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[FR Doc. 96–31116 Filed 12–5–96; 8:45 am]
BILLING CODE 7710–12–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 70

[AD–FRL–5657–5]

Clean Air Act Final Interim Approval of Operating Permits Program, State of Idaho; Clean Air Act Proposed Delegation of National Emission Standards for Hazardous Air Pollutants as They Apply to Title V Sources and Approval of Streamlined Mechanism for Future Delegations, State of Idaho

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final interim approval and delegation.

SUMMARY: EPA is promulgating final interim approval of the Operating Permits Program submitted by the Idaho Division of Environmental Quality (IDEQ) 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 is also promulgating final interim approval of IDEQ's request for delegation of authority to implement and enforce State-adopted hazardous air pollutant regulations, which adopt by reference the Federal National Emission Standards for Hazardous Air Pollutants (NESHAP) contained within 40 CFR parts 61 and 63 as in effect on April 1, 1994, as these regulations apply to sources that are required to obtain a Federal operating permit. EPA is also approving a mechanism for Idaho to receive delegation of future NESHAP standards that the State adopts by reference into State law.

EFFECTIVE DATE: January 6, 1997.

ADDRESSES: Copies of the State's submittal and other supporting information used in developing the final interim approval are available for inspection during normal business hours at the following location: U.S. Environmental Protection Agency, Region 10, 1200 Sixth Avenue, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Elizabeth Waddell, 1200 Sixth Avenue, OAQ–107, Seattle, WA 98101, (206) 553–4303.

SUPPLEMENTARY INFORMATION:

I. Background and Purpose

A. Introduction

1. Title V

Title V of the 1990 Clean Air Act Amendments (sections 501–507 of the Clean Air Act (''the Act'')), and implementing regulations at 40 Code of Federal Regulations (CFR) Part 70 require that States develop and submit operating permits programs to EPA by November 15, 1993, and that EPA act to approve or disapprove each program within 1 year after receiving the submittal. The EPA's program review occurs pursuant to section 502 of the Act and the part 70 regulations, which together outline criteria for approval or disapproval. Where a program substantially, but not fully, meets the requirements of part 70, EPA may grant the program interim approval for a period of up to 2 years. If EPA has not fully approved a program by 2 years after the November 15, 1993, date, or by the end of an interim program, it must establish and implement a Federal program.

On October 27, 1995, EPA proposed disapproval of Idaho's title V operating permits program because of deficiencies in the State's provisions for excess emissions and administrative amendments. In the alternative, EPA proposed interim approval of Idaho's program provided Idaho revised its regulations to address these deficiencies and submitted the revisions to EPA before final action on Idaho's submittal. See 60 FR 54990. EPA received a single letter of public comment which addressed sources located on Tribal lands and Idaho's insignificant activities list. On January 12, 1996, Idaho submitted program revisions addressing EPA's two proposed grounds for disapproving Idaho's program.

On June 17, 1996, EPA reproposed action on two aspects of Idaho's title V program. 61 FR 30570. First, EPA proposed that one of the four deficiencies EPA initially noted in the October 27, 1996, Federal Register in Idaho's general permitting regulations be eliminated as an interim approval issue. 61 FR 30571. Second, EPA identified additional reasons it believed that the audit immunity provisions of the Idaho Environmental Audit Protection Act [1], Idaho Code 9–801 to 9–811, required interim rather than full approval and proposed that Idaho also be required to revise or address the audit privilege provisions of the Idaho Audit Act as a condition of full approval. 61 FR 30571–30573. EPA did not address the single comment it received on the October 27, 1995, proposal or the effect of the State's revisions to its title V program on the two disapproval issues because neither the comment nor the State's program revisions involved the two title V issues on which EPA reproposed action in the June 17, 1996, Federal Register document.

2. Section 112

Section 112(l) of the Clean Air Act authorizes EPA to approve State air toxic programs or rules that operate in place of the Federal air toxic program or rules. The Federal air toxic program implements the requirements found in section 112 of the Act pertaining to the regulation of hazardous air pollutants. Approval of an air toxic program is granted by EPA if the Agency finds that: (1) The State program is ''no less stringent'' than the corresponding Federal program or rule, (2) the State has adequate authority and resources to implement the program, (3) the schedule for implementation and compliance is sufficiently expeditious, and (4) the program is otherwise in compliance with Federal guidance. Once approval is granted, the air toxic program can be implemented and enforced by State or local agencies, as well as EPA.

On September 15, 1995, Idaho requested delegation of authority to implement and enforce specific NESHAP regulations in 40 CFR parts 61 and 63 that Idaho had adopted as a matter of Idaho law on April 1, 1994. On December 14, 1995, Idaho also requested approval of its mechanism for receiving automatic delegation of future NESHAP standards as promulgated. In the June 17, 1996, limited reproposal on Idaho's title V submittal, EPA also proposed interim approval of Idaho's request for delegation under section 112(l) and requested public comment on this action. Additionally, EPA proposed approval of a mechanism for Idaho to receive delegation of the NESHAP standard which the State may adopt by reference into State law in the future. See 61 FR 30570.

