ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 140

[FRL–5615–9]

Marine Sanitation Device Standard—Establishment of Drinking Water Intake No Discharge Zone(s) Under Section 312(f)(4) (A) and (B) of the Clean Water Act

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Clean Water Act (CWA) authorizes the Administrator of the Environmental Protection Agency (EPA) to establish drinking water intake no discharge zones upon application by a State. Within these zones, the discharge of sewage from a vessel, whether treated or untreated, is prohibited. This provision was added to the statute in 1977, after EPA had promulgated regulations on application requirements for other types of no discharge zones. EPA has not promulgated regulations specific to application requirements for drinking water intake no discharge zones under the CWA. Applicants for drinking water intake zones, therefore, have followed application requirements which are not tailored to drinking water intakes, and provided more information than needed for these no discharge zones. EPA is proposing today to promulgate application requirements specific to drinking water intake no discharge zones. The effect of today's proposal would be to more specifically tailor the type of information required in an application for a drinking water intake no discharge zone and reduce the amount of information required.

DATES: Comments must be received on or before December 16, 1996. All comments must be postmarked or delivered by hand to the address below by this date.

ADDRESSES: Comments should be addressed to Drinking Water Intake Zones Comment Clerk, Water Docket MC–4101; Environmental Protection Agency, 401 M St. S.W., Washington, D.C. 20460. The official record for this rulemaking is available for viewing at EPA's Water Docket, Rm. M2616, Waterside Mall, 401 M Street, S.W., Washington, D.C. 20460. For access to the docket materials, call (202) 260–3027 between 9 a.m. and 3:30 p.m., Monday through Friday, excluding legal holidays for an appointment. EPA public information regulation (40 CFR Part 2) provides that a reasonable fee may be charged for copying.

EPA will also accept comments electronically, but these comments must be submitted also in paper version. Comments should be addressed to the following Internet address: ow-docket@epamail.epa.gov.

FOR FURTHER INFORMATION CONTACT: Deborah Lebow, Oceans and Coastal Protection Division, United States Environmental Protection Agency, 4504F, 401 M St. S.W., Washington, D.C. 20460, (202) 260–8448.

SUPPLEMENTARY INFORMATION: EPA is today proposing to clarify the application requirements for designating drinking water intake no discharge zones under section 312 of the CWA. This rule only applies to States requesting approval of drinking water intake no discharge zones and has no direct effect on any regulated entity. These requirements are being proposed pursuant to section 312(f)(4)(B) of the CWA (33 U.S.C. 1322(f)(4)(B)), which provides that ''Upon application by a State, the Administrator shall, by regulation, establish a drinking water intake zone in any waters within such State and prohibit the discharge of sewage from vessels within that zone.'' The effect of this proposal would be to set out application requirements specific to drinking water intake no discharge zones, which would reduce the amount of information States have submitted to EPA under existing 40 CFR 140.4(b) to establish these no discharge zones.

The public is invited to participate in this rulemaking by submitting written views, data or arguments on any aspect of the proposed rule or on any additional requirements the public feels should be included. Comments should include the name and address of the person commenting, identify this proposed rule by name (Establishment of Drinking Water Intake No Discharge Zone(s)), cite the specific section of the proposed rule to which each comment applies, and give the reasons for the comment. Commenters are requested to submit any references cited in their comments. Commenters are also requested to submit 2 copies of their written comments and enclosures. Commenters who want receipt of their comments acknowledged should include a self-addressed, stamped envelope. No facsimiles (faxes) will be accepted. For electronic comments, commenters should include their complete name, full address, and E-mail address. Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Electronic comments will be transferred into a paper version for the official record. EPA is experimenting with electronic commenting, therefore commenters must submit both electronic comments and duplicate paper comments. All comments post-marked or hand-delivered by the expiration date of the comment period will be considered before any action is taken on this proposed rule.

Organization of This Document

I. Background

Section 312 of the CWA, entitled ''Marine sanitation devices,'' regulates the discharge of vessel sewage. The primary purpose of section 312 is to prevent the discharge of untreated or inadequately treated sewage from vessels into waters of the United States. This provision is designed to help achieve the goal of the CWA which is to restore and maintain the chemical, physical, and biological integrity of the nation's waters.

