implementation

*a. Ecology.* The statutes authorizing the Washington state operating permit program are contained in chapter 70.94 of the Revised Code of Washington (RCW), in particular RCW 70.94.161 (Operating Permits for Air Contaminant Sources—Generally—Fees, report to legislature), 70.94.162 (Annual fees from operating permit program sources to cover cost of program) and 70.94.422 (Department of health powers regarding radionuclides—Energy facility site evaluation council authority over permit program sources). RCW 70.94.161(2)(a) required Ecology to promulgate rules for a state-wide operating permit program consistent with Title V of the Clean Air Act. Chapter 173-401 of the Washington Annotated Code (WAC) sets out the specific requirements of the state-wide operating permit program. This rule, together with ch. 70.94 RCW, and the other supporting statutes and regulations submitted by Ecology, substantially meet the requirements of 40 CFR Part 70, Section 70.2 and 70.3 for applicability, Section 70.4, 70.5, and 70.6 for permit content including operational flexibility, Section 70.7 for public participation and minor permit modifications, Section 70.5 for criteria which define insignificant activities, Section 70.11 for requirements for enforcement authority, and Section 70.5 for complete application forms.

*b. EFSEC.* RCW 70.94.422(2) gives EFSEC authority to issue operating permits to and administer the operating permit program for large energy facilities regulated under ch. 80.50 RCW, and does not require EFSEC to apply to Ecology for delegation of the operating permit program. EFSEC has adopted by reference all of ch. 173-401 WAC and the provisions of ch. 173-400 WAC necessary to implement the operating permit program (see WAC 463-39-005). In issuing Title V permits, EFSEC will contract with Ecology or the local air authority with jurisdiction over the geographic area where the EFSEC

source is located to develop the air operating permit which will be incorporated into the source's "certification," the document containing all requirements with which the EFSEC source must comply. EFSEC has used this approach in the past for Prevention of Significant Deterioration and water quality permitting issues.

*c. Local Air Authorities.* RCW 70.94.161(2)(b) authorizes local air authorities to request delegation from Ecology to implement the operating permit program for sources within their respective jurisdictions. Each of Washington's seven local air authorities, which together cover 22 of the 39 counties in the State, has requested and received delegation from Ecology contingent on EPA approval of the local air authority operating permit program. All Title V sources within the jurisdiction of a delegated local air authority will be subject to the operating permit program of such local air authority, except for primary aluminum smelters, kraft pulping mills, sulfite pulping mills, energy facilities under EFSEC's jurisdiction and sources on the U.S. Department of Energy's Hanford Nuclear Reservation. These sources, along with sources in the 17 counties not covered by local air authorities, will be subject to Ecology's operating permit program, with the exception of energy facilities that will be subject to EFSEC's program.

Each of the seven local air authorities has promulgated a rule authorizing the assessment and collection of fees from permit program sources as required by State law (see RCW 70.94.162(1)). With respect to the other requirements of the operating permit program, the local air authorities have taken one of four different approaches to program implementation. SCAPCA has not promulgated any rules to implement Title V, except for fee rules. Instead, SCAPCA will be implementing the operating permit program by enforcing the State rule, ch. 173-401 WAC, as authorized by State law (see RCW 70.94.161(2)(a)). SWAPCA has issued a local rule which restates the State operating permit rule (see SWAPCA Ch. 401). NWAPA, PSAPCA and OAPCA have each adopted rules requiring operating permit program sources subject to their respective jurisdictions to comply with the State operating permit program rule (see NWAPA Sec. 326; PSAPCA Reg. I, Sec. 7.01, 7.03 and 7.05; OAPCA Reg. 1, Sec. 6.01).

BFCCAA and YCCAA have each adopted a rule expressing the authority's intent to implement the State air operating permit program (BFCCAA Reg. 1, Sec. 4.01; YCCAA Reg. I, Sec.

6.01 and Sec. 12.01), and have also adopted rules addressing which sources are subject to the program; program delegation; permit application; permit content; permit issuance, renewal, reopenings and revisions; public involvement; and fee assessment (see BFCCAA Reg. 1, Sec. 4.02-4.08; YCCAA Reg. I, Sec. 6.02-6.09). These rules do not, however, cover many of the requirements of Part 70. Although both BFCCAA and YCCAA apparently intended that the State operating permit rule (ch. 173-401 WAC) would supplement and fill in the gaps in their local regulations, there is a serious question regarding whether this is the case.

There are many potential inconsistencies between the operating permit regulations of BFCCAA and YCCAA and the operating permit rule of the State. For example, the local regulations require that renewal applications be submitted at least six months prior to the expiration of the permit but do not place any outside limit on the submission of a renewal application (see BFCCAA Reg. 1, Sec. 4.06(C); YCCAA Reg. I, Sec. 6.06). State law, however, as required by Title V, provides that in no event shall a renewal application be submitted more than 18 months before the expiration of the permit (see WAC 173-401-710(1)). Because the local regulations were adopted after ch. 173-401 WAC, it is questionable whether the provisions of the State operating permit rule that are inconsistent with the operating permit rules of BFCCAA and YCCAA could be enforced against a Title V source. This is especially true for YCCAA because the YCCAA regulation that incorporates ch. 173-401 WAC by reference states that State regulations are not adopted to the extent they are inconsistent with any YCCAA regulations (see YCCAA Reg. I, Sec. 12.01).

*d. Tribal Lands.* The Governor's letter to EPA states that Ecology, EFSEC and the delegated local air authorities will serve as the permitting authorities for sources over which they each, respectively, have jurisdiction. Except with respect to certain sources located on the Puyallup Reservation, there is no further discussion in the submittals of Ecology, EFSEC or the local air authorities of any basis for the assertion of jurisdiction by Washington permitting authorities over sources on Tribal lands.

Opinion letters from the Washington Attorney General and PSAPCA's attorney rely on the Washington Indian (Puyallup) Land Claims Settlement, 25 USC sections 1773-1773j, and the Agreement between the Puyallup Tribe

of Indians, Local Governments in Pierce County, the State of Washington, the United States of America, and certain private property owners, dated August 27, 1988 (Settlement Agreement) to support their assertion of jurisdiction over portions of the Puyallup Reservation. The Settlement Agreement specifically gives federal, state and local governments exclusive jurisdiction for the administration and implementation of federal, state and local environmental laws on all non-trust lands within the 1873 Survey Area and gives the federal government and the Puyallup Tribe the same exclusive jurisdiction over all trust and restricted lands within the 1873 Survey Area (as "non-trust lands," "trust lands," "restricted lands" and "1873 Survey Area" are defined in the Settlement Agreement). Based on the terms of the Settlement Agreement, EPA is proposing to grant interim approval of the operating permit programs of Ecology and PSAPCA for all non-trust lands within the 1873 Survey Area of the Puyallup Reservation.

Because the Washington permitting authorities have not demonstrated, consistent with applicable principles of Indian law and federal Indian policies, legal authority to regulate other sources on Tribal lands under the Clean Air Act, the proposed interim approval of the Washington operating permit programs will not extend to any trust or restricted lands within the Puyallup 1873 Survey Area or to lands within the exterior boundaries of any other Indian Reservation.<sup>1</sup> Title V sources located within the exterior boundaries of other Indian Reservations in Washington will be subject to the federal operating permit program, to be promulgated at 40 CFR Part 71, or subject to the operating permit program of any Tribe approved after issuance of the regulations under Section 301(d) of the Clean Air Act authorizing EPA to treat Tribes in the same manner as States for appropriate Clean Air Act provisions.<sup>2</sup>

*e. Applicable Requirements.* Part 70 requires that all federally-enforceable applicable requirements be included in an operating permit (see 40 CFR 70.4(3)(v) and 70.6(a)). RCW 70.94.161(10) could be read to require that only the most stringent of any federal, state or local requirement be

<sup>1</sup> This is not a determination that the Washington permitting authorities could not possibly demonstrate jurisdiction over sources within the exterior boundaries of Indian Reservations in Washington. However, no such showing has been made, except as discussed above with respect to portions of the Puyallup Reservation.

<sup>2</sup> Tribes may also have inherent sovereign authority to regulate air pollutants from sources on Tribal lands.

included in the permit. According to the Attorney General's opinion, however, this provision does not preclude Washington permitting authorities from including all federally-enforceable applicable requirements in the permit, and several other State regulations in fact require the permitting authority to do so. The Attorney General first points to RCW 70.94.161(2)(a), which requires that the rules establishing the State's permitting program be consistent with the Federal Clean Air Act. The Attorney General then relies on WAC 173-401-600, which requires that the permit assure compliance with all applicable requirements and that, where a federally enforceable applicable requirement is less stringent than a State or local requirement, both the federal requirement and the State or local requirement be included in the permit. EPA notes, as well, that WAC 173-401-625(b) specifically requires any "state-only" terms and conditions be designated as not being federally enforceable. In order for a permit to assure compliance with a federally enforceable applicable requirement which is less stringent than a "state-only" requirement, both requirements would have to be included in the permit. Moreover, EPA notes that pursuant to WAC 173-401-640 a Title V source would be shielded from enforcement of a federally-enforceable applicable requirement only if the requirement is included in the permit or is specifically determined not to be applicable. Based on the opinion of the Attorney General and on the assurances of the Washington permitting authorities that all federally-enforceable applicable requirements will be included in Title V permits, EPA believes that RCW 70.94.161(10) does not preclude approval of the Washington submittal.

*f. Compliance Orders.* WAC 173-400-161 authorizes Washington permitting authorities to issue regulatory orders requiring that sources be brought into compliance in accordance with a compliance schedule.<sup>3</sup> It further provides that a source which has been issued such a regulatory order shall be deemed to be in compliance with "this chapter" if the source is in compliance with all of the requirements of the regulatory order, including the compliance schedule. This provision would pose a problem for Title V

<sup>3</sup> EFSEC has incorporated this provision by reference (see WAC 463-39-005). Several local air authorities have comparable provisions (see OAPCA Reg. 1, Sec. 329; SCAPCA Reg. I, Art. VII; SWAPCA 400-161). The same analysis of the State's authority to issue compliance orders applies for EFSEC and these local air authorities.

approval if a Washington permitting authority would be precluded from assessing penalties against a source with a Title V operating permit who had been issued and was in compliance with such a regulatory order, but was not in compliance with the underlying permit requirements. It would also be problematic if a compliance schedule submitted by a source pursuant to WAC 173-401-510(2)(h)(iii) became a regulatory order under WAC 173-400-161 when it becomes a part of a Title V operating permit and thus precluded the permitting authority from assessing penalties for the source's noncompliance with the underlying permit requirements.

The Attorney General's opinion states that a regulatory order issued under WAC 173-400-161 is a completely separate device from a Title V operating permit issued under ch. 173-401 WAC, even though both may contain compliance schedules. Moreover, the Attorney General's letter points out that WAC 173-401-620(2) makes any noncompliance with a Title V permit grounds for an enforcement action and that a permit condition can be changed only through a permit modification, not a regulatory order. Finally, the Attorney General states that even if a compliance schedule is issued under WAC 173-400-161 to a Title V source, compliance with such a schedule only constitutes compliance with the requirements of "this chapter," ch. 173-400 WAC, and not the operating permit rule, ch. 173-401 WAC. Therefore, a source could still be subject to an enforcement action for being in violation of the permit but in compliance with the compliance schedule. Based on the Attorney General's opinion, EPA believes that WAC 173-400-161 does not bar approval of the Washington submittal. If, during program implementation, Washington permitting authorities issue regulatory orders containing compliance schedules to Title V sources without collecting appropriate penalties, EPA will consider this grounds for withdrawing approval of such permitting authority's program in accordance with the provisions of 40 CFR 70.10(c).

