detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to that direct final rule, no further activity is contemplated in relation to this proposed rule. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. The EPA will not institute a second comment period on this document. Any parties interested in commenting on this document should do so at this time.

DATES: To be considered, comments must be received by October 18, 1996.

ADDRESSES: Written comments on this action should be addressed to Kimberly Bingham, at the EPA Regional Office listed below. Copies of the documents relative to this action are available for public inspection during normal business hours at the following locations. The interested persons wanting to examine these documents should make an appointment with the appropriate office at least 24 hours before the visiting day.

Air and Radiation Docket and Information Center (Air Docket 6102), U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460

Environmental Protection Agency, Region IV, Air Programs Branch, 100 Alabama Street, SW, Atlanta, GA 30303–3104

Florida Department of Environmental Protection, Twin Towers Office Building, 2600 Blair Stone Road, Tallahassee, Florida 32399–2400

FOR FURTHER INFORMATION CONTACT: Kimberly Bingham of the EPA Region 4, Air Programs Branch at (404) 347–3555 extension 4195 and at the above address.

SUPPLEMENTARY INFORMATION: For additional information see the direct final rule which is published in the rules section of this Federal Register.

Dated: August 15, 1996.

R.F. McGhee,

Acting Regional Administrator.

[FR Doc. 96–23821 Filed 9–17–96; 8:45 am]

BILLING CODE 6560–50–P

40 CFR Parts 61, 63 and 70

[AD–FRL–5612–1]

Clean Air Act Proposed Interim Approval, Operating Permits Program; State of Alaska and Clean Air Act Proposed Approval in Part and Proposed Disapproval in Part, Section 112(l) Program Submittal; State of Alaska

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed interim approval, and proposed approval in part and proposed disapproval in part.

SUMMARY: EPA proposes interim approval of the operating permits program submitted by the Alaska Department of Environmental Conservation for the purpose of complying with Federal requirements for an approvable State program to issue operating permits to all major stationary sources, and to certain other sources.

EPA also proposes approval in part and disapproval in part of the program submitted by the Alaska Department of Environmental Conservation for the purpose of implementing and enforcing the hazardous air pollutant requirements under section 112 of the Act.

DATES: Comments on this proposed action must be received in writing by October 18, 1996.

ADDRESSES: Comments should be addressed to David C. Bray, Office of Air Quality, OAQ–107, U.S. Environmental Protection Agency, 1200 Sixth Avenue, Seattle, Washington 98101. Copies of the State's submittal and other supporting information used in developing this action are available for inspection during normal business hours at the following location: U.S. Environmental Protection Agency, Region 10, Office of Air Quality, 1200 Sixth Avenue, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: David C. Bray, Office of Air Quality, OAQ–107, U.S. Environmental Protection Agency, 1200 Sixth Avenue, Seattle, Washington 98101; telephone (206) 553–4253.

SUPPLEMENTARY INFORMATION:

I. Background and Purpose

A. Title V Background

As required under title V of the 1990 Clean Air Act Amendments (sections 501–507 of the Clean Air Act (''the Act'')), EPA has promulgated rules which define the minimum elements of an approvable State operating permits program and the corresponding standards and procedures by which EPA will approve, oversee, and withdraw approval of State operating permits programs (see 57 FR 32250 (July 21, 1992)). These rules are codified at 40 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 the part 70 regulations, which together outline criteria for approval or disapproval. Where a program substantially, but not fully, meets the requirements of part 70, EPA may grant the program interim approval for a period of up to two years. If EPA has not fully approved a program by two years after the November 15, 1993 date, or by the end of an interim program, it must establish and implement a Federal program.

EPA must apply sanctions to a State 18 months after EPA disapproves the program. In addition, discretionary sanctions may be applied any time during the 18-month period following the date required for program submittal or program revision. If the State has no approved program two years after the date required for submission of the program, EPA will impose additional sanctions, where applicable, and EPA must promulgate, administer, and enforce a Federal permits program for the State. EPA has the authority to collect reasonable fees from the permittees to cover the costs of administering the program.

B. Section 112 Background

Section 112(l) of the Act established new, more stringent requirements for a State or local agency that wishes to implement and enforce a hazardous air pollutant program pursuant to section 112 of the Act. Prior to November 15, 1990, delegation of NESHAP regulations to the State and local agencies could occur without formal rulemaking by EPA. However, the new section 112(l) of the Act requires EPA to approve State and local hazardous air pollutant rules and programs under section 112 through formal notice and comment rulemaking. Now State and local air agencies that wish to implement and enforce a Federally-approved hazardous air pollutant program must make a showing to EPA that they have adequate authorities and resources. Approval is

granted by EPA through the authority contained in section 112(l), and implemented through the Federal rule found in 40 CFR part 63, subpart E if the Agency finds that: (1) The State or local program or rule is ''no less stringent'' than the corresponding Federal rule or program, (2) adequate authority and resources exist to implement the State or local program or rule, (3) the schedule for implementation and compliance is sufficiently expeditious, and (4) the State or local program or rule is otherwise in compliance with Federal guidance.

II. Proposed Action on Title V Submittal and Implications

A. Analysis of State Title V Submittal

1. Support Materials

On May 31, 1995, the Alaska Department of Environmental Conservation (referred to herein as ''ADEC,'' ''the Department,'' ''Alaska'' or ''the State'') submitted a title V program for EPA review and approval. EPA notified the State in writing on July 13, 1995, that the submittal was complete. The State submitted additional information to EPA to supplement its May 31, 1995 submittal on August 16, 1995, February 6, 1996, February 27, 1996, July 5, 1996, and August 2, 1996. EPA considers these supplemental submittals to be a material change to ADEC's May 31, 1995 program submittal and therefore extends its official review period by 8 months to January 31, 1997.

Section II of the Alaska submittal addresses the requirement of 40 CFR part 70.4(b)(1) by describing how the State intends to carry out its responsibilities under the part 70 regulations. An implementation agreement is currently being developed between ADEC and EPA. EPA has deemed the program description to be sufficient for meeting the requirement of 40 CFR 70.4(b)(1).

Section IV of the Alaska submittal includes a legal opinion from the Attorney General of Alaska addressing the thirteen program elements set forth in 40 CFR part 70 that are specifically required by title V and 40 CFR part 70, as well as several additional program elements. With the exception of the proposed interim approval items discussed below, this opinion letter demonstrates adequate legal authority to implement all aspects of the title V operating permits program in Alaska.

Alaska has submitted draft copies of its permit application and permit forms, as required by 40 CFR 70.4(b)(4). Final versions of these forms will need to be available in time to implement the program.

In summary, EPA believes that Alaska's title V operating permits program substantially meets the requirements of 40 CFR part 70, sections 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 70.8 for permit review by EPA; 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. The issues that EPA proposes the State must address in order to obtain full approval are discussed below under ''Options for Program Approval and Implications.''

The full program submittal and the Technical Support Document (TSD) are contained in the docket at the address noted above and provide more detailed information on the State's program.

2. Regulations and Program Implementation

a. Regulations. The Alaska title V operating permits program is authorized by the Air Quality Control Act, Title 46, Chapter 14 of the Alaska Statutes. The State of Alaska revised its Air Quality Control Regulations (18 Alaska Administrative Code (AAC) 50) to implement the requirements of 40 CFR part 70 and the Alaska Air Quality Control Act. These revisions were adopted on May 17, 1995 and, together with the enabling legislation, become effective upon EPA's interim approval of Alaska's title V operating permit program. Additional revisions to these rules were adopted on February 22, 1996, April 9, 1996, and July 3, 1996. These rules and statutes, as well as other rules and statutes governing State permitting and administrative actions, were submitted by Alaska with evidence of procedurally correct adoption as required by 40 CFR 70.4(b)(2).

Title 18, chapter 50 of Alaska's regulations contain requirements pertaining to both title V and non-title V sources. Therefore, this notice proposes to approve certain regulations within 18 AAC 50 as part of Alaska's title V program. The TSD identifies the title V-related regulations acted upon in this rulemaking. Other portions of 18 AAC 50 have been submitted by the State for EPA approval under section 112(l) of the Act, and the TSD also identifies which section 112-related regulations are acted upon in this rulemaking. Portions of 18 AAC 50 have been submitted by the State as revisions to the Alaska state implementation plan (SIP) and will be approved or disapproved as part of the Alaska SIP in a separate rulemaking. Finally, portions of 18 AAC 50 have been submitted to EPA in support of a request for delegation under section 111(b) of the Act and will be acted upon later pursuant to that section.

b. Scope of proposed action. ADEC has requested approval to implement its title V program in all geographic regions of the State except within ''Indian Country,'' as defined in 18 U.S.C. section 1151. Therefore, EPA proposes that interim approval of the Alaska operating permits program not extend to sources located in Indian Country in Alaska. Because the extent of Indian Country is currently unknown and in litigation, the exact boundaries of Indian Country have not been established. At present, the lands acknowledged to be Indian Country are the Annette Island Reserve, and trust lands identified as Indian Country by the United States in Klawock, Kake, and Angoon. By proposing to grant interim approval to Alaska's title V operating permits program throughout the State except within Indian Country, EPA does not intend to affect the rights of Federally-recognized Indian tribes in Alaska, nor does it intend to limit existing rights of the State of Alaska. Title V sources located within Indian Country in Alaska will be subject to the Federal operating permits program, promulgated at 40 CFR part 71, *see* 61 FR 34202 (July 1, 1996), or subject to the operating permit program of any Tribe approved after issuance of 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, *see* 59 FR 43956 (August 25, 1994) (proposed rules implementing section 301(d)).

c. Program implementation. There are several areas where the Alaska program does not directly address certain requirements of part 70, but EPA believes either that (1) the Alaska program, as a whole, satisfies the requirements of part 70 in that particular respect or (2) no changes are currently required to the Alaska program to comply with part 70, but changes will likely be required some time in the future.

i. Application submittal. Part 70 defines a ''timely application'' for sources applying for a title V permit for the first time as an application that is submitted within 12 months after the source becomes subject to the program or on or before such time as the permitting authority may establish. *See* 40 CFR 70.5(a)(1)(i). For sources required to meet the preconstruction requirements of section 112(g) of the Act or required to have a permit under the

preconstruction review program approved into the SIP under part C or part D of the Act, a ''timely application'' is one that is submitted within 12 months after the source commences operation or such earlier date set by the permitting authority. 40 CFR 70.5(a)(1)(ii).