Idaho received numerous comments on the June 17, 1996, reproposal, all addressing Idaho's title V submittal and all except for one addressing the Idaho

[1] In the October 27, 1995, and June 17, 1996, Federal Register notices, EPA referred to the legislation as the ''Idaho Environmental Audit Statute.'' The comments submitted by IDEQ and the Idaho Attorney General refer to the legislation as the ''Idaho Environmental Audit Protection Act,'' shortened to the ''Idaho Audit Act.'' EPA will refer to this legislation by the latter title in this notice.

Audit Act. None of the comments addressed EPA's proposed action under section 112(l). In this document, EPA is taking final action to promulgate interim approval of the operating permits program for the State of Idaho, to delegate the NESHAPs as adopted by Idaho as they apply to title V sources and as in effect on April 1, 1994[2], and to approve a streamlined mechanism for future NESHAP delegations. EPA is also responding to comments received on the October 27, 1995, proposal and the June 17, 1996, reproposal.

II. Final Action and Implications

A. Analysis of Idaho's Title V Submission and Response to Public Comments

1. Changes to Idaho's Regulations

Through an emergency rulemaking effective November 20, 1995, the Idaho Division of Environmental Quality (IDEQ) repealed all of the excess emission provisions in its title V regulations (IDAPA 16.01.01.326 through .332) except for IDAPA 16.01.01.332, which provides an affirmative defense comparable to that provided in part 70 for violations of technology-based emission limits due to an ''emergency.'' See 40 CFR 70.6(g). These revisions adequately address EPA's concerns that Idaho's excess emissions program for title V sources did not assure compliance with all applicable requirements. Idaho also made revisions to the excess emissions provisions that apply to all sources in Idaho. See IDAPA 16.01.01.130 through .136. EPA will review these changes as a revision to Idaho's State Implementation Plan, which has been submitted to EPA for approval.

The emergency rulemaking also made revisions to Idaho's permit to construct procedures applicable to title V sources. See IDAPA 16.01.01.209. These revisions ensure that the terms of preconstruction permits incorporated into title V permits by administrative amendment will contain compliance requirements substantially equivalent to the requirements of a title V permit and adequately address the proposed grounds for disapproval identified by EPA in the October 27, 1995, Federal Register document.

IDEQ has made two other revisions to its title V permitting regulations, neither of which affect the approvability of Idaho's title V program. First, Idaho extended the deadline for the submission of title V permit applications for sources existing on May 1, 1994, from January 1, 1996, to June 1, 1996. See IDAPA 16.01.01.313.01.a. This date will still ensure that all permit applications are submitted within 12 months of when a source becomes subject to Idaho's title V program, as required by 40 CFR 70.5(a)(1). Second, Idaho has made minor revisions to the regulation specifying the information required in a permit application. See IDAPA 16.01.01.314. These changes do not affect the approvability of Idaho's permit application requirements.

2. Response to Public Comment

EPA received a single public comment on the October 27, 1995, Federal Register document. The commenter disagreed with EPA's proposed decisions regarding the geographic scope of the proposed approval and insignificant activities. EPA received numerous comments on the June 17, 1996, reproposal. One commenter stated generally that it supports full approval of the Idaho title V program, but did not explain why it believed Idaho was entitled to full rather than interim approval. EPA continues to believe that interim approval is appropriate for the reasons set forth in the October 27, 1995, proposal (60 FR 54990), the June 17, 1996, reproposal (61 FR 30570) and this document. All other comments on the June 17, 1996, reproposal addressed the Idaho Audit Act.

a. Geographic Scope of Idaho Program—Tribal Lands. EPA proposed to exclude from the Idaho title V program title V sources located within the exterior boundaries of Indian Reservations in Idaho[3] because the State did not establish that it had authority to issue permits to and enforce permits against such sources. The commenter expressed concern over the complexity of the jurisdiction issue and that EPA's proposal might cause hardships to sources on Indian Reservations, but did not elaborate on what these hardships might be. EPA continues to believe that the State of Idaho has not made a sufficient showing to obtain title V approval for sources located within Indian Country in Idaho and, therefore, is taking final action to exclude such sources from the scope of this interim approval.

To obtain title V program approval, a State must demonstrate that it has adequate authority to issue permits and to assure compliance by all sources required to have permits under title V with each applicable requirement under the Act. See Section 502(b)(5) of the Act; 40 CFR 70.4(b)(3)(i). The authority must include:

> A legal opinion from the Attorney General from the State or the attorney for those State, local, or interstate air pollution control agencies that have independent counsel, stating that the laws of the State, locality, or interstate compact provide adequate authority to carry out all aspects of the program. This statement shall include citations to the specific sta[tut]es, administrative regulations, and, where appropriate, judicial decisions that demonstrate adequate authority.

40 CFR 70.4(b)(3). Thus, the Act requires States to support their title V program submittals with a specific showing of adequate legal authority over all regulated sources, including sources located on lands within Indian Country.