**g. Technical Assistance Visits.** Washington has two statutes which address violations observed during technical assistance visits, RCW 43.21A.087 and RCW 70.94.035. RCW 70.94.035, which was enacted in 1991 and specifically applies to the air program, prohibits enforcement action "unless and until the facility owner or operator has been provided a reasonable time to correct the violation." According to the Attorney General's opinion, this

provision does not prevent a permitting authority from commencing an enforcement action for a violation observed during a technical assistance visit, but merely requires the permitting authority to give the source a reasonable opportunity to comply before deciding whether enforcement action is appropriate. The Attorney General similarly interprets RCW 43.21A.087, enacted in 1992, which allows the permitting authority to reinspect the facility and take enforcement action "[i]f the owner or operator of the facility does not correct the violation."<sup>4</sup> The Attorney General also states that because RCW 70.94.035 applies specifically to the air program and specifically requires that the technical assistance program be consistent with the Federal Clean Air Act, this provision would prevail in the event of any conflict with RCW 43.21A.087, which applies to technical assistance visits under all of Ecology's environmental programs. EPA does not believe the plain language of RCW 43.21A.087 supports the Attorney General's opinion and that it could prohibit enforcement action if a violation observed during a technical assistance visit is promptly corrected. EPA does agree, however, that RCW 70.94.035 would allow enforcement action in such a case provided the enforcement action was commenced after the source had had an opportunity to comply. EPA also believes that RCW 70.94.035, and not RCW 43.21A.087, applies in the case of technical assistance visits under the air program. EPA therefore believes that Washington's technical assistance statutes, as interpreted by the Attorney General, do not bar approval of Washington's operating permit program.

**h. Variances.** State law allows sources to petition the permitting authority for a variance from requirements governing the quality, nature, duration or extent of discharges of air contaminants (see RCW 70.94.181; WAC 173-400-180)). Each of the local air authorities has also adopted a regulation authorizing variances under certain circumstances (see BFCCAA Reg. 1, Sec. 3.01; NWAPA Sec. 350; PSAPCA Reg. I, Sec. 4.01; OAPCA Reg. 1, Sec. 3.23; SCAPCA Reg. I, Art. III; SWAPCA Reg. 401-180; YCCAA Reg. I, Sec. 7.01). State law also prohibits any State or local air authority from incorporating a variance in a permit unless the variance has been approved by EPA as part of the State

<sup>4</sup>Both statutes allow Ecology to commence immediate enforcement action for any violation that places anyone in imminent danger of death or substantial bodily harm or causes substantial property damage.

Implementation Plan or from issuing a variance that sets aside or delays any requirements of the Federal Clean Air Act except with the approval and written concurrence of the EPA (see RCW 70.94.181(8); WAC 173-400-180(3)). The program submittal is approvable based on these limitations on the issuance of variances.<sup>5</sup>

**i. Additional Information.** The full program submittal and the Technical Support Document are available for review for more detailed information about this proposed action.

### 3. Permit Fee Demonstration

**a. EFSEC.** RCW 80.50.071(1)(b) and (c) require that an applicant for an EFSEC certification pay all "reasonable costs actually and necessarily incurred" by EFSEC in processing applications and inspecting and determining compliance. RCW 70.94.422(2) additionally gives EFSEC the same authority as local air authorities to collect fees from Title V sources subject to EFSEC's jurisdiction. As discussed above, EFSEC will contract with Ecology or the relevant local air authority to perform certain technical tasks, including developing the Title V permit terms and monitoring compliance with those terms. Ecology and any participating local air authority will then charge EFSEC the same fees they would charge a source subject to their jurisdiction for issuing a permit and monitoring compliance. EFSEC will pass these fees onto the EFSEC source, along with its administrative costs (staff costs) for the air operating permit program as "reasonable costs actually and necessarily incurred" by EFSEC in processing applications and inspecting and determining compliance. EFSEC estimates its air operating permit program administrative costs to be approximately \$1,121 per year per source. Based on this estimate, EPA believes that the combined contract and administrative fees are sufficient to meet the Act's requirements to cover the permit program costs.

**b. NWAPA and SWAPCA.** NWAPA and SWAPCA have opted for fees below the presumptive minimum (\$30.18 a ton for FY95). NWAPA will collect the equivalent of \$19.29 per ton for the first year of the program. Operating permit fees will be based on a two-tiered model in which 20% of the total fees collected will be distributed equally between all

<sup>5</sup>Although the variance regulations of BFCCAA, NWAPA, SWAPCA and YCCAA do not expressly state that EPA must approve any variance to requirements of the Federal Clean Air Act or any variance incorporated into an operating permit, the Attorney General's opinion letter confirms that State law prohibits a local authority from issuing such a variance.

the affected sources and 80% will be distributed based on the quantity of emissions emitted by each of the sources. In addition to the fees assessed by NWAPA, each of the sources will also be responsible for a portion of Ecology's oversight costs. EPA believes the combined State and local air authority fees are sufficient to cover the permit program costs based on NWAPA's detailed fee demonstration using a workload analysis. NWAPA is a small agency in a relatively rural and low cost area of the State. There are several sources in its jurisdiction that emit very large tonnages but few sources overall. This high ratio of tons of emissions to number of permits lowers the cost per ton of implementing an operating permit program. NWAPA has committed in its submittal to review its fee schedule annually and increase fees, as needed, to reflect actual program implementation costs.

SWAPCA will collect the equivalent of \$19.13 per ton for the first year of the program. Operating permit fees will be based on a three-tiered model with equal weight given to each part. The model divides the fees collected into a flat fee for all affected sources, a fee based on quantity of emissions, and a fee based on the complexity of the permit. In addition to the fees assessed by the Authority, each of the sources will also be responsible for a portion of Ecology's oversight costs. EPA believes that the combined State and local air authority fees are sufficient to cover permit program costs based on SWAPCA's detailed fee demonstration using a workload analysis. As with NWAPA, SWAPCA is a small agency in a relatively rural and low cost area of the State with several sources in its jurisdiction that emit very large quantities of emissions but few sources overall. Once again, this high ratio of tons of emissions to number of permits lowers the cost per ton of implementing an operating permit program. SWAPCA has committed in its submittal to review its fee schedule annually and to increase fees, as needed, to reflect actual program implementation costs.

*c. Ecology, BFCAA, OAPCA, PSAPCA, SCAPCA and YCCAA.* The fees to be assessed by Ecology, BFCAA, OAPCA, PSAPCA, SCAPCA, and YCCAA all exceed the presumptive minimum. Fees range from \$40 per ton to \$64.72 per ton. In addition, each agency provided a detailed fee demonstration. Together, all permitting authorities in Washington will collect an estimated \$4.6 million in the first year of program implementation. Each permitting authority has committed in its submittal to review its fee schedule

annually and to increase fees, as needed, to reflect actual program implementation costs.

#### 4. Provisions Implementing the Requirements of Other Titles of the Act

*a. Authority and Commitments for Section 112 Implementation.* The Washington permitting authorities have indicated in their Title V program submittals that they are constitutionally precluded from implementing and enforcing future federally-promulgated applicable requirements by reference, but must instead first adopt state regulations in order to incorporate such requirements into permits and enforce them. Ecology has demonstrated, however, that it has broad legal authority to adopt regulations necessary to implement any and all section 112 requirements (see RCW 70.94.141(1); 70.94.331(2)). The local air authorities may include these requirements in their Title V permits as soon as Ecology adopts such requirements (see RCW 70.94.161(2)(a)).<sup>6</sup> EFSEC, which has the legal authority to adopt air quality standards consistent with those established by Ecology and the local air authorities (see RCW 70.94.422(2)), intends to incorporate by reference the section 112 standards adopted by Ecology. In their submittal, the Washington permitting authorities have committed to adopting regulations necessary to implement the section 112 requirements in a timely manner.

EPA has determined that this broad statutory and regulatory authority is adequate for the Washington permitting authorities to implement all section 112 requirements provided they expeditiously adopt appropriate implementing regulations as new federal regulations are promulgated. EPA regards the commitments of the Washington permitting authorities as an acknowledgement of their obligation to adopt regulations necessary to issue permits that assure compliance with section 112 applicable requirements. Should a Washington permitting authority fail to adopt regulations necessary to maintain adequate legal authority to issue timely permits, EPA will consider this grounds for withdrawing approval of such permitting authority's program in accordance with the provisions of 40 CFR 70.10(c). For further discussion of this determination, please refer to the April 13, 1993 guidance memorandum entitled "Title V Program Approval

<sup>6</sup> A local authority may also promulgate its own requirements, which may be not less stringent than those promulgated by Ecology (see RCW 70.94.331(6); WAC 173-400-020(2)).

Criteria for Section 112 Activities," signed by John Seitz.

*b. Implementation of Section 112(g) Upon Program Approval.* After the effective date of the Washington operating permit programs, no new major source or major modification to an existing major source may be constructed unless it has been subject to a case-by-case determination of maximum achievable control technology (MACT) or offsets by the permitting authority under section 112(g) of the Federal Clean Air Act. The results of such case-by-case determination of MACT or offsets must be federally-enforceable by the time that construction begins on the new source or modification. Unless and until the Washington permitting authorities<sup>7</sup> submit, and EPA approves, air toxics permitting regulations, there will be no mechanism for making federally-enforceable MACT or offset determinations, thereby effectively prohibiting construction of new major sources and major modifications to existing major sources as of the date EPA grants interim approval of the Washington operating permit programs.

Because EPA has not yet promulgated regulations to implement section 112(g) of the Act, EPA has determined it has authority to approve many existing state air toxics permitting regulations under the authority of Title V and sections 112(g) and 112(l) of the Act solely for the purpose of implementing section 112(g) during the transition period between Title V approval and adoption of State rules implementing EPA's forthcoming section 112(g) regulations. Submission by Washington and approval by EPA of Washington's existing state air toxics permitting rules could provide Washington permitting authorities with an interim mechanism for establishing federally-enforceable restrictions for section 112(g) purposes. The scope of such an approval of Washington's air toxic regulations would be narrowly limited to section 112(g) and would not confer or imply approval for purposes of any other provision under the Act. Furthermore, such approval would be for an interim period only, until such time as the Washington permitting authorities adopt regulations consistent with regulations promulgated by EPA to implement section 112(g) of the Act.

<sup>7</sup> As stated above, as a matter of State law, once Ecology adopts air toxics permitting regulations, the local air authorities may either directly implement Ecology's regulations, may incorporate Ecology's regulations by reference or may adopt their own, more stringent regulations. The EFSEC must incorporate Ecology's regulations by reference or adopt their own regulations.

Accordingly, if Washington submits its existing air toxics permitting rules and EPA determines that such rules are approvable pending adoption of State rules implementing EPA's forthcoming section 112(g) regulations, EPA would limit the duration of such an approval to a reasonable time following promulgation of section 112(g) regulations so that the Washington permitting authorities act expeditiously to adopt regulations consistent with the section 112(g) regulations.

#### c. Delegation of Section 112

**Standards.** As discussed above, State law prohibits Washington permitting authorities from implementing and enforcing federal standards until they are adopted as State or local regulations. Therefore, the Washington permitting authorities can only request, and EPA can only grant, delegation of section 112 standards after the Washington permitting authorities adopt and submit their regulations to EPA for approval under section 112(l) of the Act.

The Washington permitting authorities have adopted all of the National Emission Standards for Hazardous Air Pollutants (NESHAP) in 40 CFR part 61 and have submitted a request for delegation of those standards in accordance with section 112(l) of the Act. Since the adopted regulations and the requests for delegation cover sources in addition to those subject to Title V, EPA will be acting on these request under separate rulemaking pursuant to the provisions of 40 CFR part 63.

**d. Commitments for Title IV Implementation.** The Washington permitting authorities have committed to adopting and submitting to EPA by January 1, 1995, a program implementing Title IV of the Clean Air Act. This commitment is supported by adequate legal authority (see RCW 70.94.161(2)(c)).

#### B. Options for Approval/Disapproval and Implications

1. Ecology, EFSEC, NWAPA, OAPCA, PSAPCA, SCAPCA, and SWAPCA

EPA is proposing to grant interim approval to the operating permit programs submitted on November 1, 1993, by Ecology, EFSEC, NWAPA, OAPCA, PSAPCA, SCAPCA, and SWAPCA.<sup>9</sup> If and when this proposed action becomes final, these permitting

authorities must make the following changes to receive full approval:<sup>9</sup>

a. **Ecology.** (1) Revise WAC 173-401-200(33), the definition of "Title I modification," to include any modification permitted through a minor source preconstruction permit. The EPA believes the phrase "modification under an provision of title I of the Act" in 40 CFR 70.7(e)(2)(i)(A)(5) is best interpreted to mean literally any change at a source that would trigger permitting authority review under regulations approved or promulgated under Title I of the Act. This would include State preconstruction review programs approved by EPA as part of the State Implementation Plan under section 110(a)(2)(C) of the Clean Air Act and regulations addressing source changes that trigger the application of NESHAP established pursuant to section 112 of the Act prior to the 1990 amendments. The EPA intends to revise its criteria for interim approval in 40 CFR 70.4(d) prior to taking final action on this proposal to grant Washington interim approval so that interim approval may be granted to State programs like Washington's that currently allow a more narrow definition of Title I modification.