The Alaska program requires a source to submit an application within 12 months of becoming subject to the title V program or 60 days before beginning construction of a source if the facility containing the source is a new source that is not required to obtain a construction permit under AS 46.14.130(a). *See* AS 46.14.150(a). However, the Alaska program does not specifically address new sources under section 112(g) or parts C or D of the Act. EPA understands that the Alaska program would consider such sources as ''becoming subject to the title V program'' at the time the source commences operation, thereby making the Alaska program consistent with 40 CFR 70.5(a)(1)(ii).

ii. Applicable requirements. The Alaska program does not use the term ''applicable requirements'' and therefore does not contain a concise definition of the Federally-enforceable requirements which must be contained in a title V permit. Rather, the Alaska program simply indicates that a title V permit must contain each ''air quality control requirement,'' which is defined in 18 AAC 50.990 as an obligation created by AS 46.14, 18 AAC 50 or a term or condition of a preconstruction permit issued by ADEC. In an attempt to ensure that all EPA-promulgated requirements are covered, ADEC has adopted by reference into 18 AAC 50.040 Federal regulations that currently apply to sources in Alaska. ADEC has not adopted those existing EPA-promulgated requirements for which there are currently no subject sources in Alaska. However, as described in section B.1.iii. below, ADEC failed to adopt several NESHAP that currently apply to Title V sources in Alaska. If at some future time, sources in Alaska become subject to these existing Federal regulations, ADEC will need to expeditiously update its incorporation by reference in order to adequately implement its title V program. In addition, as new EPA regulations are promulgated which apply to sources in Alaska, ADEC is expected to expeditiously incorporate these new regulations into 18 AAC 50.040.[1]

iii. Applicable requirements in EPA-issued PSD permits. Part 70 requires all ''applicable requirements,'' as defined in 40 CFR 70.2, to be included in title V permit applications and permits. As stated above, the Alaska program does not use the term ''applicable requirements'', but instead requires that a title V permit contain each ''air quality control requirement,'' which is defined in 18 AAC 50.990 as an obligation created by AS 46.14, 18 AAC 50 or a term or condition of a preconstruction permit issued by ADEC. However, Part 70 defines ''applicable requirement'' as including the terms and conditions of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I of the Act, including parts C or D of the Act. *See* 40 CFR 70.2. Prior to July 5, 1983, EPA issued permits to construct to new and modified major stationary sources in Alaska under the PSD permitting regulations. *See* 40 CFR 52.96 as it existed prior to July 5, 1983. These permits are still in effect and contain Federally-enforceable requirements for sources subject to those permits. Since Alaska's regulations incorporate by reference 40 CFR 52.96 as it applies to title V sources, and EPA permits issued pursuant to 40 CFR 52.96 are considered to be Federally-enforceable parts of the Alaska SIP, such permits are considered to be ''air quality control requirements'' under the Alaska rules.

iv. Inclusion of fugitive emissions. EPA's regulations require that fugitive emissions be included in the permit and permit application in the same manner as stationary source emissions whether or not the source category in question is included in the list of sources for which fugitives must be included in determining a source's potential to emit. *See* 40 CFR 70.3(d). Alaska's regulations do not include a similar requirement, but rather, only contain the provisions regarding the inclusion of fugitives when determining a source's potential to emit. However, the Alaska rules do not include any provision which would explicitly allow a permit to exclude fugitive emissions once a source has been determined to require a permit. Accordingly, EPA believes that the Alaska program complies with the requirements of EPA's regulations. EPA is, therefore, proposing to approve this portion of the Alaska program based on an understanding that Alaska will implement its program consistently with the requirements of 40 CFR 70.3(d).

v. Changes provided for in the permit. Part 70 requires a permit to contain a provision stating that no permit revision shall be required, under any approved economic incentives, marketable permits, emissions trading and other similar programs or processes for changes that are provided for in the permit. *See* 40 CFR 70.6(a)(8). Similarly, part 70 requires that, if an applicable implementation plan allows a determination of an alternative emission limit, equivalent to that contained in the plan, to be made in the permit issuance, renewal or significant modification process and the State elects to use such process, any permit containing such an equivalency determination shall contain provisions to ensure that any resulting emissions limit has been demonstrated to be quantifiable, accountable, enforceable and based on replicable procedures. *See* 40 CFR 70.6(a)(1)(iii). The Alaska program does not contain corresponding requirements for permit content because there are currently no such programs in the Alaska SIP. EPA is proposing to approve this portion of the Alaska program based on an understanding that, should any such program be added to the Alaska SIP in the future, the provisions required by 40 CFR 70.6(a)(8) and 40 CFR 70.6(a)(1)(iii), as applicable, will be added to Alaska's title V rules at the same time.

vi. Administrative amendments. Part 70 authorizes States to allow certain ministerial types of changes to title V permits to be made by administrative amendment, which does not require EPA or public review or participation. *See* 40 CFR 70.7(d). That section contains a list of five types of changes which may be made by administrative amendment, and authorizes EPA to approve as appropriate for incorporation by administrative amendment other types of changes which are similar to those specifically enumerated in 40 CFR 70.7(d)(1). *See* 40 CFR 70.7(d)(1)(vi). The Alaska program authorizes three types of changes to be made by administrative amendment in addition to the five listed in part 70. *See* 18 AAC 50.370(a)(4), (5) and (6). As discussed below in section II.B.1., EPA believes that one of the three additional changes is not approvable and must be revised as a condition of full approval. EPA proposes to approve the two other types of changes, however, as appropriate for administrative amendment with the following understandings.

The Alaska program allows a change in assessable emissions to be made by administrative amendment, provided the change does not allow emissions to exceed emissions allowable under the permit. *See* 18 AAC 50.370(a)(4). ''Assessable emissions'' is defined as the lesser of the annual rate of emissions of

[1] As discussed in Sections II.B.1 below, additional issues with Alaska's treatment of ''applicable requirements'' are listed as proposed interim approval issues.

each air contaminant authorized by the facility's title V permit or the projected annual rate of emissions of each air contaminant based on previous actual annual emissions if the facility can make a certain showing to ADEC. *See* AS 46.14.240(h)(1). EPA interprets Alaska's administrative amendment procedures as allowing a change of assessable emissions only if the facility's assessable emissions are based on the facility's projected annual rate of emissions, and the change does not increase assessable emissions above the emissions allowable under the permit.

Finally, Alaska's program allows a source to convert an approval to operate under a general permit to a facility-specific permit with identical terms and conditions and the same expiration date. *See* 18 AAC 50.370(a)(6). According to Alaska's submittal, the purpose of allowing conversion from a general permit to a facility-specific permit is so that the permit can then be modified, by means other than administrative amendment, without affecting other facilities operating under the general operating permit. By the express terms of 18 AAC 50.370(a)(6), such a change is a change in the type of permit and not in the permit terms themselves. EPA therefore believes that this type of change is sufficiently similar to the other truly ''administrative'' types of changes specified in part 70 as appropriate for administrative amendment.

vii. Affected State review. Part 70 requires permit programs to contain provisions for notifying ''affected States'' of title V permitting actions. *See, e.g.,* 40 CFR 70.8. ''Affected State'' is defined as a State (1) whose air quality may be affected and that is contiguous to the State in which the permit activity is occurring or (2) that is within 50 miles of the permitted source. 40 CFR 70.2. There are no ''affected States'' vis-a-vis Alaska and the Alaska title V program therefore does not contain provisions requiring the notification of affected States.

viii. Option to obtain permit. Part 70 requires States to allow any source exempt under 40 CFR 70.3(b) to opt to obtain a part 70 permit. *See* 40 CFR 70.3(b)(3). The Alaska regulations do not contain a comparable provision. Unlike most other State operating permit programs, however, Alaska has not deferred permitting minor sources subject to section 111 and 112 standards, as authorized by 40 CFR 70.3(b). Instead, Alaska has exempted from title V permitting requirements only those minor sources which would be required to obtain an operating permit solely because they are subject to 40 CFR part 60, subpart AAA (NSPS for new residential wood heaters), 40 CFR 61.145 (asbestos NESHAP for demolition and renovation), or 40 CFR 63.340(e)(1) (chromium NESHAP for hard and decorative chromium electroplating and chromium anodizing tanks). Given the very limited exemption from title V permitting requirements in Alaska, EPA believes it is highly improbable that any exempt sources in Alaska would apply for a title V operating permit. Accordingly, EPA believes that Alaska satisfies the requirements of 40 CFR 70.3(b)(3).