In its title V program submittal, Idaho made no attempt either to claim or to show authority over sources located within Indian Country. Indeed, the State clarified on April 5, 1995, that its submittal ''was not an attempt to address jurisdictional issues over tribal lands.'' Furthermore, the Shoshone-Bannock Tribes and the Kootenai Tribe of Idaho wrote to EPA on April 11, 1995, and March 22, 1995, respectively, asserting that the State had ''not demonstrate[d] authority to institute an air permitting program on reservations as is required under title V of the Act.'' Accordingly, EPA concludes that Idaho has not demonstrated authority to regulate title V sources in Indian Country and, therefore, does not grant program approval to the State for these sources.

b. Insignificant activities. The commenter also disagreed with EPA's proposal to grant interim rather than full approval to Idaho's insignificant activities list. The commenter referred to the EPA guidance document entitled White Paper for Streamlined Development of Part 70 Permit Applications, from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, to the Air Division Directors (July 10, 1995), as supporting the development of insignificant activities lists. The commenter believes that EPA should encourage IDEQ to develop the proper regulatory guidance to go with Idaho's list and that such guidance would give Idaho and the regulated community further time to evaluate the list and to propose any changes that may be warranted.

EPA agrees with the commenter and fully intended this outcome by granting

[2] With the exception of the radionuclide NESHAP regulations in 40 CFR part 61, subparts B, H, I, Q, R, T, and W.

[3] Although the October 27, 1995, Federal Register notice used the term ''within the exterior boundaries of Indian Reservations,'' EPA's position is that State's generally do not have civil jurisdiction within ''Indian Country,'' as defined in 18 USC 1151.

Idaho interim approval of its program for insignificant activities. By granting Idaho interim approval on this issue, Idaho will have 18 months to submit changes that address EPA's concerns. In the interim, IDEQ and the regulated community may use the lists as currently promulgated by the State. This time period will allow Idaho and the regulated community the time that the commenter requests to develop guidance and evaluate and revise the list as required by EPA as a condition of full approval. Accordingly, EPA will continue to require that Idaho address the issues identified in Section II.A.6. below as a condition of full approval.

c. Idaho Audit Act. In the June 17, 1996, Federal Register document reproposing action on Idaho's title V program, EPA explained in great detail why EPA believed that the Idaho Audit Act impermissibly interfered with the enforcement requirements of title V and part 70 and thus posed a bar to full approval. EPA received four comment letters strongly opposing EPA's proposal with respect to the Idaho Audit Act. These included comments jointly submitted by IDEQ and the Idaho Attorney General's Office; comments submitted by the Idaho Association of Commerce & Industry, which represents members of the Idaho business community; and comments from two law firms representing nationwide trade organizations and industries. EPA also received three comment letters from environmental and public interest organizations agreeing with EPA that the Idaho Audit Act was inconsistent with the enforcement requirements of title V and part 70 and urged interim approval or disapproval.[4]

i. Comments that the Idaho Audit Act does not pose a bar to full title V approval. (A) Effect of the Idaho Audit Act on Idaho's enforcement authority. The commenters opposing EPA's action with respect to the Idaho Audit Act raise numerous issues. As an initial matter, several of the commenters stated that nothing in the Clean Air Act or part 70 contains a prohibition against State audit protection and/or immunity laws or precludes a State from determining that criminal or civil prosecution is inappropriate in certain defined situations, such as those specified in the Idaho Audit Act.

Section 502(b)(5)(E) of the Clean Air Act lays out the minimum enforcement authorities which Congress required a State to have in order to secure Federal approval to implement and enforce a title V operating permits program. That section requires, as a condition of Federal approval, that a State have adequate authority to issue permits and assure compliance; to terminate or revoke such permits for cause; and to enforce permits, permit fee requirements, and the requirement to obtain a permit, including authority to recover civil penalties of at least $10,000 per day for each violation and to provide appropriate criminal penalties. The part 70 implementing regulations, at 40 CFR 70.11, elaborate upon those authorities. Part 70 requires a State to have authority to issue emergency orders and seek injunctive relief (40 CFR 70.11(a) (1) and (2)) and to assess civil and criminal penalties in a maximum amount of not less than $10,000 per day per violation (40 CFR 70.11(a)(3)). Although neither title V nor part 70 expressly prohibits State audit privilege and/or immunity laws, the analysis in the June 17, 1996, Federal Register document shows how the Idaho Audit Act interferes with the requirements for civil and criminal penalty authority set forth in title V and the part 70 implementing regulations so as to preclude full approval of Idaho's operating permits program. For example, as EPA explained in the June 17, 1996, Federal Register document, the immunity provisions of the Idaho Audit Act alter and in fact eliminate the State's authority to recover *any* civil or criminal penalties under the circumstances identified in the Idaho Audit Act. See 61 FR 30571–30573. The immunity provision of the Idaho Audit Act bars prosecution of intentional and knowing violations that would otherwise be a basis for criminal liability unless the source has previously and repeatedly violated the same requirements within the past three years. Moreover, the provisions of the Idaho Audit Act preventing the compelled disclosure of environmental audit reports prevents the State from obtaining potentially important information on whether a violation was knowing or whether a violation has been corrected. If the State, by virtue of such laws, surrenders its ability to thoroughly investigate potential violations or its discretion to take appropriate enforcement action in the face of violations, then the State's fundamental enforcement authority is compromised. EPA believes that this is the case with the Idaho Audit Act.