As noted, EPA believes the better interpretation of "Title I modifications" would preclude granting full approval to the Washington program. However, in the proposal to revise part 70, EPA will be taking comment on whether the criteria in 40 CFR 70.7(e)(2)(i)(A), including the phrase "modification under any provision of title I," should be interpreted in a manner that would allow changes reviewed under programs approved pursuant to section 110(a)(2)(C) and changes that trigger the application of NESHAP established pursuant to section 112 prior to the 1990 Amendments to be eligible for processing through minor modification procedures. Should EPA adopt this alternative interpretation, the definition of "Title I modification" in the Washington program would then be fully consistent with Part 70.

(2) Revise RCW 70.94.430(1) to provide for maximum criminal penalties of not less than \$10,000 per day per violation, as required by 40 CFR 70.11(a)(3)(ii). Existing language appears to cap penalties for criminal violations at \$10,000. The civil penalty authority

in RCW 70.94.431(1) already meets the requirements of 40 CFR 70.11(a)(3)(i) for maximum civil penalties of not less than \$10,000 per day per violation.

(3) Revise RCW 70.94.430 to allow the imposition of criminal penalties against any person who knowingly makes any false material statement, representation or certification in any form, in any notice or report required by a permit, as required by 40 CFR 70.11(a)(3)(iii). This provision must include maximum penalties of not less than \$10,000 per day per violation.

The Attorney General's opinion states that false reporting is a criminal violation under Washington law because RCW 70.94.430(1) makes it unlawful to knowingly violate any regulations adopted under ch. 70.94 RCW, and WAC 173-401-520 requires that all application forms, reports and compliance certifications submitted pursuant to ch. 173-401 WAC contain a certification as to their truth, accuracy and completeness. This authority, however, does not appear to be as broad as that required by 40 CFR 70.11(a)(3)(iii). Knowing violation of the certification requirement of WAC 173-401-520 would be only one criminal violation even if the document which was falsely certified covered several false material statements. Under 40 CFR 70.11(a)(3)(iii), each false material statement must be subject to a criminal penalty. Moreover, accepting the State's interpretation would render the specific requirement of 40 CFR 70.11(a)(3)(iii) entirely superfluous. Because Part 70 otherwise requires States to have the provisions on which the Attorney General relies (see 40 CFR 70.5(d) and 70.11(a)(3)(ii)), no State would have to make any additional showing of the authority required by 40 CFR 70.11(a)(3)(iii) under the State's interpretation.

(4) Revise RCW 70.94.430 to allow the imposition of criminal penalties against any person who knowingly renders inaccurate any required monitoring device or method, as required by 40 CFR 70.11(a)(3)(iii). This provision must include maximum penalties of not less than \$10,000 per day per violation.

As authority for this requirement, the Attorney General's opinion states that a knowing violation of WAC 173-400-040(7), which prohibits the use of any means which conceals or masks an emission of an air contaminant, would subject the offender to criminal penalties under RCW 70.94.430(1). Again, however, this authority does not appear to be as broad as that required by 40 CFR 70.11(a)(3)(iii). WAC 173-400-040(7) only prohibits tampering that conceals air emissions; it would not

<sup>9</sup> The scope of this action does not include the issuance of permits or the enforcement of standards for sewage sludge incinerators under Section 405 of the Clean Water Act, 42 USC 1345. Delegation of sewage sludge incinerator permitting under the Clean Water Act, if requested by the State, would be considered in a separate administrative action (see 40 CFR Parts 122 and 501).

<sup>9</sup> All changes required for Ecology to receive full approval must be made before EFSEC or any local air authority may receive full approval. In addition, in order to receive full approval, EFSEC and each local air authority must make such changes to their regulations as are necessary under applicable State and local law to incorporate into their respective regulations all required changes to Ecology's operating permit program.

prohibit tampering with equipment that monitors secondary parameters, such as fuel content or production rate.

(5) Delete WAC 173-401-735(3) entirely or revise it so that it refers to RCW 34.05.570(4)(b), rather than RCW 7.16.360. Part 70 requires that State law provide a cause of action in State court for the permitting authority's failure to take final action on a permit within the specified time period (see 40 CFR 70.4(b)(3)(xi)). WAC 173-401-735(3) authorizes a person to seek a writ of mandamus in such a case "[a]s provided in chapter 7.16-RCW." Chapter 7.16 RCW, however, authorizes the issuance of a writ of mandamus only if there is no other remedy available (see RCW 7.16.360). RCW 34.05.570(4)(b) provides an express cause of action for an agency's failure to take a required action. Therefore, WAC 173-401-735(3) must be revised to delete the reference to ch. 7.16 RCW as the basis for the cause of action.

(6) Revise WAC 173-401-530(2) to define an emissions unit as insignificant only if it is subject to no federally enforceable applicable requirement and delete the last sentence in WAC 173-401-200(16) ("These units and activities are exempt from permit program requirements except as provided in WAC 173-401-530."). Under 40 CFR 70.5(c), EPA may approve as part of a State program a list of insignificant activities and emissions levels which need not be included in permit applications. However, no activity for which there is an applicable requirement may be defined as insignificant. The Washington State Implementation Plan includes several "generally" applicable requirements (e.g. a 20% opacity limit for all emission units) that apply to any and all emission points and are "applicable requirements" under the part 70 rules. Together, WAC 173-401-530(2) and the last sentence of WAC 173-401-200(16) relieve sources from the requirement of demonstrating and certifying compliance with these "generally" applicable requirements for emission units that are subject to no other applicable requirement and meet the other criteria for insignificance (e.g., size, production rate, emission level). WAC 173-401-530(1) clarifies that these insignificant activities must still comply with all requirements. WAC 173-401-530(2)(b) requires that all such generally applicable requirements to which the source is subject be listed in the application and the permit. The program, taken as a whole, substantially fulfills the requirement under 40 CFR 70.6(a)(1) that a permit include emission limitations and standards that assure

compliance with all applicable requirements.

#### b. NWAPA.

(1) Revise NWAPA Sec. 132.1 to provide for maximum criminal penalties of not less than \$10,000 per day per violation, as required by 40 CFR 70.11(a)(3)(ii). Existing language appears to cap penalties for criminal violations at \$10,000.

(2) Revise NWAPA Sec. 132 to allow the imposition of criminal penalties against any person who knowingly makes any false material statement, representation or certification in any form, in any notice or report required by a permit, as required by 40 CFR 70.11(a)(3)(iii). See discussion above in paragraph (3) of Ecology's interim approval issues.

(3) Revise NWAPA Sec. 132 to allow the imposition of criminal penalties against any person who knowingly renders inaccurate any required monitoring device or method, as required by 40 CFR 70.11(a)(3)(iii). See discussion above in paragraph (4) of Ecology's interim approval issues.

(4) Revise NWAPA Sec. 133.1 to provide for maximum civil penalties of not less than \$10,000 per day per violation in the case of violations of multiple standards by a specific emissions unit, as required by 40 CFR 70.11(a)(3). Existing language appears to cap penalties for violations of multiple standards by a specific emissions unit at \$10,000.

#### c. PSAPCA.

(1) Revise PSAPCA Reg. I, Sec. 3.13(a) to provide for maximum criminal penalties of not less than \$10,000 per day per violation, as required by 40 CFR 70.11(a)(3)(ii). Existing language appears to cap penalties for criminal violations at \$10,000.

(2) Revise PSAPCA Reg. I, Sec. 3.13 to allow the imposition of criminal penalties against any person who knowingly makes any false material statement, representation or certification in any form, in any notice or report required by a permit, as required by 40 CFR 70.11(a)(3)(iii). See discussion above in paragraph (3) of Ecology's interim approval issues.

(3) Revise PSAPCA Reg. I, Sec. 3.13 to allow the imposition of criminal penalties against any person who knowingly renders inaccurate any required monitoring device or method, as required by 40 CFR 70.11(a)(3)(iii). See discussion above in paragraph (4) of Ecology's interim approval issues.

#### d. OAPCA.

(1) Revise OAPCA Reg. 1, Sec. 3.27(b)(1) to provide for maximum criminal penalties of not less than \$10,000 per day per violation, as

required by 40 CFR 70.11(a)(3)(ii). Existing language appears to cap penalties for criminal violations at \$10,000.

(2) Revise OAPCA Reg. 1, Sec. 3.27(b) to allow the imposition of criminal penalties against any person who knowingly makes any false material statement, representation or certification in any form, in any notice or report required by a permit, as required by 40 CFR 70.11(a)(3)(iii). See discussion above in paragraph (3) of Ecology's interim approval issues.

(3) Revise OAPCA Reg. 1, Sec. 3.27(b) to allow the imposition of criminal penalties against any person who knowingly renders inaccurate any required monitoring device or method, as required by 40 CFR 70.11(a)(3)(iii). See discussion above in paragraph (4) of Ecology's interim approval issues.

(4) Revise the definition of "potential to emit" in OAPCA Reg. 1, Sec. 6.00 to provide that any physical or operational limitation on the capacity of a source to emit a pollutant shall be treated as part of its design only if the limitation is federally enforceable (see 40 CFR 70.2 (definition of potential to emit)). OAPCA regulations currently define "potential to emit" to include any such limitation that is enforceable by OAPCA.

#### e. SCAPCA.

(1) Revise SCAPCA Reg. I, Sec. 2.04(B) to eliminate the limitation on the control officer's authority to request criminal penalties to cases in which a violator has failed to correct the violation after a "reasonable and/or required period of time." Sections 70.11(a)(3)(ii) and (iii) require that States have authority to impose a criminal penalty for each day of violation. A requirement that a violator can be subject to criminal penalties only if the violator fails to correct the violation after an opportunity to comply is inconsistent with the requirements of part 70.

(2) Revise SCAPCA Reg. I, Sec. 2.11(A)(1) to provide for maximum criminal penalties of not less than \$10,000 per day per violation, as required by 40 CFR 70.11(a)(3)(ii). Under existing language, it is not clear that criminal penalties may be assessed for each day on which a violation occurs.

(3) Revise SCAPCA Reg. I, Sec. 2.11(A) to allow the imposition of criminal penalties against any person who knowingly makes any false material statement, representation or certification in any form, in any notice or report required by a permit, as required by 40 CFR 70.11(a)(3)(iii). See

discussion above in paragraph (3) of Ecology's interim approval issues.

(4) Revise SCAPCA Reg. I, Sec. 2.11(A) to allow the imposition of criminal penalties against any person who knowingly renders inaccurate any required monitoring device or method, as required by 40 CFR 70.11(a)(3)(iii). See discussion above in paragraph (4) of Ecology's interim approval issues.

f. *SWAPCA*. No changes in the SWAPCA operating permit program are necessary to receive full approval other than those that may be necessary under applicable State and local law to incorporate into SWAPCA's regulations all required changes to Ecology's operating permit program.

## 2. BFCCAA and YCCAA

a. *Required changes for interim approval*. As discussed above, there is a serious question regarding whether BFCCAA and YCCAA have effectively incorporated by reference the State operating permit rule and, if so, whether the provisions of the State operating permit rule that are inconsistent with the operating permit rules of BFCCAA and YCCAA could be enforced against a Title V source. On that basis, EPA proposes disapproval of the operating permit programs submitted by BFCCAA and YCCAA. Both of these authorities have advised EPA, however, that they intend to make all changes necessary to receive interim approval by October 1994. Based on this assurance, EPA is proposing in the alternative to grant interim approval of the operating permit programs submitted by BFCCAA and YCCAA provided that they make the following changes by the time of final action on this rulemaking:

BFCCAA. (1) Repeal BFCCAA Reg. 1, Sec. 4.01, or revise it to incorporate by reference the State operating permit regulation, ch. 173-401 WAC, adopted on October 4, 1993, as amended to incorporate any changes made by Ecology at the time BFCCAA so amends BFCCAA Reg. 1, Sec. 4.01.

(2) Repeal BFCCAA Reg. 1, Sec. 4.02, 4.04, 4.05, 4.06 and 4.07.