3. Permit Fee Demonstration

Section 502(b)(3) of the Clean Air Act requires each permitting authority to collect fees sufficient to cover all reasonable direct and indirect costs necessary for the development and administration of its title V operating permit program. Each title V program submittal must contain either a detailed demonstration of fee adequacy or a demonstration that aggregate fees collected from title V sources meet or exceed $25 per ton of emission per year (adjusted from 1989 by the Consumer Price Index). *See* 40 CFR 70.4(b)(7); 40 CFR 70.9. The adjusted amount is currently $30.07. The $30.07 per ton is presumed, for purposes of program approval, to be sufficient to cover all reasonable program costs and is thus referred to as the ''presumptive minimum''.

The State of Alaska has adopted a fee structure that is a combination of emissions fees and user fees. User fees are currently set at $78 per billable hour. Emission fees are currently $5.07 per ton of assessable emissions. These fees will result in the collection of over $1,200,000 per year based on the State's current estimate of assessable emissions and the billable hours for permit actions. Based on a detailed demonstration of program costs, the amount of fees collected under the State's fee structure appears sufficient to cover the direct and indirect costs of administering the State's title V program. EPA therefore is approving the State's fee structure as meeting the requirements of section 502(b)(3) of the Act and 40 CFR 70.9. Title V fees are deposited in a ''clean air protection fund'' which must be appropriated by the Alaska Legislature. In order to retain approval of its title V program, the State must ensure that adequate funds are appropriated to cover all of the program costs.

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

a. Authority for section 112 implementation. Except as discussed below in section B.1.iii. and the section proposing action on Alaska's section 112(l) submittal, Alaska has demonstrated adequate legal authority to implement and enforce section 112 requirements through the title V permit. Alaska has incorporated by reference most of the regulations that have been promulgated by EPA under section 112 of the Act that may affect Alaska sources. *See* 18 AAC 50.040(b) (relevant standards under 40 CFR part 61); 18 AAC 50.040(c) (relevant standards under 40 CFR part 63); AS 46.14.130(a) and 18 AAC 50.300 to 50.322 (preconstruction review of major sources of hazardous air pollutants (''HAPs''). All title V permit applications are required to cite and describe all sources regulated by a Federal emission standard adopted by reference in 18 AAC 50.040 and the standard that applies to the source (18 AAC 50.335(e) (2) and (6)) and all title V permits issued by the State are required to include terms and conditions that assure compliance with the applicable requirements of 18 AAC 50.040 (18 AAC 50.350(d)(1)(A) and (d)(3)).

b. Implementation of Title IV of the Act. Title IV does not apply in Alaska. *See* section 401(b) of the Act.

B. Options for Title V Program Approval and Implications

1. Proposed Interim Approval

EPA is proposing to grant interim approval to the Alaska program. If interim approval is promulgated, Alaska must address to EPA's satisfaction the following issues in order to receive full approval.

i. Applicability. The Alaska definition of ''regulated air contaminant'' in AS 46.14.990(21) is inconsistent with the EPA definition of the term ''regulated air pollutant'' in 40 CFR 70.2. Specifically, EPA's definition requires that any pollutant subject to section 112(j) of the Act be considered a regulated air pollutant on the date 18 months after the applicable date established pursuant to section 112(e) of the Act (i.e., the date that major sources are required to submit permit applications under section 112(j)(2)). The Alaska definition, however, requires a pollutant to be considered a regulated air contaminant only after a permit has been issued pursuant to section 112(j). Because there are currently no sources or pollutants subject to section 112(j) of the Act, EPA

does not consider this deficiency to be a disapproval issue. However, because sources and pollutants may become subject to section 112(j) in the future, the Alaska definition must be revised. As a condition of full approval, EPA proposes that Alaska demonstrate to EPA's satisfaction that its definition of ''regulated air contaminant'' is consistent with EPA's definition of ''regulated air pollutant'' in 40 CFR 70.2.

ii. Applicable requirements. Part 70 requires all ''applicable requirements'' to be included in a permit application and permit, and defines ''applicable requirement'' to include, among other things, the requirements of title VI of the Act (Stratospheric Ozone Protection). *See* 40 CFR 70.2. The Alaska definition of ''applicable requirement'' does not include all of the EPA regulations implementing title VI (40 CFR part 82) but only subparts B and F. Although EPA has proposed to revise 40 CFR part 70 to limit the definition of ''applicable requirement'' to only those provisions promulgated under sections 608 and 609 of the Act (which EPA has promulgated in 40 CFR part 82, subparts B and F), this proposed revision is not yet adopted. As such, EPA believes it must propose interim approval of the Alaska program at this time because it does not meet the requirements of part 70. Should EPA revise part 70 as proposed, Alaska's rules will be consistent and no revisions will be needed. However, if EPA does not revise part 70 as proposed, EPA proposes to require that Alaska adopt and submit appropriate revisions as a condition of interim approval.

iii. Authority to implement section 112 requirements. Alaska failed to adopt by reference into 18 AAC 50.040 certain NESHAP that apply to sources in Alaska, specifically 40 CFR 61.150 (asbestos NESHAP for waste disposal), 40 CFR 61.154 (asbestos NESHAP for active waste disposal sites) and 40 CFR Part 61 Subpart I (radionuclide NESHAP for facilities licensed by the Nuclear Regulatory Commission). As a result, sources subject to these NESHAP are not required to obtain title V permits, contrary to Alaska statutes which require operating permits for all sources subject to section 112 of the Act (unless exempted by EPA from the obligation to have a title V permit pursuant to section 502()) of the Act. Moreover, these NESHAP would not be considered to be ''applicable requirements'' under the Alaska program and therefore would not be required to be included in title V permits for subject sources.

EPA believes that these deficiencies are not so serious as to warrant disapproval of the Alaska program, but rather, the Alaska program can be granted interim approval on the following grounds. Regarding the issue of sources required to have title V permits, EPA has deferred from the obligation to have a permit sources which are not major sources but are subject to a standard under section 111 or section 112. The fact that the Alaska program has not generally deferred non-major sources from its program, but may have inadvertently deferred non-major sources subject to these three NESHAP, is a matter of State law is not an issue for EPA approval. Since the Alaska program does not exempt any more sources subject to these NESHAP than allowed under EPA's deferral, this aspect of the Alaska program is approvable.

On the issue of applicable requirements, Alaska has pointed out that other provisions of the Alaska rules, specifically 18 AAC 50.335(g) and 18 AAC 50.350(f)(4) allows ADEC to include in a permit any Federally-enforceable requirement that the source requests be included. If the source does not request the State to include an applicable Federal requirement, EPA would have to object to the permit and eventually issue a Federal permit which includes the requirement. While this does not sufficiently address the deficiency in the State's legal authority to require inclusion of all applicable requirements in a permit, it does provide an opportunity for the State to issue adequate permits for the period of interim approval. Furthermore, there appears to be only a small number of sources which will be impacted by this deficiency, so its impact on the program will be minimal. As such, EPA is requiring, as a condition of full approval, that Alaska update its incorporation by reference to include all of the NESHAP that currently apply to title V sources in Alaska.

iv. Insignificant emission units. Part 70 authorizes EPA to approve as part of a State program a list of insignificant activities and emissions levels which need not be included in the permit application, provided that an application may not omit information needed to determine the applicability of, or to impose, any applicable requirement, or to evaluate the fee amount required under the EPA-approved schedule. 18 AAC 50.335(q) through (v) contain criteria for identifying insignificant sources and consist of a list of emission rates below which sources would be defined as insignificant, but must be listed in the permit application; a list of sources that are defined as ''categorically exempt'' and may be omitted from the permit application; a list of sources that are defined as ''insignificant'' based on size or production rate, but must be listed in the permit application; a list of sources that will be deemed ''insignificant'' on a case-by-case basis, but must be listed on the permit application; and a list of ''categorically exempt'' sources that could have significant emissions but are considered ''administratively insignificant'' for the purpose of operating permit applications because the sources are not regulated as stationary sources in Alaska. Sources that are subject to a Federally-enforceable requirement other than a requirement of the SIP that applies generally to all sources in Alaska (a so-called ''generally applicable requirement''[2]) are not deemed ''insignificant'' under Alaska's program even if they otherwise qualify under one of the five lists. 18 AAC 50.335(q). Importantly, 18 AAC 50.335(m) includes a so-called ''gatekeeper,'' which expressly states that no permit application can omit information necessary to determine the applicability of, and include in a permit, all applicable requirements, including those for insignificant sources. In addition, 18 AAC 50.350(m)(2) states that the permit will contain all Federally-enforceable requirements that apply to insignificant sources.