In a similar vein, the commenters argue that the State of Idaho has the general authorities enumerated in section 502(b)(5)(E) of the Clean Air Act and 40 CFR 70.11 to enforce permits, permit fee requirements and the requirement to obtain a permit and to recover civil and criminal penalties in a maximum amount of not less than $10,000 per day of violation, and that nothing in the text of section 502(b)(5)(E) of the Act or the part 70 regulations authorizes EPA to consider the effect of State laws of general applicability on a State's title V civil and criminal enforcement authorities. The commenters further argue that the logical corollary of EPA's proposed action with respect to the Idaho Audit Act is that every State procedural and evidentiary rule must be evaluated and amended whenever EPA believes that it could in some fashion, directly or indirectly, interfere with environmental enforcement.

Laws of general applicability are an appropriate subject for EPA review as is evident from the language of the part 70 regulations themselves. The regulations require that a State applying for a title V operating permits program include copies of ''all applicable State or local statutes and regulations including those governing State administrative procedures that either authorize the part 70 program *or restrict its implementation*.'' 40 CFR 70.4(b)(2) (emphasis added). The regulations also require a legal opinion from the State Attorney General asserting that the laws of the State provide adequate authority to carry out ''all aspects of the program.'' 40 CFR 70.4(b)(3). It is certainly EPA's expectation that, in issuing such a legal opinion, the Attorney General is certifying that no State laws, even laws of general applicability or laws of evidence, interfere with the State's authority to administer and enforce the title V program. See 59 FR 47105, 47108 (September 14, 1994) (requiring Oregon to revise or clarify meaning of criminal statute appearing to limit criminal liability of corporations as a condition of full title V approval); 59 FR 61820, 61825 (December 2, 1994) (accepting Oregon Attorney General's opinion regarding effect of statute).[5]

[4] EPA has recently received a copy of rules promulgated by IDEQ under the Idaho Audit Act. See IDAPA 16.01.10.000–018. EPA does not believe that these rules remedy the problems identified with the Idaho Audit Act in the June 17, 1996, Federal Register notice and this notice. EPA notes with concern, however, the provision of IDAPA 16.01.10.015.03(b) which defines a violation disclosed within 60 days after discovery through an environmental audit as a violation disclosed in a ''timely manner'' and thus entitled to immunity. EPA is concerned that this lengthy time period would not require prompt reporting of violations involving a potential of imminent and substantial endangerment as a condition of immunity.

[5] One commenter argues that section 116 of the Clean Air Act bars EPA from seeking to preempt State audit privilege and/or immunity laws. Section 116 states that, subject to limited exceptions, nothing in the Clean Air Act shall preclude or deny the right of any State to adopt or enforce emissions

Several commenters also argued that the Idaho Audit Act does not interfere with the enforcement requirements of title V because it is qualified in a number of important respects. The commenters note in particular that the Idaho Audit Act, like most other State audit privilege and/or immunity legislation, does not offer immunity or protection from disclosure for information required by law to be collected, developed, reported or otherwise made available to a government agency. See Idaho Code 9–805, 9–807, 9–809(5). One commenter stated that the Idaho Audit Act covers ''almost every conceivable disclosure affected by a Title V Clean Air Act permit * * * In fact, it is difficult to conceive of a situation under a Title V program in which there was not a specific permit condition to make the disclosure voluntary.''

EPA noted in the June 17, 1996, Federal Register document that the Idaho Audit Act does contain provisions which narrow its scope, and noted particularly the provisions which exclude from the scope of the immunity and protection from disclosure information that is required to be collected, developed, or reported under State or Federal law. 61 FR 60572–73. Therefore, EPA agrees with the commenters that in many cases disclosure of a violation discovered during an audit would not be considered ''voluntary'' and thus would not be entitled to immunity under the Idaho Audit Act. Similarly, EPA agrees that in many cases the information necessary to bring an enforcement action will be information that a facility is required to collect, develop, report, or otherwise make available to the government and therefore not subject to the protection from disclosure provided by the Idaho Audit Act. At least one other State has issued an opinion stating that its audit immunity statute does not apply to title V sources because the statute does not apply to violations that are required to be reported by the source and because of the extensive monitoring, recordkeeping, and reporting requirements of that State's title V operating program. See 61 FR 42224–42225 (August 14, 1996) (proposed interim approval of New Hampshire title V program); 61 FR 51370 (October 2, 1996) (final interim approval of New Hampshire title V program). It is not clear, however, as a matter of Idaho law, that all evidence of violations of title V permits and permit requirements would be required to be reported to the State of Idaho under its title V regulations, thus excluding such violations from the immunity of Idaho Code 9–809 and from the prohibition against compelled disclosure of Idaho Code 9–804. The Idaho Attorney General's Office has not provided EPA with such an opinion, and EPA must therefore infer that there could be violations at a title V source discovered through an environmental audit that would be entitled to immunity or protection against compelled disclosure under the Idaho Audit Act. Therefore, the concerns raised by EPA in the June 17, 1996, Federal Register document remain.