YCCAA. (1) Repeal YCCAA Reg. 1, Sec. 6.02, 6.04, 6.05, 6.06, 6.07 and 6.08.

(2) Revise YCCAA Reg. 1, Sec. 12.01 to provide that the identified provisions of the Washington State Administrative Code are incorporated by reference unless the YCCAA regulation is more stringent than the State regulation.

(3) Revise YCCAA Reg. 1, Sec. 12.02 so that the identified provisions of federal law are incorporated by reference regardless of whether the federal regulations are inconsistent with YCCAA regulations. Part 70 requires that all "applicable requirements" be

included in the permit (see 40 CFR 70.6(a)(1)). The term "applicable requirement" is defined to include any standard or other requirement under Sections 111 and 112 of the Act (see 40 CFR 70.2). YCCAA Reg. 1, Sec. 12.02, however, would preclude YCCAA from including a Section 111 or 112 standard in an operating permit if the YCCAA had a regulation that was less stringent than the federal standard. Therefore, YCCAA does not have the authority to include all "applicable requirements" in a permit as required by part 70.

If BFCCAA or YCCAA fails to make these required changes by the time EPA takes final action on this proposed rulemaking, EPA will disapprove the operating permit program of such local air authority in the final action. In the event of such a disapproval, Washington's Attorney General has opined that Ecology's operating permit program would apply as a matter of State law to sources located in the counties under the jurisdiction of the local air authority. On that basis, EPA intends to grant Ecology interim approval to administer the operating permit program in the event of a disapproval of either local air authority operating permit program within the jurisdiction of such local authority. Therefore, no sanctions will result from a disapproval of the operating permit program of either local air authority because all sources in the State of Washington required to have an operating permit under part 70 will be subject to either the State or a local operating permit program that will have received interim approval.

b. *Required changes for full approval*. EPA will grant BFCCAA and YCCAA interim approval of their operating permit programs provided they make the changes required in paragraph (a) above. If they receive interim approval, these local air authorities must make the following additional changes to receive full approval:<sup>10</sup>

BFCCAA. No additional changes are necessary for the BFCCAA operating permit program to receive full approval other than those that may be necessary under applicable State and local law to incorporate into BFCCAA's regulations all changes to the State operating permit program required for full approval.

<sup>10</sup>All changes required for Ecology to receive full approval must be made before BFCCAA or YCCAA may receive full approval. In addition, in order to receive full approval, BFCCAA and YCCAA must make such changes to their regulations as are necessary under applicable State and local law to incorporate into their respective regulations all required changes to Ecology's operating permit program.

YCCAA. Revise YCCAA Reg. I, Sec. 2.01, to delete the requirement that violations be "knowing." Part 70 prohibits a permitting authority from including a mental state as an element of proof for civil violations (see 40 CFR 70.11(a)(i)).

### 3. Effect of Interim Approval

Interim approval of these operating permit programs, which may not be renewed, extends for a period of up to two years.

During the interim approval period, the State is protected from sanctions for failure to have a program and EPA is not obligated to promulgate a federal permits program in the State. Permits issued under a program with interim approval have full standing with respect to part 70. In addition, the one-year deadline for submittal of permit applications by subject sources and the three-year time period for processing the initial permit applications begin upon interim approval.

## III. Administrative Requirements

### A. Request for Public Comments

The EPA is requesting comments on all aspects of this proposed interim approval. Copies of the submittals of the State and local air authorities and other information relied upon for the proposed interim approval are contained in a docket maintained at the EPA Regional Office. The docket is an organized and complete file of all the information submitted to, or otherwise considered by, EPA in the development of this proposed rulemaking. The principal purposes of the docket are:

(1) to allow interested parties a means to identify and locate documents so that they can effectively participate in the approval process, and

(2) to serve as the record in case of judicial review. EPA will consider any comments received by September 19, 1994.

### B. Executive Order 12866

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

### C. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. sections 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 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.

Operating permit program approvals under section 502 of the Act do not create any new requirements, but simply approve requirements that the State is already imposing. Therefore, because the federal operating permit program 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 regulatory flexibility analysis would constitute federal inquiry into the economic reasonableness of State action. The Act forbids EPA to base its actions concerning operating permit programs 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. 7410(a)(2).

#### List of Subjects in 40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Environmental protection, Intergovernmental relations, Operating permits, and Reporting and recordkeeping requirements.

Authority: 42 U.S.C. sections 7401-76719.

Dated: July 18, 1994.

Chuck Clarke,

Regional Administrator.

[FR Doc. 94-19774 Filed 8-17-94; 8:45 am]

BILLING CODE 6560-50-P

#### 40 CFR Part 75

[FRL-5040-2]

#### Acid Rain Program: Continuous Emissions Monitoring

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

**SUMMARY:** The EPA proposes to revise the Continuous Emission Monitoring (CEM) provisions of the Acid Rain Program for the purpose of making the implementation of the program more efficient. In the final rules section of this **Federal Register**, EPA is revising the CEM provisions as a direct final rule without prior proposal because the Agency views these provisions as noncontroversial and anticipates no adverse comments. A detailed rationale for the revisions is set forth in preamble to the direct final rule. If no adverse comments are received, the effective date of the revisions will be October 17, 1994. EPA believes that these revisions are noncontroversial because they provide a limited extension to some affected utilities to meet the

requirements of the CEM rule. The extension is beneficial to both the industry and to EPA in allowing the prioritization of limited resources for assuring the smooth implementation of the Acid Rain Program.

However, if EPA does receive adverse comments, EPA will publish a document in the **Federal Register** withdrawing the direct final rule. All public comments received will be treated as comments on this proposed rule and will be addressed in a subsequent final rulemaking notice. The EPA will not institute a second comment period on this notice. Any parties interested in commenting on this notice should do so at this time.

**DATES:** Comments on this proposed rule must be received on or before September 19, 1994.

**ADDRESSES:** Any written comments on these rule revisions must be identified with the document control number "A-94-16" and must be submitted in duplicate to: EPA Air Docket (6102), Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460.

**FOR FURTHER INFORMATION CONTACT:** Sharon Saile, CEM Section Chief, Acid Rain Division (6204J), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. (202) 233-9180.

**SUPPLEMENTARY INFORMATION:** For additional information, see the direct final rule published in the final rules Section of this **Federal Register**.

Dated: August 4, 1994.

Carol M. Browner,

Administrator, Environmental Protection Agency.

[FR Doc. 94-20168 Filed 8-17-94; 8:45 am]

BILLING CODE 6560-50-P

#### 40 CFR Part 180

[OPP-300354; FRL-4904-8]

RIN 2070-AC18

#### Methyl-1-Alkylamido Ethyl-2-Alkyl-2-Imidazolinium Methyl Sulfate; Tolerance Exemption

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

**SUMMARY:** This document proposes that methyl-1-alkylamido ethyl-2-alkyl-imidazolinium methyl sulfate, where the alkyl group (C<sub>8</sub>-C<sub>18</sub>) is derived from coconut, cottonseed, soya, tallow, or hogfat fatty acids, be exempted from the requirement of a tolerance when used as an inert ingredient (metal corrosion inhibitor, spreader-sticker) in propionic

acid formulations applied to various grains, grasses, and hays. This proposed regulation was requested by the Witco Corp.

**DATES:** Comments, identified by the document control number [OPP-300354], must be received on or before September 19, 1994.

**ADDRESSES:** By mail, submit written comments to: Public Response and Program Resources Branch, Field Operations Division (7506C) Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person deliver comments to: Rm. 1132, Crystal Mall, Bldg. #2, 1921 Jefferson Davis Hwy., Arlington, VA 22202.

Information submitted as a comment concerning this document may be claimed confidential by marking any part of all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

A copy of the comment that does not contain CBI must be submitted for inclusion in the public record.

Information not marked confidential will be included in the public docket by the EPA without prior notice. The public docket is available for public inspection in Rm. 1132 at the address given above, from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

**FOR FURTHER INFORMATION CONTACT:** By mail: Tina Levine, Registration Support Branch, Registration Division (7505W), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: 2800 Crystal Drive, North Tower, Arlington, VA 22202, (703)-308-8393.

**SUPPLEMENTARY INFORMATION:** The Witco Corp., 3200 Brookfield St., Houston, TX 77045, has submitted pesticide petition (PP) 2E4123 to EPA requesting that the Administrator, pursuant to section 408(e) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 346a(e), propose to amend 40 CFR 180.1001(c) by establishing an exemption from the requirement of a tolerance for methyl-1-alkylamido ethyl-2-alkyl-imidazolinium methyl sulfate, where the alkyl group (C<sub>8</sub>-C<sub>18</sub>) is derived from coconut, cottonseed, soya, tallow, or hogfat fatty acids, when used as an inert ingredient (metal corrosion inhibitor, spreader-sticker) in propionic acid formulations applied to various grains, grasses and hays, as specified in 40 CFR 180.1023.

Inert ingredients are all ingredients that are not active ingredients as defined in 40 CFR 153.125, and include, but are

not limited to, the following types of ingredients (except when they have a pesticidal efficacy of their own); solvents such as alcohols and hydrocarbons; surfactants such as polyoxyethylene polymers and fatty acids; carriers such as clay and diatomaceous earth; thickeners such as carrageenan and modified cellulose; wetting, spreading, and dispersing agents; propellants in aerosol dispensers; microencapsulating agents; and emulsifiers. The term "inert" is not intended to imply nontoxicity; the ingredient may or may not be chemically active.

The data submitted in the petition and other relevant material have been evaluated. As part of the EPA policy statement on inert ingredients published in the *Federal Register* of April 22, 1987 (52 FR 13305), the Agency set forth a list of studies which would generally be used to evaluate the risks posed by the presence of an inert ingredient in a pesticide formulation. However, where it can be determined without that data that the inert ingredient will present minimal or no risk, the Agency generally does not require some or all of the listed studies to rule on the proposed tolerance or exemption from the requirement of a tolerance for an inert ingredient. The Agency has decided that no data, in addition to that described below, for methyl-2-alkylamido ethyl-2-alkyl-imidazolium methyl sulfate will need to be submitted. The rationale for this decision is described below:

1. A 90-day feeding study in rats resulted in a no-observed-effect level (NOEL) of 100 mg/kg/day and a lowest-observed-effect level (LOEL) of 1,000 mg/kg/day based upon a decreased liver to body weight ratio. There were no other effects and no liver histopathology.

2. A 90-day feeding study in dogs showed a decrease in cholesterol values at dose levels greater than 4,000 ppm. However, this effect was considered an artifact of decreased food consumption. Therefore, the NOEL for systemic toxicity in this study is considered to be greater than 12,000 ppm (366 and 632 mg/kg/day for males and females, respectively).

3. A rat developmental toxicity study indicates a NOEL of 300 mg/kg/day and a LOEL of 1,000 mg/kg/day. However, at the LOEL there was only a very slight increase in the total number of litters with any kind of malformation (14% in control and 20% in the 1,000 mg/kg/day dose group) and no significant increase in the incidences of individual malformations. Thus, the true NOEL appears to lie closer to 1,000 mg/kg/day.

Based upon the above information and review of its use, EPA has found that, when used in accordance with good agricultural practice, this ingredient is useful and a tolerance is not necessary to protect the public health. Therefore, EPA proposes that the exemption from the requirement of a tolerance be established as set forth below.

Any person who has registered or submitted an application for registration of a pesticide, under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as amended, which contains any of the ingredients listed herein, may request within 30 days after publication of this document in the *Federal Register* that this rulemaking proposal be referred to an Advisory Committee in accordance with section 408(e) of the Federal Food, Drug, and Cosmetic Act.

Interested persons are invited to submit written comments on the proposed regulation. Comments must bear a notation indicating the document control number, [OPP-300354]. All written comments filed in response to this petition will be available in the Public Response and Program Resources Branch, at the address given above from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays.

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601-612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the *Federal Register* of May 4, 1981 (46 FR 24950).

#### List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Recording and recordkeeping requirements.

Dated: August 9, 1994.

Lois Rossi,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, it is proposed that 40 CFR part 180 be amended as follows:

#### PART 180—[AMENDED]

1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 346a and 371.