EPA believes that, notwithstanding the gatekeeper and the requirement that a permit must contain all Federally-enforceable requirements that apply to insignificant sources, full approval of the Alaska provisions for insignificant sources is inappropriate for two reasons. First, 18 AAC 50.335(u) contains a list of sources that may be determined to be ''insignificant'' on a case-by-case basis. In order for EPA to approve such a ''director's discretion'' provision, Alaska must first demonstrate that each of the sources on that list (for example, pilot plants) would otherwise qualify as ''insignificant'' in all cases. EPA does not believe that 40 CFR 70.5(c) allows EPA to approve regulations that give a permitting authority complete discretion to determine on a case-by-case basis that a particular source is ''insignificant.'' *See* 60 FR 54990, 54995 (October 27, 1995) (proposed action on Idaho operating permits program). Alaska has advised EPA that upon further review of the sources listed in 18 AAC 50.335(u), it has determined that several of those sources do not qualify as ''insignificant'' and that Alaska plans

[2] ''Generally applicable requirements'' are those that apply universally to all sources, as opposed to requirements that focus on a category of sources.

on removing them from the list in a future revision of the rules. Therefore, as a condition of interim approval, EPA proposes to require that Alaska must demonstrate to EPA's satisfaction that each of the sources identified in 18 AAC 50.335(u) are insignificant or must delete those sources from the list.

EPA's second concern with Alaska's program for insignificant sources concerns the State's exemption from monitoring, recordkeeping, reporting, and compliance certification requirements for insignificant sources that are subject only to generally applicable SIP requirements. *See* 18 AAC 50.350(m)(3). EPA believes that part 70 does not exempt such sources from the monitoring, recordkeeping, reporting and compliance certification requirements of 40 CFR 70.6, but instead provides only a limited exemption from permit application requirements for insignificant sources. *See* 61 FR 39335 (July 29, 1996) (final interim approval of Tennessee operating permits program based on exemption of insignificant emission units from certain permit content requirements); 61 FR 9661 (March 11, 1996) (proposed interim approval of Tennessee operating permits program on same basis); 60 FR 62992 (December 5, 1992) (final interim approval of Washington operating permits program based on exemption of insignificant emission units from certain permit content requirements); 60 FR 50166 (September 28, 1995) (proposed interim approval of Washington's operating permits program on same basis). On March 5, 1996, EPA issued a guidance document entitled ''White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program'' by Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, to Regional Air Directors (''White Paper No. 2''), which specifically addresses the issue of how title V permits can address insignificant emission units and activities subject to generally applicable SIP requirements in a manner that minimizes the burden associated with the permitting of such emission units and activities. Briefly summarized, the guidance provides that it is within the permitting authority's discretion to decide that no additional monitoring (beyond that provided in the applicable requirement itself) will be required in the title V permit for insignificant emission units or activities subject to generally applicable requirements, if there is little or no likelihood that a violation could occur from those emission units or activities.[3] However, this is in part a factual finding, and White Paper No. 2 therefore contemplates that this discretion would be exercised on a permit-by-permit basis, where the finding can be reviewed in a context that is specific enough to be meaningful.[4]

White Paper No. 2, however, in no way suggests that emission units and activities subject to applicable requirements can be exempted from compliance certification, even on a permit-by-permit basis. To the contrary, White Paper No. 2 clearly states that compliance certification is required, but suggests a streamlined way in which compliance certifications may be made for these types of emission units and activities.

The Ninth Circuit Court of Appeals has recently decided a case addressing this same issue. *Western States Petroleum Association* v. *EPA*, No. 95–70034 (June 17, 1996) (''*WSPA*''). Because of the similarities between that case and this action, EPA believes it appropriate to address here how it plans to respond to that decision. EPA wishes to emphasize that the *WSPA* decision is very recent, and that EPA is still in the process of developing a more thorough response that addresses other title V programs. However, given the State's desire to avoid imposition of the Federal Part 71 operating permits program, EPA decided it is in the State's best interest not to delay approval until a more thorough response could be articulated.

The *WSPA* case concerned EPA's approval of the Washington State operating permits program, which contained an exemption from monitoring, recordkeeping, reporting, and compliance certification requirements for insignificant emission units and activities subject to generally applicable SIP requirements. *See* 60 FR 62996; 60 FR 50171. The Alaska insignificant sources provisions are modeled closely after the Washington provisions. Industry petitioners challenged EPA's identification of this exemption as grounds for interim approval, asserting that such an exemption was allowed by part 70, and that EPA had acted inconsistently by approving other title V programs with similar exemptions. The Ninth Circuit did not opine on whether EPA's position was consistent with part 70. It did, however, find that EPA had acted inconsistently in its title V approvals, and had failed to explain the departure from precedent that the Court perceived in the Washington interim approval.

As explained in the Federal Register notice granting final interim approval to the Tennessee operating permits program, 61 FR 39337–39340, EPA accepts the broader holding of the *WSPA* decision, namely, that EPA should act consistently in its program approvals or else explain any departures. However, EPA does not necessarily agree with the specific findings of the Court regarding inconsistent actions in other State programs. The *WSPA* court found that EPA had acted to approve title V programs with exemptions from permit content requirements in eight instances. An inconsistency would exist where EPA had approved a title V program that exempts insignificant emissions units and activities from permit content requirements even where those emission units or activities are subject to an applicable requirement.

EPA is still in the process of reviewing the insignificant emission units and activities provisions of the Ohio; North Carolina; Hawaii; and Jefferson County, Kentucky operating permit programs in order to determine whether EPA acted inconsistently in approving those programs. EPA has carefully reviewed the insignificant emission units and activities provisions of the Massachusetts; North Dakota; Knox County, Tennessee; and Florida operating permit programs, however, and has concluded that EPA did not act inconsistently in approving these programs.

A careful examination of the Massachusetts permitting rule demonstrates that Massachusetts' insignificant emission units and activities provisions represent a careful effort to list emission units and activities that are not relevant to permit content. The North Dakota and Knox County title V regulations do not in any way suggest that emission units subject to applicable requirements may be

[3] If no monitoring is required, it would follow that the permit can also dispense with recordkeeping and reporting for those units because there is no compliance data being regularly generated.

[4] EPA does not rule out that a State might structure an insignificant activities list narrowly enough that such a finding could be made programmatically, thereby allowing for a categorical exemption from part 70 monitoring, recordkeeping, and reporting. However, EPA does not find this to be the case for the current Alaska insignificant activities provisions because Alaska has not demonstrated to EPA that it has so narrowly defined the types of sources that can be deemed ''insignificant'' that there is little or no likelihood that a violation could occur from those sources.

EPA believes that more often than not it will be the case that part 70 monitoring, recordkeeping, and reporting requirements will not be necessary where the State's insignificant activities are subject only to generally applicable requirements. Therefore, Alaska may address this interim approval condition by modifying the exemption from these requirements to a regulatory presumption that the monitoring, recordkeeping, and reporting requirements will not apply in those instances, but leaving the State with the authority to prescribe those requirements as needed on a permit-by-permit basis.

exempted from permit content, although the language of the Federal Register notices approving these provisions could be read as suggesting such an exemption existed. The language of EPA's approval notices, imprecise though it may have been, cannot create an exemption where none exists in the State program rules. With respect to Florida, the program regulations do appear to exempt insignificant activities from title V permitting. The Court concluded that EPA had not identified this provision as grounds for interim approval. EPA does not necessarily agree. In EPA's view, in order to remedy the deficiencies identified by EPA in the Florida interim approval notice, which included the State's failure to include gatekeeper language that assured the completeness of permit applications, the State would necessarily have to address the exemption created from permit content requirements. It follows that, to the extent Florida's regulations can be read as creating an exemption from permit content, this should also be considered grounds for interim approval. For a more detailed explanation of EPA's conclusion that the Massachusetts, North Dakota, Knox County, Tennessee, and Florida operating permit programs are not inconsistent with EPA's proposed action on the Alaska operating permits program and EPA's interim approval of the Washington operating permits program regarding treatment of insignificant emission units and activities, please refer to the docket available at the addresses listed at the beginning of this Notice.

EPA also does not necessarily agree that the Washington interim approval constituted a departure from the precedent established generally in title V program approvals nationwide. The *WSPA* opinion states that:

> the EPA may not depart, sub silentio, from its usual rules of decision to reach a different, unexplained result in a single case * * * To the contrary, the EPA must clearly set forth the ground for its departure from *prior norms* so that we may understand the basis of the EPA's action and judge the consistency of that action with EPA's mandate. Slip Op., at 6990 (emphasis added).

EPA reads this to mean that a regulatory interpretation proffered by the Agency is not entitled to judicial deference if it conflicts with the de facto policy established through the Agency's actions on specific programs. That is, if the ''norms'' established through program approvals are other than the Agency's articulated policy, courts will not uphold the Agency's efforts to impose the latter.

The Court in *WSPA* appeared to base its specific holding of inconsistency on its assumption that EPA had approved eight programs with exemptions from permit content, but had acted to impose the policy against permit content exemptions in only two instances.[5] This assumption is incorrect. At the time the Washington State program received interim approval, EPA had approved 22 State and 39 local programs, and had proposed approval of another 13 State and 13 local programs. As of today, EPA has approved 45 State and 56 local programs, and has proposed approval of another 8 State and 4 local programs.[6] Each program submitted to EPA necessarily addresses this issue, although most do so simply by providing for permit content language consistent with part 70—that is, by not affirmatively establishing any permit content exemption. Of 113 title V programs approved or in the process of approval, EPA believes that there are at most four with regulations that present inconsistencies on this issue, which represents a relatively minor set of deviations from the normal policy manifested in the vast majority of title V program approvals. In short, EPA believes it is clear from these totals that its ''prior norm'' has been to grant full approval only where emission units and activities subject to applicable requirements are not exempted from the permit, and that its interpretation of part 70, as manifested both in its articulated policy and in actual program approvals, is consistent with the position EPA proposes here with respect to the Alaska program. In those few instances where confirmed inconsistencies exist, EPA plans to take appropriate action to follow the *WSPA* Court's mandate that it act consistently or explain any departures.