The commenters also take issue with EPA's interpretation of the title V and part 70 requirements for enforcement authority, as evidenced in the April 5, 1996, memorandum entitled ''Effect of Audit Immunity/Privilege Laws on States' Ability to Enforce Title V Requirements'' (hereinafter, the ''April 5 Title V Memorandum'') and the June 17, 1996, Federal Register document reproposing action on the Idaho title V program. The commenters argue that EPA's interpretation and application of the title V enforcement requirements improperly interferes with the States' role as independent sovereigns, improperly divests States of their primary responsibility for implementing and enforcing the Clean Air Act, and conflicts with the Clinton Administration's stated policy to allow States to experiment with alternative approaches to achieve environmental protection. The commenters further argue that the determination of the Idaho legislature that criminal or civil penalties are inappropriate under the circumstances set forth in the Idaho Audit Act is within the statutory boundaries and flexibility provided by the Clean Air Act. The commenters continue that the immunity provisions of the Idaho Audit Act reflect the Idaho legislature's judgment as to the ''appropriate'' penalty for companies that voluntarily disclose and correct instances of environmental noncompliance and reflect a reasonable allocation of the State's enforcement resources.

EPA agrees that, in enacting the Clean Air Act, Congress believed that States and local governments should have the primary responsibility for controlling air pollution at its source. *See* Section 101(a)(3) of the Clean Air Act. EPA also agrees with the commenters that the States are to be given broad flexibility to select alternative means to achieve the minimum Federal requirements established in the Act by Congress and by EPA in the part 70 regulations and fully supports State experimentation to achieve greater compliance with environmental laws. Such flexibility and experimentation, however, must be, as the commenters' acknowledge, *within* the bounds of the statutes enacted by Congress and the implementing regulations promulgated by EPA. It cannot cancel out the requirement that States must meet some minimum Federal requirements as a condition of Federal approval of their programs.

In the case of the Clean Air Act operating permits program, those minimum Federal requirements are set forth in title V and the part 70 regulations. It is these requirements that EPA is insisting that the State of Idaho meet as a condition of full approval of its title V program. In short, EPA does not believe that the Idaho title V program is within the statutory boundaries established by Congress or the flexibility provided by the Clean Air Act because the Idaho Audit Act would limit the enforcement authority Congress and EPA required States to have as a condition of Federal approval.

Moreover, the commenters' argument that the Idaho Audit Act governs areas of law traditionally committed to States in their role as independent sovereigns—if taken to its logical conclusion—would mean that a State could not be required to have any civil or criminal penalty authority to get full title V approval. It is an argument that goes to the validity of section 502(b)(5)(E) and 40 CFR 70.11 themselves and therefore is untimely in this context. As stated above, Congress through title V, and EPA through the part 70 implementing regulations, required States to satisfy certain minimum requirements for enforcement authority as a condition of Federal approval of a Clean Air Act operating permits program. By conditioning full approval of the Idaho title V program on changes to the Idaho Audit Act or a demonstration by the State satisfactory to EPA that the Idaho Audit Act does not interfere with the enforcement requirements of title V, EPA is simply seeking to assure that Idaho has the required enforcement authorities before receiving Federal approval of its program. *Cf. Commonwealth of Virginia* v. *Browner*, 80 F.3d 869, 880 (4th Cir. 1996) (in rejecting Virginia's argument that requiring State to change its judicial standing rules as a condition of title V

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standards or limitations or requirements respecting the control or abatement of air pollution ''except where such emission standard or limitation is less stringent than required by the Clean Air Act.'' Such an interpretation would mean that EPA has no authority to disapprove any State enforcement provisions as a condition of title V approval. Section 502(b)(5)(E), which requires EPA to promulgate minimum enforcement authorities required for approval of a State title V program, clearly belies such an argument.

approval violated State's sovereignty, the Court stated: ''Even assuming *arguendo* the accuracy of Virginia's assertion that its standing rules are within the core of its sovereignty, we find no constitutional violation because federal law 'may, indeed, be designed to induce state action in areas that would otherwise be beyond Congress' regulatory authority,' '' citing *FERC* v. *Mississippi*, 456 U.S. 742, 766 (1982)).

The commenters also assert that EPA's use of its title V program approval authority to ''force'' States to modify their audit privilege and/or immunity legislation is contrary to Congress' general expression of intent against the automatic use of audit reports for enforcement of the Clean Air Act, as expressed in the Joint Explanatory Statement of the Conference Committee Report for the 1990 Amendments. S. Conf. Rep. 101–952, 101st Cong. 2d Sess. 335, 348 (Oct. 26, 1990), reprinted in Legislative History at 941–42, 955, 1798. The commenters further assert that Idaho's decision to provide qualified audit immunity is consistent with that Congressional intent.