2. In subpart D, by adding new § 180.1133, to read as follows:

**§ 180.1133 Methyl-1-alkylamido ethyl-2-alkyl-imidazolium methyl sulfate; exemption from the requirement of a tolerance.**

Methyl-1-alkylamido ethyl-2-alkyl-imidazolium methyl sulfate, where the alkyl group (C<sub>a</sub>-C<sub>18</sub>) is derived from coconut, cottonseed, soya, tallow, or hogfat fatty acids, is exempted from the requirement of a tolerance when used as an inert ingredient (metal corrosion inhibitor, spreader-sticker) in propionic acid formulations applied to various grains, grasses, and hays, as specified in 40 CFR 180.1023.

[FR Doc. 94-20326 Filed 8-17-94; 8:45 am]

BILLING CODE 5560-50-F

#### DEPARTMENT OF HEALTH AND HUMAN SERVICES

##### Public Health Service

##### 42 CFR Part 2

RIN 0905-AD97

##### Alcohol and Drug Abuse Patient Records

AGENCY: Substance Abuse and Mental Health Services Administration, PHS, HHS.

ACTION: Notice of proposed rulemaking.

**SUMMARY:** The Department is proposing a clarification to the regulations which govern the confidentiality of alcohol and drug abuse records. Specifically, the Department is proposing to clarify that, as to general medical care facilities, these regulations that hold themselves out as providing and provide alcohol or drug abuse diagnosis, treatment or referral for treatment and which are federally assisted, directly or indirectly.

**DATES:** Written comments must be received on or before October 17, 1994.

**ADDRESSES:** Written comments on these proposed rules may be sent to Sue Martone, SAMHSA, Room 12C15, 5600 Fishers Lane, Rockville, Maryland 20857.

**FOR FURTHER INFORMATION:** Sue Martone, Telephone (301) 443-4640.

**SUPPLEMENTARY INFORMATION:** The "Confidentiality of Alcohol and Drug Abuse Patient Records" regulations, 42 CFR part 2, implement section 543 of the Public Health Service Act, 42 U.S.C.

290dd-2, as amended by section 131 of the ADAMHA Reorganization Act, Public Law 102-321 (July 10, 1992). The regulations were promulgated as a final rule on July 1, 1975 (40 FR 27802) and amended on June 9, 1987 (52 FR 21798).

The purpose of this notice is to clarify the ambiguity in the regulations regarding the definition of "program." This ambiguity was identified in the case *United States v. Eide*, 875 F. 2d 1429, 1438 (9th Cir. 1989), where the court held that the Veterans Administration Medical Center's (VAMC) general emergency room is a "program" as defined by the regulations. In reaching this conclusion, the court relied on the clause that "(p)rogram means a person which in whole or in part holds itself out as providing, and provides, alcohol or drug abuse diagnosis, treatment, or referral for treatment." *Id.* The court ruled that the VAMC was a "person" which is defined at § 2.12 to mean "an individual, \* \* \* Federal, State or local government or any other legal entity," and concluded that "(a) hospital emergency room, while obviously also performing functions unrelated to drug abuse, serves as a vital first link in drug abuse diagnosis, treatment and referral." *Id.*

The Department believes this interpretation too broadly defines the term "program." It is the Department's position that "program" encompasses only (1) An individual or entity (other than a general medical facility) who holds itself out as providing, and provides, alcohol or drug abuse diagnosis, treatment or referral for treatment; or (2) an identified unit within a general medical facility which holds itself out as providing and provides alcohol or drug abuse diagnosis, treatment or referral for treatment; or (3) medical personnel or other staff in a general medical care facility whose primary function is the provision of alcohol or drug abuse diagnosis, treatment or referral for treatment and who are identified as such providers.

This was the intent of the revisions made to the regulations in 1987. See 52 FR 21796, 21797 (June 9, 1987). Prior to the 1987 amendments, the regulations applied to any record relating to substance abuse whether the information was obtained from an emergency room, a general medical unit or a general practitioner so long as there was a Federal nexus. In 1987, however, it was the intent of the Department to limit the applicability of the regulations to specialized programs and personnel so as to simplify administration of the

regulations. It was the Department's position that this limitation would not significantly affect the incentive to seek treatment provided by the confidentiality protection. See 52 FR at 21797. Furthermore, the Department questioned whether applicability of the regulations to general medical care facilities addressed the intent of Congress to enhance treatment incentives for alcohol and drug abuse, since many substance abuse patients are treated in a general medical care facility not because they have made a decision to seek substance abuse treatment, but because they have suffered a trauma or have an acute condition with a primary diagnosis of something other than substance abuse. *Id.*

Accordingly, as to general medical facilities, it is the Department's position that the regulations apply only to discrete, identifiable units providing alcohol or drug abuse treatment, diagnosis or referral for treatment or specialized personnel who are identified as providing such services as a primary function. By way of example, these regulations do not apply to alcohol or drug abuse prevention programs, whether based in general care facilities or otherwise, which do not hold themselves out to the community as providing alcohol or drug abuse diagnosis, treatment or referral for treatment, even though such programs may occasionally refer individuals to treatment for substance abuse as an incidental function of the prevention program. Nor do they apply to emergency room personnel who may treat substance abusers who need medical attention, unless the provision of alcohol and drug abuse diagnosis, treatment or referral for treatment is the primary function of such staff and they have been identified as providing such services, or the emergency room as a whole has promoted itself to the community as providing such services. Finally, these regulations do not apply to physicians or other medical personnel in a general medical facility who are not identified as providing such services even though they may occasionally provide drug abuse services, such as referral.

These regulations do, however, apply to federally assisted specialized drug and alcohol treatment units in general medical facilities and to identified personnel whose primary function is the provision of such services. For example, although the regulations would not ordinarily apply to a staff physician of an emergency room or an intensive care unit who refers an overdose patient to a drug abuse treatment practitioner, they would apply to a drug abuse treatment

practitioner whose primary function is to provide such services.

This notice would also update the authority citation to reflect that 42 U.S.C. 290dd-3 and 290ee-3 were amended by section 131 of the ADAMHA Reorganization Act, Public Law 102-321 (July 10, 1992), 42 U.S.C. 290dd-2.

#### Executive Order 12866

Executive Order 12866 requires that all regulatory actions reflect consideration of the costs and benefits they generate, and that they meet certain standards, such as avoiding the imposition of unnecessary burdens on the affected public. If a regulatory action is deemed to fall within the scope of the definition of the term "significant regulatory action" contained in section 3(f) of the Order, pre-publication review by the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) is necessary. OIRA has thus reviewed this NPRM under the Order.

#### Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 requires that we analyze regulatory proposals to determine whether they create a significant impact on a substantial number of small entities. The Secretary certifies that any final rule resulting from this proposal will not have any such impact.

#### Paperwork Reduction Act

There are no paperwork requirements in this proposal subject to Office of Management and Budget approval under the Paperwork Reduction Act of 1980.

#### List of Subjects in 42 CFR Part 2

Alcohol abuse, Alcoholism, Confidentiality, Drug Abuse, Health records, Privacy.

Dated: March 16, 1994.

Philip R. Lee,  
Assistant Secretary for Health.

Approved: June 27, 1994.

Donna E. Shalala,  
Secretary.

For the reasons set out in the preamble, the Department proposes to amend part 2 of title 42, Code of Federal Regulations, as follows:

#### PART 2—[AMENDED]

1. The authority citation for Part 2 is revised to read as follows:

**Authority:** Sec. 408 of Pub. L. 92-255, 86 Stat. 79, as amended by sec. 303 (a), (b) of Pub. L. 93-282, 83 Stat. 137, 138; sec. 4(c)(5)(A) of Pub. L. 94-237, 90 Stat. 244; sec.

111(c)(3) of Pub. L. 94-581, 90 Stat. 2852; sec. 509 of Pub. L. 96-88, 93 Stat. 695; sec. 973(d) of Pub. L. 97-35, 95 Stat. 598; and transferred to sec. 527 of the Public Health Service Act by sec. 2(b)(16)(B) of Pub. L. 98-24, 97 Stat. 182 and as amended by sec. 106 of Pub. L. 99-401, 100 Stat. 907 (42 U.S.C. 290ee-3) and sec. 333 of Pub. L. 91-616, 84 Stat. 1853, as amended by sec. 122(a) of Pub. L. 93-282, 88 Stat. 131; and sec. 111(c)(4) of Pub. L. 94-581, 90 Stat. 2852 and transferred to sec. 523 of the Public Health Service Act by sec. 2(b)(13) of Pub. L. 98-24, 97 Stat. 181 and as amended by sec. 106 of Pub. L. 99-401, 100 Stat. 907 (42 U.S.C. 290dd-3), as amended by sec. 131 of Pub. L. 102-321, 106 Stat. 368, (42 U.S.C. 290dd-1).

§2.11 [Amended]

2. In Section 2.11, the definition of Program is revised to read as follows:

\* \* \* \* \*

Program means:

(1) An individual or entity (other than a general medical care facility) who holds itself out as providing, and provides, alcohol or drug abuse diagnosis, treatment or referral for treatment; or

(2) An identified unit within a general medical facility which holds itself out as providing, and provides, alcohol or drug abuse diagnosis, treatment or referral for treatment; or

(3) Medical personnel or other staff in a general medical care facility whose primary function is the provision of alcohol or drug abuse diagnosis, treatment or referral for treatment and who are identified as such providers. (See § 2.12(e)(1) for example).

\* \* \* \* \*

§2.12 [Amended]

3. Section 2.12(e)(1) is amended by adding the following sentence at the end to read as follows:

\* \* \* \* \*

(e) \* \* \* (1) \* \* \* However, these regulations would not apply, for example, to emergency room personnel who refer a patient to the intensive care unit for an apparent overdose, unless the primary function of such personnel is the provision of alcohol or drug abuse diagnosis, treatment or referral and they are identified as providing such services or the emergency room has promoted itself to the community as a provider of such services.

\* \* \* \* \*

[FR Doc. 94-20226 Filed 8-17-94; 8:45 am]

BILLING CODE 4160-20-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 22 and 90

[GN Docket No. 94-90, FCC 94-202]

Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band and Use of Radio Dispatch Communications

AGENCY: Federal Communications Commission.

ACTION: Notice of proposed rule making.

SUMMARY: In this Notice of Proposed Rule Making (NPRM), the Commission proposes to eliminate the rules that now prohibit wireline telephone carriers from holding licenses in the Specialized Mobile Radio (SMR) service and the commercial 220-222 MHz land mobile band. The NPRM also proposes to eliminate the current prohibition on the provision of dispatch service by cellular licensees and other licensees in the Public Mobile Services.

DATES: Comments are due by September 21, 1994 and reply comments are due by October 6, 1994.

ADDRESSES: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Kathleen O'Brien Ham or Susan McNeil, Private Radio Bureau, Land Mobile and Microwave Division, (202) 632-2443.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's NPRM in GN Docket No. 94-90, adopted August 2, 1994 and released August 11, 1994. The full text of Commission decisions are available for inspection and copying during normal business hours in the FCC Docket Branch (Room 230), 1919 M Street, N.W., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857-3800, 2100 M Street, N.W., Washington, DC 20554.

Synopsis of the Notice of Proposed Rule Making

I. Background

A. Wireline Restrictions

1. When the Commission established the SMR service in 1974, it elected to prohibit wireline telephone common carriers from holding SMR base station licenses. Because of the dominance of the established wireline carriers in the 1970's, the Commission viewed the prohibition on wireline entry as consistent with promoting competition in the fledgling SMR industry. The

Commission has also stated that the wireline prohibition was intended to ensure that SMRs would be available as a business opportunity for small entrepreneurs and to reduce incentives for wireline carriers to engage in discriminatory interconnection practices.

2. When 220-222 MHz service was established in 1991, the Commission adopted an identical restriction on wireline eligibility for commercial licenses in that service. The Commission indicated that the rationale for excluding wirelines from SMR licensing also served as the basis for the 220 MHz limitation.

3. In 1986, the Commission issued a Notice of Proposed Rule Making in PR Docket No. 86-3 that proposed to eliminate the SMR wireline restriction. The proceeding was terminated in 1992 on the grounds that the record has become stale. The Commission stated that the wireline restriction should be retained at least until the Commission could more fully evaluate "the competitive potential of private land mobile services vis-a-vis common carrier land mobile providers" so as "to preserve a climate favorable to the continued development of private land mobile competitors."