In summary, EPA proposes as a condition of full approval that Alaska must adequately address these two identified issues: (1) The designation and definition of insignificant sources on a case-by-case basis; and (2) the exemption of insignificant sources from monitoring, recordkeeping, reporting, and compliance certification requirements. EPA does not believe, however, that these problems with Alaska's program preclude interim approval. The ''gatekeeper'' provisions of 18 AAC 50.335(m), along with 18 AAC 50.350(m)(2), adequately assure that Alaska has the necessary authority to issue permits that assure compliance with all applicable requirements to subject sources during the interim approval period, as required by 40 CFR 70.4(d)(3)(ii) and 70.6(a)(1).

v. Emissions trading provided for in applicable requirements. Part 70 requires that the permitting authority must include terms and conditions, if the permit applicant requests them, for trading of emissions increases and decreases in the permitted facility, to the extent that the applicable requirements provide for trading such increases without a case-by-case approval of each emissions trade. *See* 40 CFR 70.6(a)(10). The Alaska program does not contain a comparable provision. This appears to be based on the State's assumption that no applicable requirements currently provide for such trading. Certain of the EPA standards in 40 CFR part 63, however, do allow for such trading, and as such, EPA believes that the Alaska program must contain such a provision as a condition of full approval. Therefore, EPA proposes that Alaska ensure that its program include the necessary provisions to meet the requirements of 40 CFR 70.6(a)(10).

vi. Inspection and entry requirements. Part 70 requires each title V permit to contain a provision allowing the permitting authority or an authorized representative, upon presentation of credentials and other documents as may be required by law, to perform specified inspection and entry functions. *See* 40 CFR 70.6(c)(2). The Alaska program fails to meet the requirements of part 70 in an important respect. Alaska law conditions ADEC's inspection and entry authority on first obtaining the consent of the owner or operator or obtaining a warrant. *See* AS 46.03.860; 46.14.515(a); 18 AAC 50.345(7). The owner or operator is not required to consent to such inspections and entry as a condition of obtaining a title V permit. EPA proposes to require, as a condition of full approval, that Alaska demonstrate to EPA's satisfaction that its inspection and entry authority meets the requirements of 40 CFR 70.6(c)(2).

vii. Progress reports. Part 70 requires a title V permit to require the submission of progress reports, consistent with the applicable schedule of compliance and 40 CFR 70.5(c)(8), to be submitted at least semiannually, or at a more frequent period if specified in the applicable requirement or by the permitting authority. *See* 40 CFR 70.6(c)(4). Alaska requires the submission of such reports semi-annually, but requires that they be submitted more frequently only if required by the permitting authority.

[5] ''[T]he EPA has identified only two Title V programs that in fact apply permitting requirements to IEU's . . ..'' Slip Op., at 6988.

[6] Altogether, 116 State and local agencies will have title V programs.

See 18 AAC 50.350(k)(3). There is therefore no assurance that more frequent progress reports will be required in the permit if specified in the applicable requirement. As a condition of full approval, EPA proposes to require that Alaska demonstrate to EPA's satisfaction that its program complies with the requirements of 40 CFR 70.6(c)(4).

viii. Compliance certification. Part 70 requires a permitting program to contain requirements for compliance certification with terms and conditions contained in the permit, including emissions limitations, standards or work practices. *See* 40 CFR 70.6(c)(5). The Alaska program requires a title V permit to contain compliance certification requirements only with permit terms and conditions established under 18 AAC 50.345 (standard conditions) and 18 AAC 50.350(d) (source specific permit requirements), (e) (facility-wide permit requirements) and (f) (certain other requirements). It therefore does not require certification of compliance with all permit terms and conditions, such as monitoring, recordkeeping, reporting and compliance plan requirements. *See* 18 AAC 50.350(g), (h), (i) and (j). There may also be other terms and conditions of a permit that are required by a statute or regulation other than those specifically enumerated in 18 AAC 50.350(j). As a condition of full approval, EPA proposes to require that Alaska demonstrate to EPA's satisfaction that its program complies with the requirements of 40 CFR 70.6(c)(5).

ix. General permits. Part 70 allows States to issue ''general permits,'' which are permits issued after notice and opportunity for public participation that cover numerous similar sources. *See* 40 CFR 70.6(d). The Alaska program authorizes the issuance of general permits. *See* AS 46.14.210; 18 AAC 50.380. The Alaska provisions for general permits, however, fail to comply with the requirements of part 70 in one respect. Part 70 allows permitting authorities to provide for applications for general permits which deviate from the requirements of 40 CFR 70.5, provided that such applications otherwise meet the requirements of title V. 40 CFR 70.6(d)(2). The Alaska regulations indicate that ADEC will issue specialized permit applications for general permits, *see* 18 AAC 50.380(c) (source shall submit a completed application form issued by ADEC for the specific facility type), but do not require that such general permit applications meet the requirements of title V. Accordingly, EPA proposes to require, as a condition of full approval, that Alaska demonstrate to EPA's satisfaction that applications for general permits meet the requirements of title V.

x. Affirmative defense for emergencies. Part 70 provides an affirmative defense to an action brought for noncompliance with a technology-based limitation in a title V permit if certain specified conditions are met. *See* 40 CFR 70.6(g). In the August 1995 proposed revisions to part 70, EPA has clarified that, ''By technology-based standards, EPA means those standards the stringency of which are based on determinations of what is technologically feasible, considering relevant factors. The fact that technology-based standards contribute to the attainment of the health-based NAAQS or help protect public health from hazardous air pollutants does not change their character as technology-based standards.'' See 59 FR 45530, 45559 (August 31, 1995).

Alaska's program provides an affirmative defense for unavoidable emergencies, malfunctions and nonroutine repairs that closely parallels 40 CFR 70.6(g), but is slightly broader than that section in a few respects. *See* AS 46.14.560; 18 AAC 50.235; 18 AAC 50.990. First, the Alaska regulations include a definition of ''technology-based standard'' which closely corresponds to the definition in the proposed part 70 revisions, but requires that the stringency of the standard be based ''primarily'' on determinations of what is technologically feasible. 18 AAC 50.990(82). EPA is concerned that, with the addition of the word ''primarily,'' this provision could be used to incorrectly classify a health-based standard, such as an opacity limit or grain loading standard, as a technology-based standard. Second, although the Alaska program requires a permittee claiming the affirmative defense to notify ADEC within two working days of the exceedance, Alaska gives a permittee up to one week after the discovery of the exceedance to provide ADEC with a written notice describing the cause of, and its response to, the exceedance. 18 AAC 50.235. Part 70 requires that written notice of the exceedance containing this information be provided within two working days of the exceedance. *See* 40 CFR 70.6(g)(3)(iv). As a condition of full approval, EPA proposes to require that Alaska demonstrate to EPA's satisfaction that its emergency provisions are consistent with the requirements of 40 CFR 70.6(g).

xi. Off-permit provisions. Part 70 authorizes an approved permit program to include certain ''off-permit'' provisions whereby a source can make a change at the permitted facility without the need for a permit revision. *See* 40 CFR 70.4(b) (14) and (15). These provisions require the permittee to keep a record at the facility describing each off-permit change and to provide ''contemporaneous'' notice of each off-permit change to EPA and the permitting authority. *See* 40 CFR 70.4(b)(14). The Alaska program, however, limits the requirement to provide notice and keep records to only those sources required to provide certain information under 18 AAC 50.335. Although EPA has proposed to revise 40 CFR part 70 to eliminate the off-permit requirements, this proposed revision is not yet adopted. As such, EPA believes it must propose interim approval of the Alaska program at this time because it does not meet the requirements of part 70. Should EPA revise part 70 as proposed, Alaska's rules will be consistent with part 70 in this respect and no revisions will be needed. However, if EPA does not revise part 70 as proposed, EPA proposes to require that Alaska ensure that its program requires notice and records for all off-permit changes.

xii. Statement of basis. Part 70 requires that the permitting authority shall provide and send to EPA, and to any other person who requests it, a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions). *See* 40 CFR 70.7(a)(5). The Alaska title V program does not contain a comparable requirement. As a condition of full approval, Alaska must demonstrate to EPA's satisfaction that its program satisfies the requirements of 40 CFR 70.7(a)(5).

xiii. Administrative amendments. As discussed above, part 70 authorizes States to allow certain ministerial types of changes to title V permits to be made by administrative amendment, which does not require EPA or public review or participation. *See* 40 CFR 70.7(d). That section contains a list of five types of changes which may be made by administrative amendment, and authorizes EPA to approve as appropriate for incorporation by administrative amendment other types of changes which are similar to those specifically enumerated in 40 CFR 70.7(d)(1). *See* 40 CFR 70.7(d)(1)(vi). As also discussed above, EPA believes that one of the three additional changes in the Alaska regulations is not approvable and must be revised as a condition of full approval.