As an initial matter, EPA disagrees that it is using the title V approval process to ''force'' States to modify their audit legislation. Instead, as stated above, EPA is simply analyzing to what extent the audit privilege and/or immunity laws of a particular State compromise the enforcement authorities required by Congress in title V, as interpreted by EPA through the part 70 regulations, as a condition of Federal approval of the State's operating permits program.

With respect to the issue of Congress' intent, the language from the Conference Report cited by the commenters does not clearly express a desire that audit reports not be used for enforcement of the Clean Air Act requirements. Rather, the text expresses some general support for the concept of auditing and a desire that the *criminal penalties* of section 113(c) ''should not be applied in a situation where a person, acting in good faith, promptly reports the results of an audit and promptly acts to correct any deviation. Knowledge gained by an individual solely in conducting an audit or while attempting to correct deficiencies identified in an audit or the audit report *should not ordinarily form the basis for intent which results in criminal penalties.*'' (emphasis added). The legislative history merely indicates that the circumstances involving violations discovered through an audit report and voluntarily disclosed by a company will generally not meet the requirements for criminal liability. Importantly, Congress did not in any way suggest that a company which self-disclosed violations discovered through an environmental audit should be immune from civil penalties. In any case, when Congress amended the Clean Air Act in 1990, there were no audit privilege and/or immunity laws on the books in any State. Any legislative history on auditing and enforcement from that period must be read in light of that reality. EPA does not believe Congress intended that the growth of environmental auditing—in itself a laudable goal fully supported by EPA—come at the expense of the enforcement of environmental laws.[6] If Congress had wished to give special status to self-disclosed violations detected during an environmental compliance audit or to prohibit the use for general enforcement purposes of audits conducted under the Clean Air Act and EPA approved programs, Congress could have done so in the language of the 1990 amendments. If anything, the legislative history of the Act is evidence of Congress' intent that such incentives for audits should be a basis for the exercise of prosecutorial discretion, and not a legislative grant of immunity or protection from disclosure.

The commenters also argue that Congress intended to vest the States with discretion in enforcing title V permit requirements and that the part 70 regulations merely provide that penalties assessed under a title V program must be ''appropriate'' to the violation. Nothing requires a State to obtain a penalty for every violation or prohibits a State from rewarding good actors who identify, disclose, and correct violations, the commenters continue.

EPA agrees that a State is not required to collect a penalty for every violation and is not precluded from using its discretion to reward companies that conduct environmental audits and disclose and correct any violations discovered through such an audit. EPA disagrees, however, that the only inquiry for title V approval is whether a State has authority to assess ''appropriate'' penalties. The part 70 regulations first state that civil and criminal fines must be recoverable ''in a maximum amount of *not less than $10,000 per day per violation*.'' 40 CFR 70.11(a)(3)(i)–(iii) (emphasis added).[7] Section 70.11(c) then provides that ''[a] civil penalty or criminal fine assessed, sought, or agreed upon by the permitting authority under paragraph (a)(3) of this section shall be appropriate *to the violation*.'' (emphasis added). By interpreting title V and part 70 to require only that States have authority to assess ''appropriate'' penalties, the commenters are reading out of the regulations the independent requirement that States have the authority to assess civil and criminal penalties in a maximum amount of not less than $10,000 per day per violation. Read together, 40 CFR 70.11(a)(3) and 70.11(c) require that a State have authority to assess a civil or criminal penalty of up to $10,000 per day per violation and that, in addition, the penalty assessed in any particular case be ''appropriate'' to the violation at issue. Thus, EPA agrees with the commenters that it is within Idaho's discretion to impose a penalty less than the statutory maximum if a lesser penalty is appropriate under the facts and circumstances of a particular case or to determine that criminal or civil prosecution is inappropriate under the facts and circumstances of a particular case so long as the State has the *authority* to assess penalties for each day of violation. The legislative history cited by the commenters in support of their position is, in fact, consistent with EPA's position on this issue. See Legislative History at 5815 (''states are not going to be required to impose these minimum fines of $10,000 for permit violations. Instead, the bill is revised to make clear that states shall ensure that they have the *authority* to impose this. It is not mandated, it is authority.'') (emphasis added).

Several commenters stated that section 113(e) of the Clean Air Act only sets forth penalty factors that EPA or a Federal court must consider in imposing

[6] That distinction is also reflected in ''Incentives for Self-Policing; Discovery, Disclosure, Correction and Preventions of Violations,'' 60 FR 66706 (December 22, 1995) (hereinafter, ''EPA's Self-Disclosure Policy''), which offers significant incentives for businesses to audit and self-disclose violations, while at the same time retaining safeguards to ensure the protection of public health and the environment.