Under sections 312(f)(3) and 312(f)(4)(A) and (B) of the CWA, States may apply to EPA for the designation of certain waterbodies as no discharge zones. Originally, section 312 contained only two provisions addressing no discharge zones: sections 312(f)(3) and 312(f)(4)(A). Under section 312(f)(3), if a State determines that some or all of the waters within that State require additional environmental protection, the State may apply to the Administrator for approval of a State designation of a no discharge zone. Approval of such application depends, among other things, upon a finding by the Administrator that adequate and reasonably available pump-out facilities exist for the area to be designated a no discharge zone. The regulations at 40 CFR 140.4(a) specify the application requirements that must be met for approval of a section 312(f)(3) no discharge zone. We are proposing to add an introductory heading to clarify this linkage to CWA section 312(f)(3), but those regulations are not otherwise affected by today's proposal. Currently, EPA has approved thirty such no discharge zones.

Under section 312(f)(4)(A), upon application by a State the Administrator may determine that the protection and enhancement of the

quality of specified waters (e.g., pristine water bodies) requires a complete prohibition of the discharge of sewage from vessels. This determination is different from a section 312(f)(3) approval of a State designation, in that the Administrator is not also required to determine that adequate facilities for the safe and sanitary removal and treatment of sewage from vessels are reasonably available. The regulations at 40 CFR 140.4(b) set forth the criteria upon which the Administrator will evaluate such a State application, and provide that they apply to applications under section 312(f)(4) of the Act. (Currently, EPA has designated one no discharge area for this second type of no discharge zone, which is identified in 40 CFR 140.4(b)(1)(i).)

In 1977, Congress amended section 312 to add a new section 312(f)(4)(B). Under section 312(f)(4)(B), States may apply to EPA for a complete prohibition of the discharge of sewage from vessels into a body of water designated as a drinking water intake no discharge zone. The statute requires that designation of a drinking water intake no discharge zone may only be accomplished by regulation. For this type of no discharge zone, the Administrator is not required to determine that adequate facilities for the safe and sanitary removal and treatment of sewage from vessels are reasonably available, nor is it required to determine whether the protection and enhancement of the water quality requires such a prohibition. Prior to this proposed regulation, EPA has designated one drinking water intake no discharge zone under section 312(f)(4)(B), which is currently codified at 40 CFR 140.4(b)(1)(ii).

No regulations directly and specifically responsive to section 312(f)(4)(B) have been promulgated. Consequently, the regulations in 40 CFR 140.4(b) have been used, as they purport to apply to any no discharge zone established under section 312(f)(4). The result of not having regulations specifically dealing with section 312(f)(4)(B) is that applicants may compile extraneous materials for a section 312(f)(4)(B) drinking water intake no discharge zone, and do not provide other information that the Administrator needs to make a section 312(f)(4)(B) decision. Today's proposed regulations clarify that § 140.4(b) only applies to designations for no discharge areas under section 312(f)(4)(A) and adds a new proposed § 140.4(c) to specifically cover application requirements for the designation of drinking water intake no discharge zones under section 312(f)(4)(B).

In clarifying the regulations pursuant to section 312(f)(4)(B), EPA has sought to comply with Congressional intent expressed in the legislative history for this section. The 1977 CWA Conference Report, referring to section 312(f)(4)(B), stated ''[t]he conferees intend that the Administrator [of the Environmental Protection Agency] define the area to which the prohibition applies in his promulgation of such a prohibition.'' See Clean Water Act of 1977, Conference Report (to accompany H.R. 3199), H. Rep. No. 830, 95th Congress, 1st sess. (1977). The Report went on to say ''[i]n implementing section 312(f)(4)(B), the Administrator is cautioned to use discretion in establishing drinking water intake zones. This new paragraph is intended to protect drinking water and not to result in far reaching discharge prohibitions unnecessary to protect drinking water.'' *Id*. The proposed regulations are designed primarily to ensure that the size of the requested no discharge zone is neither too large nor too small to protect drinking water intake zones from vessel sewage.

II. Detailed Discussion of the Proposed Rule

Today's proposal would add new § 140.4(c) to specifically address application requirements for drinking water intake no discharge zones under CWA section 312(f)(4)(B). In addition, the existing no discharge zone designated under CWA secion 312 (f)(4)(B), now set out in 40 CFR 140.4(b)(1)(ii), would be relocated into new § 140.4(c)(4)(i).