Alaska's program allows alterations in the identification of equipment or components that have been replaced

with equivalent equipment or components to be made by administrative amendment provided certain conditions are met. *See* 18 AAC 50.370(a)(5). EPA believes that the restrictions on such permit alterations for equivalent replacement equipment or components are sufficient to ensure that any resulting change would be truly ministerial, with the following exception. 18 AAC 50.370(a)(5)(D) prohibits such a change to be made by administrative amendment if the revision would result in a modification under 40 CFR part 60, which is adopted by reference in 18 AAC 50.040. This restriction is too narrow, in that it would allow alterations in equivalent replacement equipment or components even if the change resulted in a modification or reconstruction under 40 CFR part 61 or 63. Such changes are title I modifications and as such must be made by significant permit modification procedures. *See* 18 AAC 50.990(82); 18 AAC 50.375. Accordingly, EPA proposes to require, as a condition of full approval, that Alaska revise 18 AAC 50.370(a)(5)(D) to expand the prohibition to include modifications and reconstructions made pursuant to 40 CFR parts 60, 61 and 63, or to eliminate 18 AAC 50.370(a)(5) from the list of changes that may be made by administrative amendment.

xvi. Minor permit modifications. Part 70 requires States to establish procedures for minor permit modifications which are substantially equivalent to those set forth in 40 CFR 70.7(e). The part 70 regulations contain criteria that a revision must meet in order to be processed as a minor permit modification and then contains procedures for those changes qualifying as minor permit modifications. *See* 40 CFR 70.7(e)(2)(i)(A). The Alaska program takes the same basic approach to permit modifications as part 70, but contains several differences which EPA believes require interim approval. *See* 18 AAC 50.375.

First, part 70 prohibits a permit revision to be made as a minor permit modification if the revision involves ''significant changes to existing monitoring, reporting, or recordkeeping requirements in the permit.'' 40 CFR 70.7(e)(2)(i)(A)(2). Part 70's significant modification procedures further restrict the class of revisions that may be processed as a minor permit modification, stating that ''every significant change in existing monitoring permit terms or conditions and every relaxation of reporting or recordkeeping permit terms shall be considered significant.'' *See* 40 CFR 70.7(e)(4). Like part 70, the Alaska program prohibits changes to be made by minor permit modification if the change would ''materially alter or reduce the frequency, accuracy, or precision of existing monitoring, recordkeeping, or reporting requirements in the permit.'' 18 AAC 50.375(a)(6). In contrast to part 70, however, neither Alaska's minor nor significant modification procedures ensure that a relaxation of reporting or recordkeeping permit terms must be processed as a significant modification. Instead, the Alaska program simply states that any revision that cannot be processed as an administrative amendment or minor permit modification shall be processed as a significant modification. 18 AAC 50.370(h). The Alaska program would, therefore, allow a relaxation of reporting or recordkeeping requirements to be processed as a minor modification, as long as the revision did not ''materially alter or reduce'' the frequency, accuracy, or precision of existing reporting or recordkeeping requirements.

Second, the Alaska program also appears deficient with respect to the information required in applications for minor permit modifications. Part 70 requires that an application for a minor permit modification must include a description of the change, the emissions resulting from the change and any new applicable requirements that will apply if the change occurs. 40 CFR 70.7(e)(2)(ii)(A). The Alaska program requires that an application for a minor permit modification contain a description of changes at the facility that would result from the proposed revision and, for any resulting changes at the facility, the information required by 18 AAC 50.335, which sets forth the requirements for permit applications for title V permits. That section, however, does not appear to require a facility applying for a minor permit modification to provide information on the emissions resulting from the modification.

Finally, the Alaska program fails to include provisions which allow minor permit modification procedures to be used for permit modifications involving the use of economic incentives, marketable permits, emissions trading, and other similar approaches to the extent that such minor permit modification procedures are explicitly provided for in an applicable implementation plan or in applicable requirements promulgated by EPA. *See* 70.7(e)(2)(B). Again, this appears to be based on an incorrect assumption by the State that no applicable requirements currently provide for the use of such minor permit modification procedures. However, as stated above, certain of the EPA standards in 40 CFR part 63 do allow for the use of minor modification procedures, and as such, this provision is required as a condition of full approval. Therefore, as a condition of full approval, EPA proposes to require Alaska to ensure that its program include the necessary provisions to meet the requirements of 40 CFR 70.7(e)(2)(B).

xv. Group processing of minor permit modifications. Part 70 allows a permitting authority to process as a group certain categories of applications for minor permit modifications at a single source. *See* 40 CFR 70.7(e)(3). Section 70.7(e)(3)(i) establishes standard thresholds for determining whether requests for permit modifications can be grouped, but allows EPA to approve alternative thresholds, if the permitting authority can justify the alternative thresholds based on two specified criteria. The Alaska program contains provisions allowing group processing of minor permit modifications. *See* 18 AAC 50.375(d). The Alaska program, however, does not contain any thresholds, either the standard thresholds set forth in 40 CFR 70.7(e)(3)(i) or proposed thresholds tailored to Alaska sources, for determining whether minor permit modifications may be processed as a group.

The failure of the Alaska program to establish thresholds for group processing leads to two additional deficiencies in the Alaska program. First, the Alaska program allows for group processing of minor permit modifications on a quarterly basis. Section 70.7(e)(3)(iii) requires that the permitting authority notify EPA of requested permit modifications to be processed as a group on a quarterly basis, or within 5 working days of receipt of an application demonstrating that the aggregate of a source's pending applications equals or exceeds the approved threshold levels, *whichever is earlier*. Second, Alaska's regulations do not require a source to include in an application for group processing, a determination of whether a requested modification, when aggregated with the other pending applications to be processed as a group, equals or exceeds the approved threshold levels, as required by 40 CFR 70.7(e)(3)(ii)(D).[7] As

[7] Because the Alaska group processing provision relies on the State's general minor permit modification procedures, Alaska's group processing provision is also deficient for the reasons set forth above in the discussion of the problems with Alaska's minor permit modification procedures.

Continued

a condition of full approval, EPA proposes that Alaska be required to demonstrate that its group processing procedures are consistent with the requirements of 40 CFR 70.7(e)(3).

xvi. Significant permit modifications. Part 70 requires a State to provide for a review process that will assure completion of review of the majority of significant permit modifications within 9 months after receipt of a complete application. 40 CFR 70.7(e)(4)(ii). The Alaska submittal does not address this requirement in its regulations or otherwise in its program submittal. EPA proposes to require, as a condition of full approval, that Alaska provide assurances that its program is designed and will be implemented so as to complete review on the majority of significant permit modifications within this timeframe.

xvii. Reopenings. Part 70 establishes minimum requirements a State must meet where the State or EPA determines that cause exists to terminate, modify or revoke and reissue a permit. *See* 40 CFR 70.7 (f) and (g). The Alaska program contains reopening provisions, but the provisions fail to comply with part 70 in several respects. Part 70 requires that a permit be reopened if additional requirements become applicable to a major part 70 source with a remaining term of 3 or more years. Reopening is not required if the effective date of the requirement is later than the date the permit is due to expire, except this exception to the reopening requirement shall not apply if the permit or its terms have been administratively extended. *See* 40 CFR 70.7(f)(1)(i). The Alaska program satisfies the requirements for reopening a permit in the event of new applicable requirements, except that there is nothing in the Alaska program that would require reopening in the event that the effective date of a new applicable requirement is later than the permit expiration date and the permit has been administratively extended. *See* AS 46.14.280(a)(3)(B).

Part 70 also requires that a permit *shall* be reopened or revised if the State or EPA determines that the permit contains a material mistake or that inaccurate statements were made in establishing the emissions standards or other terms or conditions of the permit. *See* 40 CFR 70.7(f)(2)(iii). The Alaska program states that ADEC *may* reopen a permit if, among other things, the permit was obtained by misrepresentation of a material fact, the permit was obtained by failure of the facility to disclose fully the facts relating to issuance of the permit, the permit contains a material mistake or there has been a material change in the quantity or type of emissions. *See* AS 46.14.280(1)(A), (2)(A) and (2)(B). This provision of Alaska's program does not appear to comply with part 70 in that the Alaska program merely authorizes ADEC to reopen a permit under the stated circumstances, where as part 70 requires that a permit be reopened if ADEC or EPA makes such a finding.

The Alaska program also fails to contain required procedures in the event of a reopening for cause by EPA. Part 70 requires that, within 90 days of receiving notice from EPA that cause exists to terminate, modify or revoke and reissue a permit, the permitting authority shall forward to EPA a proposed determination of termination, modification, or revocation and reissuance. 40 CFR 70.7(g)(2). If EPA then objects to the permitting authority's proposed determination, the permitting authority has 90 days to resolve the objection by terminating, modifying, or revoking and reissuing the permit in accordance with EPA's objection. 40 CFR 70.7(g)(4). The Alaska program does not appear to contain any comparable provisions.