[7] One commenter appears to assert that a State need only have the authority to assess ''appropriate'' criminal penalties. In doing so, the commenter ignores the clear language of the part 70 regulations. Section 502(b)(5)(E) requires States to have authority to ''recover civil penalties in a maximum amount of not less than $10,000 per day for each violation, and provide appropriate criminal penalties.'' In promulgating part 70, EPA determined that to provide ''appropriate criminal penalties'' for purposes of title V approval, a State must have authority to issue criminal penalties in a maximum amount of not less than $10,000 per day per violation. *See* 40 CFR 70.11(a)(3) (ii) and (iii). If the commenter believes that the enforcement authorities enumerated in the part 70 regulations, including the requirement for criminal penalty authority of up to $10,000 per day per violation, are excessive or in any way inconsistent with the statutory authorities, the commenter should have challenged the part 70 regulations at the time of promulgation in 1992.

civil penalties for noncompliance with the Act, that it has no bearing on EPA's authority to approve or disapprove State title V programs, and that nothing in section 113, title V, or part 70 authorizes EPA to condition approval of a State's title V permit program on the State's ability to consider penalty factors comparable to those set out in section 113(e). The commenters further assert that, although section 113(e) is inapplicable, section 113(a) authorizes EPA in certain defined circumstances to take appropriate action, namely, filing an action against a facility where EPA believes the State's response was inadequate. This back-up authority, and not wholesale invalidation of a State's title V permits program, the commenters continue, is EPA's tool for ensuring to its own satisfaction that State audit legislation does not allow egregious Clean Air Act violations to go unsanctioned. In any event, the commenters assert, the Idaho Audit Act does take the section 113(e) factors into account.

EPA agrees that the purpose of section 113(e) is, as the commenters assert, to set forth factors which EPA and the Federal courts must consider in assessing civil penalties under the Clean Air Act. EPA believes, however, that the section 113(e) factors can also serve as guidance in determining what civil penalty authority is minimally necessary in a State title V program.

In order for a State to have the authority to assess penalties that are ''appropriate'' to the violation in any particular case as required by 40 CFR 70.11(c), a State must have, in addition to the authority to assess a penalty of at least $10,000 per day per violation, the authority to consider mitigating or aggravating factors. In enacting section 113(e), Congress set forth factors it believed EPA and Federal judicial and administrative courts should consider in determining an appropriate penalty under the specific facts and circumstances before it. Although EPA believes that the factors enumerated by Congress in section 113(e) are the most fundamental, EPA believes that States may consider other factors as well. To the extent that a State has surrendered its ability to consider factors such as those set forth in section 113(e), EPA believes that a State does not have adequate authority, on a case-by-case basis, to collect penalties that are ''appropriate'' to the violation, as required by 40 CFR 70.11(c).

Industry commenters argue that, because the section 113(e) factors do not apply to State programs, it must follow that Congress did not prescribe factors a State must apply in assessing ''appropriate'' penalties under title V, and that a State must therefore be given full approval as long as it possesses ''appropriate'' enforcement authority. There are two flaws in this reasoning. The commenters misunderstand the purpose of EPA's reference to section 113(e). As explained above, the question for EPA at the program approval stage is not how the State will exercise its enforcement discretion to assess penalties in any particular case. Rather, it is whether the State has sufficient authority to assess appropriate penalties in every case. Before granting full approval to a title V program, EPA must ensure, first, that the State has the general authority to assess penalties up to the amounts specified in section 70.11. EPA must also ensure that the State has authority to consider factors similar to those in section 113(e) such that the penalty actually assessed in any case may be appropriate to the violation. Because the immunity provisions of the Idaho Audit Act preclude the State from considering the factors set forth in section 113(e) or any other factors in determining an ''appropriate'' penalty in cases in which the source has disclosed and corrected violations discovered in an environmental audit, Idaho lacks this authority.

EPA also disagrees with the commenters' assertion that EPA's sole remedy where EPA believes a State does not have adequate enforcement authority is to take its own enforcement actions to address violations in that State. Although EPA does file Federal actions where the State fails to take enforcement action or where State action is inadequate to address a particular violation, before approving a State title V program EPA must also ensure that the State has demonstrated the capacity to administer and fully enforce a delegated program as required by law and regulation. If Federal action were the only remedy for situations in which a State does not possess adequate enforcement authority, there would have been no need for Congress to direct EPA to promulgate rules setting forth minimum enforcement requirements for Federal approval of a State operating permits program. See 59 FR 61825 (rejecting similar comment in acting on Oregon's title V program).

Finally, EPA disagrees with the commenters' contention that the Idaho Audit Act does give consideration to the penalty factors set forth in section 113(e). As EPA stated in the June 17, 1996, Federal Register document and has reiterated above, the immunity provisions of the Idaho Audit Act prevent the State from considering all but one of the factors set forth in section 113(e) of the Clean Air Act. For example, the Idaho Audit Act precludes the assessment of civil penalties for violations voluntarily disclosed in an environmental audit even if the violations resulted in serious harm or risk of harm to the public or the environment or resulted in substantial economic benefit to the violator. To the extent the Idaho Audit Act prevents consideration of these factors, EPA believes that Idaho has surrendered its authority to assess appropriate penalties as required by section 502(b)(5)(E) of the Clean Air Act and 40 CFR 70.11. See 61 FR 30572.