EPA is proposing today in 40 CFR 140.4(c) that in its application to the Administrator for establishment of a drinking water intake no discharge zone, a State should (1) identify and describe exactly and in detail the location of the drinking water supply intake(s) and the community served by the intake(s), including average and maximum expected amounts of inflow; (2) specify and describe exactly and in detail, the waters, or portions thereof, for which a complete prohibition is desired, and where appropriate, average, maximum and low flows; (3) include a map, preferably a USGS topographic quadrant map, clearly marking by latitude and longitude the waters or portions thereof to be designated a drinking water intake no discharge zone; and (4) include a statement of basis justifying the size of the requested drinking water intake no discharge zone, for example, identifying areas of intensive boating activities.

The requirement that a State specify and describe exactly and in detail the location of the drinking water supply intake(s) and the community served by the intake(s) is intended to verify the existence of a drinking water supply intake and to ensure that the location of such intake corresponds to the area to be designated a drinking water intake no discharge zone. Under this requirement, a State should specify and describe the location of the intake in relation to the location of the requested zone. The size of the community served by the intake is also relevant to determining the size of the zone. For example, the larger the drinking water needs of the community being served, the stronger might be the justification for requesting a large drinking water intake no discharge zone. This requirement can be met by specifying the average and maximum expected amounts of inflow.

The requirement to specify and describe exactly and in detail, the waters for which a complete prohibition is desired is intended to assist the Administrator with the task of identifying and defining the requested drinking water intake no discharge zone. The description should include the geographic location of such body of water and other pertinent details, and where appropriate, average, maximum and low flows. Average, maximum and low flows will be relevant for rivers, but not for certain lakes.

The requirement that a State submit a map is also intended to assist the Administrator in documenting the location of the body of water and the size of the drinking water intake no discharge zone. Preferably, the map should be a USGS topographical quadrant map since these will provide the greatest clarity. The desired drinking water intake no discharge zone should be clearly indicated on such map by latitude and longitude.

The requirement that a State applicant justify the size of the requested zone is intended to ensure a rational relationship between the size of the requested zone and the need to protect drinking water for the designated community. For example, a drinking water intake located in the proximity of an intensive boating area may require a larger no discharge area to protect the integrity of the drinking water. This requirement is designed to guard against far reaching prohibitions that are unnecessary to protect drinking water, while at the same time ensuring that prohibitions would affect a large enough area to effectively protect the drinking water supply.

III. Compliance with Other Laws and Executive Orders

A. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq*., EPA must prepare a Regulatory Flexibility Analysis for regulations having a significant impact on a substantial number of small entities. The RFA recognizes three kinds of small entities, and defines them as follows: (1) Small governmental jurisdictions: any government of a district with a population of less than 50,000. (2) Small business: any business which is independently owned and operated and not dominant in its field, as defined by the Small Business Administration regulations under the Small Business Act. (3) Small organization: any not for profit enterprise that is independently owned and operated and not dominant in its field.

As discussed in Section III.D. of this preamble on the Unfunded Mandates Reform Act, today's proposed rule does not impose economic burdens. Accordingly, the Administrator certifies that today's proposed rule would not have a significant impact on a substantial number of small entities, and that a Regulatory Flexibility Analysis therefore is unnecessary.

B. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* An Information Collection Request (ICR) document has been prepared by EPA (ICR No. 1791.01) and a copy may be obtained from Sandy Farmer, OPPE Regulatory Information Division; U.S. Environmental Protection Agency (2137); 401 M St., SW., Washington, D.C. 20460 or by calling (202) 260–2740.

This information is required from States who wish to designate a drinking water intake no discharge zone under CWA Section 312(f)(4)(B) and it allows the EPA Administrator to evaluate State applications for designating no discharge zones. This information is necessary to ensure that the discharge area is neither too large nor too small to protect drinking water intake zones from vessel sewage and it is not of a confidential nature.

Applications for drinking water intake no discharge zones have an estimated reporting burden averaging 70 hours per response and an estimated annual record keeping burden of one hour per respondent at approximately $1,472 per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR Part 9 and 48 CFR Chapter 15.

Comments are requested on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques. Send comments on the ICR to the Director, OPPE Regulatory Information Division; U.S. Environmental Protection Agency (2137); 401 M St., SW., Washington, D.C. 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th St., NW, Washington, DC 20503, marked ''Attention: Desk Officer for EPA.'' Include the ICR number in any correspondence. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after October 16, 1996, a comment to OMB is best assured of having its full effect if OMB receives it by November 15, 1996. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

C. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is ''significant,'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlement, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this proposed rule is not a ''significant regulatory action'' under the terms of Executive Order 12866 and is therefore not subject to OMB review.