Finally, part 70 requires that a State title V program assure that reopenings are made as expeditiously as practicable. 40 CFR 70.7(f)(2). The Alaska program does not appear to contain a comparable provision either in its regulations or otherwise in its program submittal. EPA proposes to require, as a condition of full approval, that Alaska demonstrate to EPA's satisfaction that its provisions for reopenings comply with the requirements of 40 CFR 70.7(f) and (g).

xviii. Public petitions to EPA. Part 70 allows any person, within 60 days after expiration of EPA's 45-day review period, to petition EPA to object to a permit based on grounds raised during the public comment period. *See* 40 CFR 70.6(d). If, as a result of such a petition, EPA objects to the permit and the permit has not already been issued, the permitting authority may not issue the permit until EPA's objection has been resolved. If the permit has been issued at the time of an EPA objection resulting from a public petition, the petition for review does not stay the effectiveness of the permit and, after any action by EPA to modify, terminate, or revoke the permit, the permitting authority may thereafter issue only a revised permit that satisfies EPA's objection. Alaska's program does not appear to address these requirements. The prohibition on issuance of a permit if the EPA objects appears to apply only if EPA objects during its 45-day review period. AS 46.14.220(a). In the case of an EPA objection in response to a petition, EPA's objection would occur after the 45-day review period. EPA proposes to require, as a condition of full approval, that Alaska demonstrate to EPA's satisfaction that Alaska's provisions regarding public petitions to EPA, comply with the requirements of 40 CFR 70.8(d).

xix. Public participation. Part 70 requires that the permitting authority make available to the public any permit application, compliance plan, permit, and monitoring and compliance certification report pursuant to section 503(e) of the Clean Air Act, except for information entitled to confidential treatment pursuant to section 114(c) of the Act, and expressly provides that the contents of a title V permit are not entitled to confidential treatment. *See* 40 CFR 70.4(b)(3)(viii). Alaska's statutes and regulations regarding public access to information appear to be comparable to the requirements of part 70 with one exception. *See* AS 09.25.110 to .220; 46.14.520; 45.50.910 to .945. There is no express assurance under Alaska law that the terms and contents of a title V permit will not be entitled to confidential treatment. EPA believes that it is very unlikely that anything in a title V permit would qualify for confidential treatment under Alaska law in light of the narrow scope of information entitled to confidential treatment in Alaska and the provisions specifying the content of a title V permit. EPA therefore believes that the failure of the Alaska program to expressly state that nothing in a title V permit shall be entitled to confidential treatment does not pose a bar to interim approval. *See* 40 CFR 70.4(d)(3)(iv); *see also* 60 FR 54990, 54999 (October 27, 1995)(proposed interim approval of Idaho title V program). In order to obtain full approval, however, Alaska must demonstrate to EPA's satisfaction that nothing in a title V permit will be entitled to confidential treatment.

2. Effect of proposed action

Final interim approval may be granted for up to two years following the effective date of final interim approval, and cannot be renewed. During the interim approval period, Alaska would be protected from sanctions, and EPA would not be obligated to promulgate, administer and enforce a Federal permits program for the State of Alaska. Permits issued under a program with interim approval have full standing with respect to part 70. In addition, the one-year time period for submittal of permit applications by subject sources and the

These issues must also be addressed for group processing as a condition of full approval.

three-year time period for processing the initial permit applications begin upon the effective date of interim approval.

If, following the grant of interim approval, Alaska were to fail to submit a complete corrective program for full approval by the date six months before expiration of the interim approval, EPA would start an 18-month clock for mandatory sanctions. If Alaska then failed to submit a corrective program that EPA found complete before the expiration of that 18-month period, EPA would be required to apply one of the section 179(b) sanctions, which would remain in effect until EPA determined that Alaska had corrected the deficiency by submitting a complete corrective program. Moreover, if the Administrator finds a lack of good faith on the part of the State, both sanctions under section 179(b) would apply after the expiration of the 18-month period until the Administrator determined that the State had come into compliance. In any case, if, six months after application of the first sanction, Alaska still had not submitted a corrective program that EPA found complete, a second sanction would be required.

If, following final interim approval, EPA were to disapprove Alaska's complete corrective program, the consequences would be the same as if EPA had initially disapproved, rather than granted interim approval to, Alaska's submittal.

3. Scope of Proposed Interim Approval

If EPA grants final interim approval to the Alaska title V program, EPA proposes that the program would apply to all title V sources (as defined in the approved program) within all geographic regions of the State of Alaska, except within ''Indian Country'' as defined in 18 U.S.C. section 1151.

III. Proposed Action on Section 112(l) Submittal and Implications

A. Authority for Section 112 Implementation

In its title V program submittal, Alaska has demonstrated adequate legal authority to implement and enforce all section 112 (hazardous air pollutants) requirements through its title V operating permit process. All Alaska title V permit applications are required to cite and describe each source regulated by a Federal emission standard adopted by reference in 18 AAC 50.040 and the standard that applies to the source (18 AAC 50.335(e)(2) and (6)). In addition, all title V permits issued by the State are required to include terms and conditions that assure compliance with the applicable requirements of 18 AAC 50.040 (18 AAC 50.350(d)(1)(A) and (d)(3)).

Alaska has incorporated by reference and is requesting delegation for all source-applicable sections of the following Federal regulations promulgated by EPA under section 112 of the Act: 40 CFR part 61, subparts A (except § 61.16[8]), E, J, V, Y, FF, § 61.145 of subpart M (along with other sections and appendices which are referenced in 61.145) as this rule applies to sources required to obtain an operating permit under AS 46.14.130(b)(1)–(3) and 18 AAC 50.330[9], and appendices A, B, and C; and 40 CFR part 63, subparts A (except 63.12 through 63.15[10]), B (except 63.50[11] and 63.54[12]), D, and M. *See* 18 AAC 50.040(b) (relevant standards under 40 CFR part 61); 18 AAC 50.040(c) (relevant standards under 40 CFR part 63); AS 46.14.130(a) and 18 AAC 50.300 through 50.322 (preconstruction review of major sources of HAPs). Alaska is also requesting authority to implement and enforce all future 40 CFR parts 61 and 63 regulations which Alaska adopts by reference into State law. Finally, Alaska requests approval under the authority of 40 CFR 63.93 to substitute its state preconstruction review program for the Federal preconstruction review requirements in 40 CFR 63.5(b)(2)–(4) and 63.54, as these rules apply to newly constructed major affected sources[13] or the construction of a new emission unit[14].

B. Program for Delegation of Section 112 Standards as Promulgated

The requirements for part 70 program approval, specified in 40 CFR 70.4(b), encompass section 112(l)(5) requirements for approval of a State program for delegation of section 112 standards promulgated by EPA as they apply to title V sources. Section 112(l)(5) requires that the State's program contain adequate authorities, adequate resources for implementation, and an expeditious compliance schedule, which are also requirements under part 70. Because the State program has met these basic requirements for the purpose of approval of its title V program, it has also met these requirements for the purpose of receiving delegation of the section 112 standards that Alaska has adopted by reference.

However, in regard to the delegation of 40 CFR 61.145, EPA is concerned that Alaska does not currently have inspection personnel trained to perform asbestos inspections. EPA believes that proper training is necessary if Alaska is to properly enforce and assure compliance with 40 CFR 61.145. In this regard EPA has requested Alaska to provide for adequate training of its staff who will be performing asbestos inspections. Although EPA is proposing to approve delegation of this portion of the asbestos program to Alaska, EPA plans to continually monitor Alaska's asbestos program to ensure that the staff are properly trained and that the program is being properly implemented and enforced.

C. Substitution of State Preconstruction Review Regulations

As stated above, Alaska seeks to replace the Federal preconstruction review regulations of 40 CFR 63.5(b)(3) and 63.54 with comparable State-adopted regulations. Alaska adopted 40 CFR 63.5(b)(3), (d) and (e)[15] into 18 AAC 50.040 but did not adopt 40 CFR 63.54. EPA has determined that the State preconstruction review requirements of AS 46.14.130 and 18 AAC 50.300 through 50.322, are less stringent than 40 CFR 63.5(b)(3) and 40 CFR 63.54 as these rules apply to newly constructed major sources of HAPs. Alaska's program requires newly constructed, installed, or modified facilities that emit or have the potential

[8] 40 CFR 61.16 references the Federal public information requirements set out in 40 CFR Part 2 which apply solely to EPA and do not place any information disclosure requirements on a State or local agency. Alaska has adopted similar requirements under AS 46.14.520 and 46.14.525 which apply to the public availability of information provided to the State by affected facilities.

[9] 18 AAC 50.330 exempts from the requirement under AS 46.14.130(b)(3) to obtain an operating permit those facilities which would only be subject to such requirement because they contain sources regulated by the asbestos demolition and renovation provisions of 40 CFR 61.145 and those sources exempted from part 70 permitting under the chromium electroplating and anodizing provisions of 40 CFR 63.340(e)(1).

[10] 40 CFR 63.12 through 63.15 refer to EPA administrative activities which do not apply to Alaska and therefore are not necessary for delegation purposes.

[11] 63.50 ''Applicability'' defines when a source becomes subject to the provisions of 63.51 through 63.56. Although Alaska did not adopt 63.50 into State law, they have adopted the relevant applicability language of 63.50(a) into 18 AAC 50.040(c)(2)(B), which EPA believes is sufficient for purposes of implementing the requirements of subpart B.

[12] Section 63.54 defines optional notice and approval requirements for newly constructed and reconstructed sources which EPA is not requiring the State to adopt for delegation purposes.

[13] See definitions of ''Major source'' and ''Affected source'' in 40 CFR 63.2.

[14] As defined in 40 CFR 63.51.

[15] Alaska adopted these rules only as these rules apply to reconstructed hazardous air contaminant major facilities through a permit condition in 18 AAC 50.345(b).

to emit hazardous air contaminants[16] equal to or greater than major source thresholds to obtain a construction permit. *See* AS 46.14.130(a)(4). In this respect, Alaska's program is as stringent as 40 CFR 63.5(b)(3) and 63.54. The Alaska program also provides for similar application, review, and approval procedures as provided for in 40 CFR 63.5(d), (e), and 63.54. *See* 18 AAC 50.300 through 50.322. But, unlike 40 CFR 63.5(b)(3), Alaska preconstruction review procedures allow newly constructed sources at an existing facility to ''net out'' of preconstruction review. *See* Section IV.G.1 of the Alaska SIP, Alaska Point Source Control Program. In other words, if a facility can offset emission increases from the new source, thereby showing that no net increase in emissions will occur, the facility is relieved from obtaining pre-approval from Alaska to construct this new emission source.