B. Dispatch Prohibition

4. The Commission currently prohibits common carriers licensed after January 1, 1982, including all cellular licensees, from offering dispatch services. The Commission has since construed the prohibition on dispatch services to include any transmission on cellular frequencies that routes communications through a dispatcher, as opposed to through a cellular switch (i.e., with no intervention by a dispatcher). On the other hand, the Commission has allowed "dispatch-type" communications to be offered through the cellular switched network as long as the communication is not directly between a dispatcher and end user.

II. Discussion

A. Licensee Eligibility in SMR and 220 MHz Commercial Service

5. In evaluating its present wireline restrictions, the Commission tentatively concludes that there is no longer a need for the SMR wireline ban or the commercial 220 MHz wireline restriction in today's competitive mobile service marketplace. First, the Commission notes that the risk of wireline carriers being able to cause competitive harm if allowed to enter the SMR market has diminished in recent

years. When the SMR wireline ban was adopted 20 years ago, mobile services were in their infancy and telecommunications was dominated by wireline carriers under the control of AT&T. Since that time, the breakup of AT&T and the rapid growth of mobile services have combined to create an environment in which wireline carrier participation in mobile services, including participation by the post-divestiture BOCs, has the potential to increase competition rather than impede it.

6. In the Broadband PCS docket, the Commission recently concluded that wireline entities should be allowed to hold broadband PCS licenses without restriction (except to the extent such entities also hold cellular interests). In that proceeding, the Commission determined that wireline participation would produce significant economies of scope between wireline and PCS networks, which, in turn, would promote rapid development of PCS and yield a broader array of PCS services at lower costs to consumers. The Commission has similarly concluded that LECs should be allowed to participate in the provision of narrowband PCS service without restriction. The Commission notes that its conclusions with respect to wireline entry into broadband and narrowband PCS are also potentially applicable to SMR and 220 MHz commercial service.

7. The Commission also questions whether the wireline restriction continues to be necessary to protect against competitive harm. The wireline restrictions have served to eliminate any incentive for LECs to: (1) Discriminate in the offering of interconnection to nonaffiliated SMR licensees, or (2) use their market power in the local exchange market to cross-subsidize SMR services, thereby undercutting potential competition. Even if the wireline prohibition is eliminated, however, other regulatory safeguards exist and can be enforced to prevent wireline from engaging in these forms of anti-competitive behavior.

8. With respect to discrimination in interconnection, Section 201 of the Communications Act mandates that a carrier must provide reasonable interconnection to any carrier that requests it. In addition, Section 332(c)(1)(B) of the Communications Act, as amended by the Budget Act, requires the Commission pursuant to Section 201 to order common carriers to interconnect with CMRS providers (which includes any SMR or commercial 220 MHz licensee utilizing interconnection) on reasonable request. In its Order implementing this

provision, the Commission determined that LECs should provide reasonable interconnection to all CMRS providers in a manner that is consistent with past requirements for cellular providers. In addition, the Commission requires LECs to offer interconnection to PMRS providers.

9. The Commission also notes that independent accounting safeguards exist to protect against cross-subsidization in the event of wireline entry into the SMR service. In the CMRS docket, the Commission indicated that the joint cost and affiliate transaction rules would apply to all CMRS providers with LEC affiliates. These rules require LECs to maintain procedures to separate the costs of the regulated activities from those of their activities that are classified as nonregulated for federal accounting purposes, and to account for their transactions with their nonregulated affiliates. Since most SMRs and commercial 220 MHz licensees fall inside the CMRS definition, these existing and applicable accounting rules should help prevent cross-subsidization.

10. Another reason for eliminating the wireline prohibition is that the SMR industry is sufficiently well-established that wireline entry is unlikely to chill further development of the service. Although SMR operations today are still relatively small in comparison to cellular operations, most available SMR spectrum has been licensed in metropolitan areas. Thus, any threat that wirelines might obtain a substantial portion of SMR spectrum and thereby hinder the development of SMR service by non-wireline carriers is substantially diminished. As a practical matter, wirelines are likely to be largely limited to entering the SMR business by acquiring existing SMR businesses, and all such transfers would be subject to Commission review under existing transfer and control rules.

11. The Commission reached a similar tentative conclusion with respect to wireline participation in commercial 220 MHz service. Although 220 MHz service was established more recently than SMR, substantial licensing has occurred and the service is closed to new applicants for the time being. Thus, wireline entry into commercial 220 MHz service would be likely to be gradual as the service develops, and would be subject to case-by-case review by the Commission. In addition, a more open eligibility policy may be suitable because of the narrowband nature of 220 MHz service. In establishing regulations for the licensing of narrowband PCS, for example, the Commission concluded that LECs should be allowed to

participate in the provision of narrowband PCS service without restriction. The Commission reasoned that narrowband PCS was sufficiently disparate from any LEC offering to make negligible any ability these carriers might have to exert undue market power or restrain trade. The Commission solicits comment on whether a similar conclusion is justified in the case of 220 MHz service.

12. Additionally, repeal of the wireline ban could promote opportunities for small entrepreneurs as well as infuse new capital and expertise into the mobile services marketplace. In its request for rule making, Polar Communications suggested that the overwhelming majority of companies shut out of the SMR business by the wireline ban are small, rural telephone companies with capitalizations that are small in comparison to many dominant SMR operators. Repeal of the ban could therefore serve to further competition in the SMR market by increasing the number of small business participants in the service. Future auctions of SMR spectrum could provide additional opportunities for small business entry into SMRS through competitive bidding incentives established for small businesses, minorities, and rural telephone companies.

13. In addition, wireline entry could infuse new capital and expertise into the mobile services marketplace. The SMR industry is in transition, evolving from stand-alone analog to wide-area networks. 220 MHz is also an important stage of technological development. During this time frame, wirelines can be a key source of capital and expertise for the development of new technological advances that will benefit these services.

14. The Commission concludes that the wireline restrictions have been outmoded by changes in the mobile services marketplace since 1974 and that there may be cause to eliminate these restrictions. Commenters are nevertheless invited to present any views that justify retaining the wireline restrictions. In particular, the Commission is interested in any concerns commenters may have about the potential ability of wirelines to unfairly influence competition in the mobile services marketplace. In addition, commenters may wish to address the alternative of retaining the restrictions for one service and not the other.

15. In proposing to allow wirelines to enter the SMR and commercial 220 MHz markets, the Commission emphasizes its intent to vigorously enforce statutory and regulatory safeguards discussed

above that prohibit wirelines from engaging in discriminatory interconnection practices. Commenters are encouraged to address how to best achieve this objective.

16. Also, assuming the wireline restrictions are repealed, the Commission seeks comment on whether existing accounting safeguards applicable to LECs with CMRS operations are sufficient to protect against cross-subsidization and discriminatory pricing, or whether structural separation requirements should also be imposed. In the Broadband PCS Second Report and Order, the Commission confirmed that the accounting safeguards would apply to PCS but concluded that no new subsidiary rules should be required because it would seriously undermine the ability of LECs to take advantage of their potential economics of scope and would jeopardize other public interest benefits of wireline participation in PCS. Commenters should address whether added structural separation requirements would similarly undermine the potential public interest benefits of wireline entry into the SMR and commercial 220 MHz markets.

17. Finally, assuming that the wireline restriction is eliminated, the issue arises whether there is a need to impose other eligibility restrictions on SMR and commercial 220 MHz applicants to address present day competitive concerns. In particular, the Commission has recognized in other contexts that it cannot yet determine that cellular licensees lack market power in the mobile services market. The Commission will defer consideration of whether this market power is sufficient to justify restrictions on cellular eligibility for SMR or 220 MHz licensing pending a decision in General Docket 93-252 on a proposal to impose a general limit on the amount of spectrum that any CMRS licensee may acquire in a given geographic market.

#### B. Common Carrier Dispatch Prohibition

18. The Commission proposes to amend its rules to permit all mobile service common carriers to provide dispatch service. A number of parties have indicated in the past that repeal of the dispatch ban would enhance competition in the dispatch market and thereby provide consumers with expanded choice. The Commission tentatively agrees with these views and therefore is included to repeal the present prohibition entirely. Commenters should address the Commission's conclusion that repeal of the dispatch ban will lead to more innovative service offerings and lower

costs for dispatch customers. The Commission also seeks comment on whether repeal of the ban will increase opportunities for dispatch customers to obtain service from commercial vendors as an alternative to relying on internal systems or systems shared with other eligible users.

19. The Commission also encourages commenters to provide data on the current state of competition in the dispatch market, including the level of participation by small businesses. Commenters are also asked to address the potential for participation in the dispatch market by mobile service common carriers, including (1) types of dispatch services that common carrier licensees are most likely to offer, (2) any technical advantages or disadvantages to offering dispatch service on a common carrier mobile service system, and (3) the effect of common carrier entry on competition in the dispatch market. Commenters should further consider whether common carriers operating in the dispatch market could engage in discriminatory pricing or cross-subsidization activities that would place dispatch competitors at a disadvantage.

20. If the Commission concludes that immediate lifting of the dispatch prohibition could have an anti-competitive impact, one alternative would be to "sunset" the rule at some point in the future. For example, the Commission could delay repeal of the rule until August 10, 1996, three years from the date the Budget Act amendments became law. This effective date would coincide with the conclusion of the three year transition period provided in the Budget Act for existing private land mobile licensees to adjust to regulation as CMRS providers. A sunset provision would also effectively defer cellular participation in the dispatch market and thereby give the Commission more time to evaluate information concerning the state of competition in the dispatch market. The Commission seeks comment on this alternative.

21. Another alternative to outright repeal of the ban on common carrier dispatch service would be to allow mobile common carrier licensees to provide dispatch service only on a secondary basis or to impose a limit on the amount of system capacity that common carrier licensees may devote to dispatch service. Consumers appear to identify cellular as primarily a two-way service, therefore cellular providers may in any case be reluctant to divert system capacity from voice to dispatch service. On the other hand, if dispatch evolves from a primarily analog service to a primarily digital service, cellular

licensees may have ample capacity to provide both radiotelephone and dispatch. In light of these factors, the Commission seeks comment on whether imposing limits on cellular dispatch is necessary or practical.

22. Finally, the Commission asks commenters to consider the treatment of dispatch offered by common carriers other than land mobile service providers, e.g. aviation, marine, and mobile satellite licensees who provide common carrier service. These categories of common carriers were not previously prohibited from offering dispatch service under old Section 332 of the Communications Act, which applied only to land mobile services. Because Section 332 as amended applies to all mobile services, however, an issue arises whether these categories of licensees now fall within the scope of the prohibition absent further Commission action. The Commission believes that Congress did not intend to extend the dispatch ban to non-land mobile licensees but meant simply to repeat and incorporate its old prohibition against common carrier land mobile service providers offering dispatch without modification and to give the Commission authority to repeal the prohibition in whole or in part. The Commission seeks comment on this view.

### III. Procedural Matters

23. *Initial Regulatory Flexibility Analysis.* Pursuant to Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact of the proposed rule changes on small entities. Written public comments are requested on the IRFA.

I. *Reason for Action.* This rule making proceeding was initiated to solicit comment on proposals to amend Sections 90.603(c), 90.703, 22.519(a) and 22.911(d) of the Commission's rules. The basic proposals are (1) Repeal the ban on wireline telephone carrier eligibility for Specialized Mobile Radio Service (SMR) and commercial 220-222 MHz (commercial 220 MHz) land mobile service and (2) permit all commercial mobile service providers to offer dispatch service in competition with SMR systems.

II. *Objectives.* In making the above proposals, the Commission intends to promote competition, growth and innovation at a time when the mobile services marketplace is undergoing regulatory changes.

III. *Legal Basis.* The proposed action is authorized under Sections 3(n), 4(i), 303(r), 332(c), and 32(d) of the

Communications Act of 1934, 47 U.S.C. 153(n), 154(i) and 303(r), 332(c) and 332(d), as amended.

IV. *Reporting, Recordkeeping and Other Compliance Requirements.* None.

V. *Federal Rules Which Overlap, Duplicate or Conflict With Rules.* None.

VI. *Description, Potential Impact, and Number of Small Entities Involved.*

Many small entities could be affected by the proposals contained in the *Notice*. The full extent of the impact cannot be predicted until the issues presented in this proceeding are resolved. The Commission will evaluate comments in response to the *Notice* and will set forth its findings on the impact of the rule changes on small entities in the Final Regulatory Flexibility Analysis.