D. The Unfunded Mandates Reform Act, and Executive Order 12875

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with

the regulatory requirements. EPA has determined that today's proposed regulation does not impose any enforceable duties upon the private sector. Therefore, this proposed rulemaking is not a ''private sector mandate.''

Further, EPA has determined that today's action 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 proposed rulemaking should reduce the reporting and recordkeeping burden on applicants. Thus, this proposed rule is not subject to the requirements of sections 202 and 205 of the UMRA. It is codifying in 40 CFR 140.4(c) that which already exists in the statute and is self-implementing. Therefore, this action should have no regulatory requirements that might significantly or uniquely affect small governments. Executive Order 12875 requires that, to the extent feasible and permitted by law, no Federal agency shall promulgate any regulation that is not required by statute and that creates a mandate upon a State, local, or tribal government, unless funds necessary to pay the direct costs incurred by the State, local or tribal government in complying with the mandate are provided by the Federal government. EPA has determined that the requirements of Executive Order 12875 do not apply to today's proposed rulemaking, since no mandate is created by this action.

List of Subjects in 40 CFR Part 140

Environmental protection, Drinking Water Intake Zones, Marine sanitation device standard; No discharge areas.

Dated: October 3, 1996.

Carol M. Browner,

Administrator.

PART 140—[AMENDED]

For the reasons set forth in the preamble, EPA proposes to amend 40 CFR part 140 as follows:

1. The authority citation for part 140 is revised to read as follows:

Authority: Sec. 312, as added Oct. 18, 1972, Pub. L. 92–500, sec. 2, 86 Stat. 871, 33 U.S.C. 1332(b)(1).

§ 140.4 [Amended]

2. Section 140.4 is amended:

a. In paragraph (a) introductory text, in the first sentence, by revising the first word ''A'' to read ''a'' and by adding to the beginning of the sentence the words *''Prohibition pursuant to CWA section 312(f)(3):''*.

b. In paragraph (b) introductory text, in the first sentence, by revising the first word ''A'' to read ''a'' and by adding to the beginning of the sentence the words *''Prohibition pursuant to CWA section 312(f)(4)(A):''* and by removing from the first sentence the words ''312(f)(4)'' and adding, in their place, the words ''312(f)(4)(A).''

c. In paragraph (b)(1) by removing the word ''prohibited:'' and adding, in its place, the words ''prohibited pursuant to CWA section 312(f)(4)(A):'', and by redesignating paragraph (b)(1)(ii) as new paragraph (c)(4)(i) and reserving paragraph (b)(1)(ii).

d. By adding the following new paragraph (c) to read as follows:

§ 140.4 Complete Prohibition.

* * * * *

(c)(1) *Prohibition pursuant to CWA section 312(f)(4)(B):* A State may make written application to the Administrator of the Environmental Protection Agency under section 312(f)(4)(B) of the Act for the issuance of a regulation establishing a drinking water intake no discharge zone which completely prohibits discharge from a vessel of any sewage, whether treated or untreated, into that zone in particular waters, or portions thereof, within such State. Such application shall:

(i) Identify and describe exactly and in detail the location of the drinking water supply intake(s) and the community served by the intake(s), including average and maximum expected amounts of inflow;

(ii) Specify and describe exactly and in detail, the waters, or portions thereof, for which a complete prohibition is desired, and where appropriate, average, maximum and low flows in million gallons per day (MGD) or the metric equivalent;

(iii) Include a map, preferably a USGS topographic quadrant map, clearly marking by latitude and longitude the waters or portions thereof to be designated a drinking water intake zone; and

(iv) Include a statement of basis justifying the size of the requested drinking water intake zone, for example, identifying areas of intensive boating activities.

(2) If the Administrator finds that a complete prohibition is appropriate under this paragraph, he or she shall publish notice of such finding together with a notice of proposed rulemaking, and then shall proceed in accordance with 5 U.S.C. 553. If the Administrator's finding is that a complete prohibition covering a more restricted or more expanded area than that applied for by the State is appropriate, he or she shall also include a statement of the reasons why the finding differs in scope from that requested in the State's application.

(3) If the Administrator finds that a complete prohibition is inappropriate under this paragraph, he or she shall deny the application and state the reasons for such denial.

(4) For the following waters the discharge from a vessel of any sewage, whether treated or not, is completely prohibited pursuant to CWA section 312(f)(4)(B):

(i) * * *

(ii) (Reserved).

[FR Doc. 96–26193 Filed 10–15–96; 8:45 am]

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