Additionally, 40 CFR 63.5(b)(3) requires all new major affected sources (i.e., new major sources which have the potential to emit HAPs in quantities above major source thresholds, and ''affected sources'' which are considered ''major sources'' for the purpose of establishing maximum achievable control technology standards under the authority of section 112 of the Clean Air Act but do not have the potential to emit HAPs above major source thresholds) to obtain approval prior to construction, whereas Alaska's preconstruction program regulations only applies to new major HAPs sources (i.e., those sources that have the potential to emit HAPs above major source thresholds). For example, a facility which builds a new hard chromium electroplating operation that has a potential rectifier capacity greater than 60 million ampere-hours per year would be subject to preconstruction review and approval under 40 CFR 63.5(b)(3) but would not be required to undergo preconstruction review under Alaska's program since it would not have the potential to emit chromium in quantities greater than 10 tons per year. Given this, EPA has determined that Alaska's preconstruction review program is less stringent than 40 CFR 63.5(b)(3) and EPA is therefore cannot be approved.

D. Options for Section 112(l) Approval and Implications

In conjunction with the actions being taken in regard to Alaska's title V program submittal, EPA proposes to approve Alaska's delegation request made on May 17, 1995, and supplemented on February 27, and July 5, 1996, for all existing applicable 40 CFR parts 61 and 63 regulations adopted by reference in 18 AAC 50.040, with the exception of 40 CFR 63.6(g) which the state has adopted by reference in 50.040(c)(1)(D). EPA is disapproving Alaska's request for delegation of authority for approving alternative non-opacity emission standards under 40 CFR 63.6(g) because such authority is reserved for the EPA Administrator and cannot be delegated to a State or local agency. Because the State's request for approval of authority to implement and enforce 40 CFR parts 61 and 63 does not include implementation and enforcement for part 70 exempted sources, EPA will retain the responsibility for implementing and enforcing 40 CFR part 61, subpart M, for area source asbestos demolition and renovation activities, and 40 CFR part 63, subpart N, for area source chromium electroplating and anodizers operations which have been exempted from part 70 permitting in 40 CFR 63.340(e)(1). *See* 61 FR 27785, 27787 (June 3, 1996). EPA also proposes to grant approval, under section 112(l)(5) and 40 CFR 63.91, of Alaska's mechanism for receiving delegation of future 40 CFR part 63 regulations as adopted unchanged into State law.[17] EPA is proposing to disapprove Alaska's request to implement and enforce its State-adopted preconstruction review regulations in 18 AAC 50.300 through 50.322 in place of 40 CFR 63.5(b)(3). In this respect, EPA retains the authority to administer the Federal preconstruction review program under 40 CFR 63.5(b)(3) as this rule applies to the construction of a new major affected source; therefore, owners and operators subject to 40 CFR 63.5(b)(3) must still obtain EPA approval prior to commencing construction.

Although EPA is delegating authority to Alaska to enforce the NESHAP regulations as they apply to affected sources, it is important to note that EPA retains oversight authority for all sources subject to these Federal requirements. EPA has the authority and responsibility to enforce the Federal regulations in those situations where the State is unable to do so or fails to do so.

E. Scope of Proposed Approval

If EPA approves the Alaska section 112(l) programs as proposed, EPA proposes that, as with Alaska's title V program, the section 112(l) programs would apply to all sources within all geographic regions of the State of Alaska, except within ''Indian Country,'' as defined in 18 U.S.C. section 1151.

IV. Administrative Requirements

A. Request for Public Comments

EPA is requesting comments on all aspects of this proposed action. Copies of the State's submittal and other information relied upon for the proposed action 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 action. 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 October 18, 1996.

B. Executive Order 12866

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

C. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 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.

EPA's actions under section 502 of the Act do not create any new requirements, but simply address operating permits programs submitted to satisfy the requirements of 40 CFR part 70. Because this action does not impose any new requirements, it does not have a significant impact on a substantial number of small entities.

D. Unfunded Mandates

Under section 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), signed into law on March 22, 1995, EPA must

[16] ''Hazardous air contaminant'' is a State term that has the same meaning as the federal term ''hazardous air pollutant.'' *See* AS 46.14.990.

[17] Under this streamlined approach, Alaska will only need to send a letter of request to EPA for all future NESHAP regulations which the State has adopted by reference. As appropriate, EPA would in turn respond to this request by sending a letter back to the State delegating the appropriate NESHAP standard(s) as requested. No further formal response from the State would be necessary at this point, and if a negative response from the State is not received within 10 days of this letter of delegation from EPA, the delegation would then become final. Such delegations will periodically be published in the Federal Register.

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

EPA has determined that the action proposed today does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new Federal requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

Authority: 42 U.S.C. 7401–7671q.

Dated: September 9, 1996.

Chuck Clarke,

Regional Administrator.

[FR Doc. 96–23785 Filed 9–17–96; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1 and 95

[PP Docket No. 93–253; FCC 96–330]

Interactive Video and Data Service

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The *Further Notice of Proposed Rule Making* (FNPRM) tentatively concludes that the 25 percent bidding credit available to women- and minority-owned applicants in IVDS is not supported by the record, and seeks additional evidence to support the provision of the bidding credit to women- and minority-owned applicants in light of the Supreme Court's decision in *Adarand*. The FNPRM also seeks comment on whether and how the Commission should extend bidding credits to small businesses. The FNPRM also requests comment on whether the Commission should implement a tiered bidding credit scheme to provide varying bidding credit amounts to small businesses of different sizes and modify its small business definition. The FNPRM also tentatively concludes that the Commission should increase the upfront payments from $2,500 for every five licenses won to $9,000 per Metropolitan Statistical Area license won, and $2,500 per Rural Statistical Area license won.

DATES: Comments must be submitted on or before October 3, 1996; reply comments must be submitted on or before October 10, 1996.

ADDRESSES: Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Eric Malinen, Wireless Telecommunications Bureau, (202) 418–0680 or Christina Eads Clearwater, Wireless Telecommunications Bureau, (202) 418–0660.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Further Notice of Proposed Rule Making* in PP Docket No. 93–253; FCC 96–330, adopted August 6, 1996 and released September 10, 1996. The complete text of the *Sixth Memorandum Opinion and Order and Further Notice of Proposed Rule Making* is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. and also may be purchased from the Commission's copy contractor, International Transcription Service, (202) 857–3800, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

Title: In the Matter of Implementation of Section 309(j) of the Communications Act—Competitive Bidding

I. Further Notice of Proposed Rule Making

A. Treatment of Designated Entities

1. In the *Fourth Report and Order,* Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93–253, 59 FR 24947 (May 13, 1994), 9 FCC Rcd 2330 (*Fourth Report and Order*), the Commission established several special provisions to ensure that designated entities, *i.e.*, small businesses, rural telephone companies, and businesses owned by members of minority groups and women, are given the opportunity to participate both in the competitive bidding process for, and in the provision of, IVDS service. Among other provisions, the rules provided that on one of the two licenses in each market, a 25 percent bidding credit would be awarded to a winning bidder that was a business owned by women or minorities. *See* 47 CFR § 95.816(d)(1). The standard of review applied to federal programs designed to enhance opportunities for racial minorities at the time the IVDS rules were adopted was an intermediate scrutiny standard. In *Adarand Constructors, Inc. v. Peña,* ____ U.S. ____, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (*Adarand),* the Supreme Court invalidated the intermediate scrutiny standard for federal race-based programs. The Court held that all racial classifications, imposed by any federal, state or local government actor, must be analyzed by a reviewing court under strict scrutiny. Application of the two-prong strict scrutiny standard of review to provisions designed to encourage minority participation in IVDS requires the Commission to show: (1) a compelling governmental interest exists for taking race into account in licensing allocation decisions, and (2) the provisions in question are narrowly tailored to further the compelling governmental interest established by the record and findings. *Adarand* offers little guidance regarding the specific requirements of this test. However, other cases, such as *Richmond* v. *J.A. Croson Co.,* 488 U.S. 469 (1989) (*Croson*) provide some indications of the type of record necessary to meet the strict scrutiny standard.

2. In *Croson,* the Supreme Court applied strict scrutiny to invalidate as unconstitutional a municipality's partial set-aside for minority-owned businesses. The Court held that remedying past discrimination constitutes a compelling interest, whether the discrimination was committed by the government or by private actors within its jurisdiction. Other courts have also held remedial measures—those intended to compensate for past discrimination—to be compelling governmental interests. In *Croson,* however, the Court made clear that an interest in remedying general societal discrimination could not be considered compelling because a ''generalized assertion'' of past discrimination ''has no logical stopping point'' and would support unconstrained uses of racial classifications.

3. The Supreme Court in *Croson* noted the high standard of evidence required for the government to establish a compelling interest. It stated that the government must demonstrate a ''strong basis in evidence for its conclusion that remedial action was necessary'' and that such evidence should approach ''a prima facie case of a constitutional or statutory violation of the rights of minorities.'' Other courts, in cases decided after *Croson,* have held that