VII. *Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives.*

The *Notice* solicits comments on the alternative described above. Any additional significant alternatives presented in the comments will also be considered.

24. *Ex Parte Rules/Non-Restricted Proceeding.* This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. See generally 47 CFR 1.1202, 1.1203, 1.120(a).

25. *Comment Period.* For filing requirements, see generally 47 CFR 1.415, 1.419. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting materials. If you want each Commissioner to receive a personal copy of your comments, you must file an original and nine copies. Send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition, commenters are requested to submit courtesy copies to the Chief, Land Mobile and Microwave Division, Private Radio Bureau, 2025 M Street, N.W., Room 5202, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) at the Commission's headquarters at 1919 M Street, N.W., Washington, D.C.

26. *Paperwork Reduction Act:* No significant impact.

#### List of Subjects

47 CFR Part 22

Public mobile services; Radio.

#### 47 CFR Part 90

Private land mobile services; Radio.

William F. Caton,

Acting Secretary.

[FR Doc. 94-19990 Filed 8-17-94; 8:45 am]

BILLING CODE 6712-01-M

### DEPARTMENT OF DEFENSE

#### 48 CFR Parts 204 and 253

#### Defense Federal Acquisition Regulation Supplement; Uniform Procurement Instrument Identification Numbers

AGENCY: Department of Defense (DoD).

ACTION: Proposed rule and request for comments.

**SUMMARY:** The Defense Acquisition Regulations (DAR) Council is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to revise the numbering system for identifying Department of Defense (DoD) orders placed against another DoD activity's contracts and to replace the DoD activity address numbers with DoD activity address codes.

**DATES:** Comments on the proposed rule should be submitted in writing to the address shown below on or before September 19, 1994, to be considered in the formulation of the final rule.

**ADDRESSES:** Interested parties should submit written comments to: Defense Acquisition Regulations Council, ATTN: Mrs. Linda Holcombe, PDUSD(A&T)DP(DAR), IMD 3D139, 3062 Defense Pentagon, Washington DC 20301-3062. Please cite DFARS Case 92-D044 in all correspondence related to this issue.

**FOR FURTHER INFORMATION CONTACT:** Ms. Linda S. Holcombe, Procurement Analyst, DAR Council, (703) 604-5929, FAX No. (703) 604-5971.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

For information and planning purposes, a proposed revision to the DFARS uniform procurement instrument identification numbering system was included as Attachment 1 to the Defense Acquisition Circular 91-1. The proposed revisions to DFARS Subparts 204 and 253 differ substantially from those Attachment 1 revisions and provide a streamlined, uniform system for identifying orders placed against another activity's contracts as well as a uniform system of identifying contracting activities through use of the DoD activity address codes with are universal throughout

supply, logistics and procurement organizations.

#### B. Regulatory Flexibility Act

The proposed rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et. seq.* because the numbering system proposed for DoD orders placed against another DoD activity's contracts is identical to that presently in use throughout DoD when numbering orders placed against contracts issued outside of DoD. The change from use of the DoD activity address numbers listed in DFARS Appendix G, to the use of existing DoD activity address codes prescribed by DoD 4000.25-6-M, DoD Activity Address Directory, does not affect the public because it merely changes the characters used to identify particular contracting activities. No new requirements are being imposed on the public. An Initial Regulatory Flexibility Analysis has therefore not been performed. The proposed rule applies to both large and small businesses. Comments are invited from small businesses and other interested parties. Comments from small entities will be considered in accordance with 5 U.S.C. 610. Such comments must be submitted separately and cite DFARS Case 92-D044 in all correspondence.

#### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed rule does not impose reporting or recordkeeping requirements which require the approval of OMB under 44 U.S.C. 3501, *et. seq.*

#### List of Subjects in 48 CFR Parts 204 and 253

Government procurement.

Claudia L. Naugle,

Deputy Director, Defense Acquisition Regulations Council.

Therefore, it is proposed that 48 CFR Parts 204 and 253 be amended as follows:

1. The authority citation for 48 CFR Parts 204 and 253 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

#### PART 204—ADMINISTRATIVE MATTERS

2. Section 204.7000 is revised to read as follows:

##### 204.7000 Scope.

This subpart prescribes policies and procedures for assigning numbers to all

solicitations, contracts, and related instruments. This subpart—

(a) Does not apply to solicitations or contracts issued by the Defense Commercials Communications Office of the Defense Information Systems Agency; and

(b) Is optional for solicitations and contracts that will be completely administered and paid by purchasing office or the consignee, except that—

(1) The procurement instrument identification (PII) number, including modification numbers, shall not exceed 26 characters (excluding hyphens); and

(2) The number shall begin with the DoD activity address code (DODAAC) of the office issuing the instrument and the fiscal year in accordance with 204.7003(a) (1) and (2).

3. Section 204.7002 is revised to read as follows:

#### 204.7002 Procedures.

(a) In assigning PII numbers—

(1) Use only the alpha-numeric characters, as prescribed in this subpart; and

(2) Do not use the letters "I" or "O".

(b) If department/agency procedures require other identification on the solicitation, contract, or other related instrument forms, enter it in such a location so as to separate it clearly from the PII number.

(c) Enter the basic PII number and any supplementary numbers in the spaces provided on the solicitation, contract, or related instrument forms. Separate the major elements by dashes, e.g., N00023-90-D-0009. If there is insufficient space provided on the form, enter the number in the upper right corner of the form and identify what it is (e.g., Supplementary PII Number N00023-90-F-0120). When issuing calls/orders against a non-DoD contract, Federal Supply Schedule or agreement, treat the non-DoD contract, schedule or agreement number as if it is a basic PII number for the purpose of

completing solicitation, contract or related forms.

4. Section 204.7003 is revised to read as follows:

#### 204.7003 Basic PII number (issued by a DoD activity).

(a) *Elements of a number.* The number consists of 13 alpha-numeric characters grouped to convey certain information.

(1) *Positions 1 through 6.*

The first six positions identify the office issuing the instrument. Use the six-position alpha/numeric DoD activity address code as prescribed by DoD 4000.25-6-M, DoD Activity Address Directory.

(2) *Positions 7 through 8.*

The seventh and eighth positions are the last two digits of the fiscal year in which the PII number is assigned.

(3) *Position 9.*

Indicate the type of instrument by entering one of the following upper case letters in position nine—

(i) Blanket purchase agreements—A

(ii) Invitations for bids—B

(iii) Contracts of all types except indefinite delivery contracts, facilities contracts, sales contracts, and contracts placed with or through other Government departments or agencies.—C

(iv) Indefinite delivery contracts—D

(v) Facilities contracts—E

(vi) Contracting actions placed with or through other Government departments or agencies or against contracts placed by such departments or agencies outside the DoD (including actions placed using the Procurement List published by the Committee for the Purchase from the Blind and Other Severely Handicapped. This letter is also used in supplementary PII numbers. See 204.7004(a)(2)(iii)(B).)—F

(vii) Basic ordering agreements—G

(viii) Agreements, including basic agreements and loan agreements, but excluding blanket purchase agreements,

basic ordering agreements, and leases—H

(ix) (Do not use)—I

(x) (Do not use. This letter is used only in supplementary PII numbers. See 204.7004(a)(2)(iii)(A).)—J

(xi) Short form research contract—K

(xii) Lease agreement—L

(xiii) Purchase orders—Manual (assign W when numbering capacity of M is exhausted during the fiscal year)—M

(xiv) Notice of intent to purchase—N

(xv) (Do not use)—O

(xvi) Purchase order—automated (assign V when numbering capacity of P is exhausted during a fiscal year)—P

(xvii) Request for quotation—manual—Q

(xviii) Request for proposal—R

(xix) Sales contract—S

(xx) Request for quotation—automated (assign U when numbering capacity of T is exhausted during a fiscal year)—T

(xxi) (See T)—U

(xxii) (See P)—V

(xxiii) (See M)—W

(xxiv) (Reserved for departmental use)—X

(xxv) Imprest fund—Y

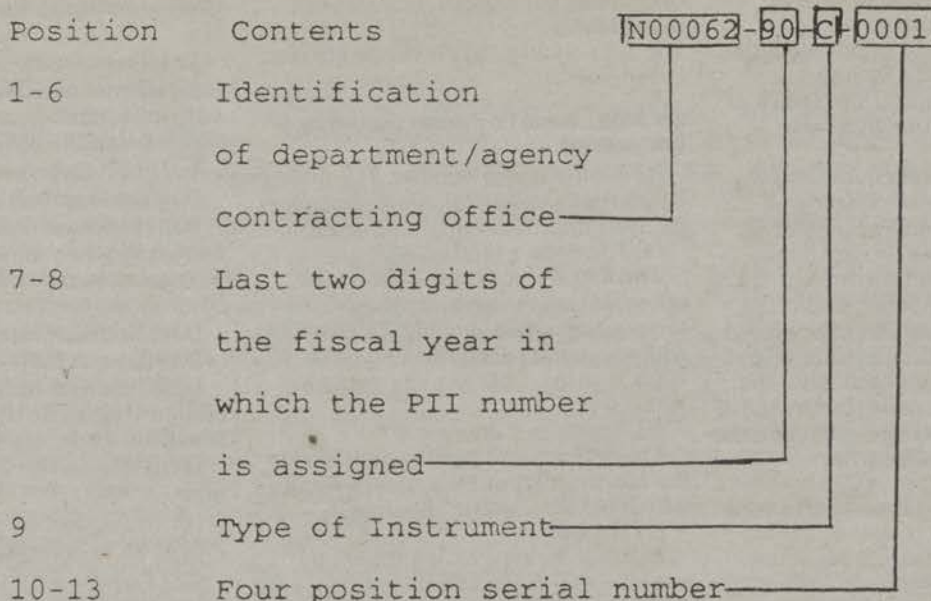
(xxvi) Reserved for departmental use—Z

(4) *Positions 10 through 13.*

Enter the unique serial number of the instrument in these positions. A separate series of unique serial numbers may be used for any type of instrument listed in paragraph (a)(3) of this section. Activities shall assign such series of PII numbers sequentially. An activity may reserve blocks of serial numbers for use by its various components.

(b) *Illustration of PII number.* The following illustrates a properly configured PII number—

BILLING CODE 5000-04-M



**BILLING CODE 5000-04-C**

5. Section 204.7004 is revised to read as follows:

**204.7004 Supplementary PII (SPII) numbers.**

Use supplementary numbers with the basic PII number, to identify—

(a) *Delivery orders under indefinite delivery contracts, orders under basic ordering agreements, calls under blanket purchase agreements, and DOD orders against Federal Supply Schedule contracts.*

(1) *Orders or calls issued by the office identified in the basic PII number.* Use a four-position alpha-numeric serial number added to the basic PII number. Use serial numbers beginning with 0001 and continuing through 9999. When the numeric identifiers run out, use alpha characters or a combination of alpha and numeric characters (but do not use alpha characters "I" or "O").

(2) *Orders or calls issued by an office other than the office identified in the basic PII number.* Construct a 13-position supplementary PII number as follows:

(i) *Positions 1 through 6.* To identify the office issuing the order or call, use the six-position alpha-numeric DoD Activity Address Code (DODAAC) prescribed by DoD 4000.25-6-M, DoD Activity Address Directory.

(ii) *Positions 7 and 8.*

Use the last two digits of the fiscal year in which the SPII number is assigned.

(iii) *Position 9.*

(A) For orders or calls placed against a contract or agreement issued by a

department or agency within DoD, enter an upper case J.

(B) For orders or calls placed against a contract or agreement issued by a department or agency outside DoD, enter an upper case F.

(iv) *Positions 10 through 13.*

Enter the unique serial number beginning with 0001 and continuing through 9999. Each office issuing orders or calls may assign a separate series of unique serial numbers for the J or F instrument types listed in (iii). When the numeric identifiers run out, use alpha characters as follows: A000-ZZZZ, except do not use the letters "I" and "O".

Activities shall assign such series of SPII numbers sequentially. An activity may reserve blocks of serial numbers for use by its various components.

(b) *Amendments to solicitations.*

Number amendments to solicitations sequentially using a four-position numeric serial number added to the basic PII number and beginning with 0001, e.g., N00062-91-R-1234-0001.

(c) *Modifications to contracts and agreements.*

(1) Number modifications to contracts and agreements using a six-position alpha-numeric serial number added to the basic PII number.

(2) *Position 1.*

Identify the office issuing the modification—

(i) Contract administration office

(ii) Contracting office

(3) *Position 2.*

Identify Air Force provisioned orders, initial or amended shipping instructions meeting the conditions given below, and definition of letter contracts by using

only the letters prescribed below. If none of the following situations apply, then assign the modification a serial number using positions two through six, but do not use I, K through Q or S through Z in this position two. See examples in paragraph (c)(5) of this section.

(i) Use K, L, M, N, P or Q in position two if the modification is issued by the Air Force and is a provisioned item order.

(ii) Use S in position two if the modification provides initial or amended shipping instructions and the price changes.

(iii) Use T, U, V, W, X or Y in position two if the modification provides initial or amended shipping instructions when the contract has f.o.b origin delivery terms and the price does not change.

(iv) Use Z in position two if the modification definitizes a letter contract.

(4) *Positions 3 through 6.*

Use a separate series of serial numbers for each type of modification listed in paragraph (c)(3) of this section.

(5) Examples of proper numbering for positions 2-6 (the first position will be either "A" or "P") are as follows:

| Normal modification | Provisioned items order (reserved for use by the Air Force only) | Shipping instructions |
|---------------------|--|-----------------------|
| 00001-99999.        | K0001-K9999  | S0001-S9999           |
| then .....          | KA001-KZ999  | SA001-SZ999           |
| A0001-A9999.        | L0001-L9999  | T0001-T9999           |

| Normal modification                  | Provisioned items order (reserved for use by the Air Force only) | Shipping instructions |
|--------------------------------------|--|-----------------------|
| B0001-<br>B9999.<br>and so<br>on to. | LA001-LZ999  | TA001-TZ999           |
| H0001-<br>H9999.<br>then .....       | M0001-M9999  | U0001-U9999           |
| J0001-<br>J9999.<br>then .....       | MA001-MZ999  | UA001-UZ999           |
| R0001-<br>R9999.<br>then .....       | N0001-N9999  | V0001-V9999           |
| AA001-<br>AZ999.<br>then .....       | NA001-NZ999  | VA001-VZ999           |
| JA001-<br>JZ999.                     | P0001-P9999  | W0001-<br>W9999       |
| RA001-<br>RZ999.                     | PA001-PZ999  | WA001-<br>WZ999       |
|                                      | Q0001-Q9999  | X0001-X9999           |
|                                      | QA001-QZ999  | XA001-XZ999           |
|                                      |  | Y0001-Y9999           |
|                                      |  | YA001-YZ999           |

(6) If the contract administration office is changing the contract administration or disbursement office for the first time and is using computer-generated modifications to notify many offices, it uses the six-position supplementary number ARZ999. If either office has to be changed again during the life of the contract, the supplementary number will be ARZ998, and on down as needed.

(7) Each office authorized to issue modifications shall assign the supplementary identification numbers in sequence. Do not assign the numbers until it has been determined that a modification is to be issued.

(d) *Modifications to calls or orders issued by the office identified in the basic PII number.*

Use a two-position alpha-numeric suffix, known as a call or order modification indicator, to identify these modifications.

(1) Modifications issued by a purchasing office begin with 01, 02, and so on through 99, then B1 through B9, BA through BZ, C1 through C9, and so on through ZZ.

(2) Modifications issued by a contract administration office begin with 1A, 1B, and so on through 9Z, followed by A1, A2, and so on to A9, then AA, AB, and so on through AZ.

(e) *Modifications to calls or orders issued by an office other than the office identified in the basic PII number.*

Number these modifications as prescribed in paragraph (d) of this section. Disregard the instructions in paragraph (c)(3) for identifying certain types of modifications by coding position two, and assign the modification a serial number using

positions two through six, e.g., A00001 or P00001.

#### PART 253—FORMS

6. Section 253.204-70(b)(2) is revised to read as follows:

##### 253.204-70 DD Form 350, Individual Contracting Action Report.

(a) \* \* \*

(b) (1) \* \* \*

(2) Block B2, Mod. Order or Other ID Number. Enter the Supplemental procurement instrument identification number (if there is one) that was assigned in accordance with 204.7004 or as permitted by 204.7000. Calls and orders will have either a four-position or a 13-position number (see 204.7004(a)) and modifications (including modifications of calls or orders) will have either a six position or a two-position modification number (see 204.7004(c), (d) or (e)).

\* \* \* \* \*

[FR Doc. 94-20224 Filed 8-17-94; 8:45 am]

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#### 48 CFR Parts 215 and 244 and Appendix C to 48 CFR Chapter 2

#### Defense Federal Acquisition Regulation Supplement; Greatest Value Sources

AGENCY: Department of Defense (DoD).

ACTION: Proposed rule with request for comments.

**SUMMARY:** The Department of Defense is proposing changes to the Defense Federal Acquisition Regulation Supplement to clarify its existing policy concerning the selection of subcontractors based on greatest value and also to provide more definitive items to consider when evaluating contractors' vendor performance rating systems.

**DATES:** Comments on the proposed rule should be submitted in writing at the address shown below on or before October 17, 1994, to be considered in the formulation of a final rule.

**ADDRESSES:** Interested parties should submit written comments to: Defense Acquisition Regulations Council, ATTN: Mr. Eric R. Mens, PDUSD (A&T)/DP/DAR, IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062. Telefax number (703) 604-5971. Please cite DFARS Case 93-D020 in all correspondence.

**FOR FURTHER INFORMATION CONTACT:** Mr. Eric R. Mens, (702) 604-5929.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

The Federal Acquisition Regulation (FAR) at 15.605(c) currently authorizes contracting officers to select the source which offers the greatest value to the Government. The Government's policy with regard to contractors applying the "greatest value" concept to the selection of subcontractors is not as clear. The proposed rule revised the Defense FAR Supplement (DFARS) to add language at 215.806-1(a)(1) to clarify the Government's existing policy as it pertains to the selection of subcontractors based on the greatest value; adds language at DFARS 244.202-2 with regard to the basis for the selection of subcontractors which contracting officers should consider when consent to subcontract is required; and revises Appendix C-207.5 to establish more definitive items for Government personnel to consider when evaluating contractor vendor rating systems in the course of conducting a Contractor Purchasing System Review.

##### B. Regulatory Flexibility Act

The proposed rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, because (1) the rule merely clarifies the Government's existing policy on contractor selection of subcontractors based on greatest value, (2) the requirement to prepare documentation to support the prime contractor's selection of subcontractors already exists, and (3) most small entities are not subject to the requirements for a Contractor Purchasing System Review under FAR subpart 44.3. Moreover, the revised Appendix C guidance for evaluating prime contractor vendor rating systems is intended to emphasize the importance of maintaining competitive opportunities for subcontractors while selecting such sources on the basis of greatest value. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. Comments from small entities concerning the affected DFARS subpart will be considered in accordance with section 610 of the Act. Such comments must be submitted separately and cite 5 U.S.C. 610 (DFARS Case 93-D020) in correspondence.

##### C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 96-511) does not apply because the proposed rule does not impose any additional reporting or recordkeeping

requirements which require the approval of OMB under 44 U.S.C. 3501 *et seq.* Contractors which may be subject to the proposed rule are already required by the FAR and DFARS to conduct and document an appropriate and adequate cost or price analysis before awarding any subcontract. The proposed rule does not impose any requirement for contractors to establish a formal system for the selection of subcontractors and suppliers based on greatest value. Rather, the rule clarifies the Government's existing policy of recognizing that, where such vendor rating systems exist, they may be a valuable tool in the establishment of best value sources. This rule also provides a list of more definitive items for consideration in the evaluation of a contractor's purchasing system, if applicable, under FAR subpart 44.3.

#### List of Subjects in 48 CFR Parts 215 and 244 and Appendix C to 48 CFR Chapter 2

Government procurement.

Claudia L. Naugle,

Deputy Director, Defense Acquisition Regulations Council.

Therefore, it is proposed that 48 CFR Parts 215 and 244 and Appendix C to 48 CFR Chapter 2 are amended as follows:

1. The authority citations for 48 CFR Parts 215 and 244 and Appendix C to 48 CFR Chapter 2 are revised to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

#### PART 215—CONTRACTING BY NEGOTIATION

2. Section 215.806-1(a)(1) is revised to read as follows:

##### 215.806 Subcontract pricing considerations.

##### 215.806-1 General.

\* \* \* \* \*

(a)(1) Contractor and subcontractor proposals may reflect the selection of sources whose proposals offer the greatest value to the Government in terms of performance and other factors. If the selection is based on greatest value rather than lowest price, the analysis supporting subcontractor selection should include a discussion of the factors considered in the selection. If the contractor's analysis is not adequate, return it for correction of deficiencies.

\* \* \* \* \*

#### PART 244—SUBCONTRACTING POLICIES AND PROCEDURES

3. Subpart 244.2 is added to read as follows:

##### Subpart 244.2—Consent to Subcontracts

Sec.

244.202 Contracting officer's evaluation.

244.202-2 Considerations.

##### Subpart 244.2—Consent to Subcontracts

244.202 Contracting officer's evaluation.

244.202-2 Considerations.

(a) Where other than lowest price is the basis for subcontractor selection, has the contractor adequately substantiated the selection as offering the greatest value to the Government?

##### Appendix C to 48 CFR Chapter 2—Contractor Purchasing System Reviews

4. Section C-207.5 is amended by revising paragraph (b) to read as follows:

##### C-207.5 Subcontractor responsibility and vendor performance rating system (II G5).

(a) \* \* \*

(b) *Vendor performance rating systems.* Contractor vendor performance rating systems may be a valuable element in the contractor's selection of subcontractors that offer the greatest value to the Government. State in the report whether the contractor has a vendor rating system. If the contractor has a system in place, evaluate its effectiveness in selecting sources. Consider whether the system—

- (1) Allows consistency of comparisons among competing subcontractors;
- (2) Protects rating information;
- (3) Provides appropriate documentation for each element rated;
- (4) Allows adequate opportunities for new subcontractor to compete;
- (5) Provides for evaluations by appropriate functional areas; and
- (6) Is kept current and accurate.

[FR Doc. 94-20223 Filed 8-17-94; 8:45 am]

BILLING CODE 5000-04-M

#### DEPARTMENT OF COMMERCE

##### National Oceanic and Atmospheric Administration

##### 50 CFR Part 646

[I.D. 081594A]

##### Snapper-Grouper Fishery of the South Atlantic

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice of availability of an amendment to a fishery management plan; request for comments.

**SUMMARY:** NMFS announces that the South Atlantic Fishery Management Council has submitted Amendment 7 to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP) for review by the Secretary of Commerce (Secretary). Written comments are requested from the public.

**DATES:** Written comments must be received on or before October 11, 1994.

**ADDRESSES:** Comments must be mailed to the Southeast Regional Office, NMFS, 9721 Executive Center Drive, St. Petersburg, FL 33702.

Requests for copies of Amendment 7, which includes a regulatory impact review and an environmental assessment, should be sent to the South Atlantic Fishery Management Council, One Southpark Circle, Suite 306, Charleston, SC 29407-4699; FAX 803-769-4520.

**FOR FURTHER INFORMATION CONTACT:** Peter J. Eldridge, 813-570-5305.

**SUPPLEMENTARY INFORMATION:** The Magnuson Fishery Conservation and Management Act (Magnuson Act) requires that a council-prepared amendment to a fishery management plan be submitted to the Secretary for review and approval, disapproval, or partial disapproval. The Magnuson Act also requires that the Secretary, upon receiving an amendment, immediately publish a document that the amendment is available for public review and comment. The Secretary will consider public comment in determining approvability of the amendment.

Amendment 7 proposes to: Change the minimum size limits of certain species, require charter vessels/headboats and dealers to obtain Federal permits, clarify one of the earned income requirements for a vessel permit, restrict the sale/purchase of snapper-grouper species, modify the criteria for determining when a vessel is operating as a headboat, modify the requirements for possessing multi-day bag limits, specify allowable gear, authorize permits for experimental fishing, modify the management unit for scup, add to the FMP's lists of problems in the snapper-grouper fishery and its objectives, and modify the framework procedure for implementing or modifying certain management measures.