Several commenters stated that EPA's approach on State audit privilege and/or immunity laws is bad policy and not supported by empirical evidence. The commenters expressed strong support for environmental auditing as a means of obtaining compliance with increasingly complex environmental requirements. These commenters argue that EPA's reaction against such audit statutes is a ''knee-jerk'' reaction that ignores the potentially huge benefits that these laws offer. EPA has wrongly concluded, the commenters continue, that the existence of a limited and qualified affirmative defense to penalties for violations discovered through environmental audits and protection for information in audit reports weakens Idaho's authority to enforce the law or to ensure compliance and that the evidence to date, both in Idaho and in other States with such laws, shows in fact that audit privilege and/or immunity legislation encourages self-correction and increased compliance. At the same time, the commenters argue, EPA has not cited any specific instance in which the Idaho Audit Act or some other State audit privilege and/or immunity law has compromised or inhibited enforcement of the Clean Air Act or a title V permit program.[8]

EPA has expressed strong support for incentives which encourage responsible companies to audit to prevent noncompliance and to disclose and correct any violations that do occur. *See, e.g.,* EPA's Self-Disclosure Policy.

[8] One commenter noted that private industry has been in the forefront of environmental auditing, and that governmental agencies that are also subject to environmental regulation have in some instances lagged behind in implementing auditing programs. This commenter went on to express concern that EPA has used the title V approval process as a mechanism to limit environmental auditing when Federal and State agencies are not conducting environmental audits. EPA agrees that private industry has played an important role in the development and implementation of environmental auditing programs and that government entities should follow the example of many private industries in conducting environmental audits.

The issue involved in this Federal Register action, however, is not whether environmental auditing is good or bad policy. Rather, the issue is whether the Idaho Audit Act, in offering immunity and protection against compelled disclosure to companies conducting environmental audits, so deprives the State of its authority to take enforcement action for violations of title V requirements that the State does not have the necessary authority required for full title V approval.

Moreover, EPA believes that it is premature at this point to expect significant empirical evidence to document whether environmental audit privilege and/or immunity laws enhance or impede environmental compliance. Most of the State audit statutes, such as Idaho Audit Act, are little more than one year old and only a few States have issued permits under approved title V programs. In any event, EPA is aware of at least one on-going environmental enforcement action in a State with an audit privilege and/or immunity law in which the audit privilege appears to be interfering with prosecutors' efforts to obtain and utilize certain evidence.[9]

The commenters go on to argue that the reasoning set forth in the April 5 Title V Memorandum and the June 17, 1996, Federal Register document could have far-reaching and unintended effects on the relationship between EPA and States in the implementation of the Clean Air Act and other environmental laws such as approvals of State Implementation Plans and State programs under the Clean Water Act and Resource Conservation and Recovery Act.

EPA agrees that the rationale behind the April 5 Title V Memorandum and EPA's action on the Idaho title V program has implications for other Federal programs delegated to the States. Because of that, the Agency has for some months been analyzing the effects of State audit privilege and/or immunity laws on enforcement authorities under the Clean Water Act, the Resource Conservation and Recovery Act, and other statutes. The rationale behind the April 5 Title V Memorandum and EPA's action on the Idaho title V program as it relates to the Idaho Audit Act, however, is dictated not by political or policy considerations, but rather by statutes and regulations that were finalized after public notice and comment.

[9] The confidentiality prerequisites that attach to all on-going enforcement actions prevent the Agency from revealing additional details at this time.

Several commenters also stated that EPA's proposed interim approval of Idaho's program based on the Idaho Audit Act is inconsistent with existing EPA and Department of Justice enforcement policies, which reflect the appropriateness of limiting enforcement discretion. The commenters point to ''Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator,'' DOJ, July 1, 1991; ''The Exercise of Investigative Discretion,'' EPA, January 12, 1994; ''Policy on Flexible State Enforcement Responses to Small Community Violations'' EPA, November 1995 (''EPA Policy on Small Communities'') [10]; ''Policy on Compliance Incentives for Small Businesses,'' EPA, May 1996; and EPA's Self-Disclosure Policy.

There is an important distinction between the policies cited by the commenters, which adopt an ''enforcement discretion'' approach, and the Idaho Audit Act. EPA and the Department of Justice have announced policies guiding the exercise of their enforcement discretion under certain narrowly defined circumstances, while preserving the underlying statutory and regulatory authority. State audit privilege and/or immunity laws, such as the Idaho Audit Act, by contrast, constrain enforcement discretion as a matter of law, impermissibly surrendering the underlying statutory and regulatory enforcement authorities required for Federal approval of State programs.

Several commenters stated that EPA's proposed action on the Idaho program is inconsistent with several previous title V approvals where audit privilege and/or immunity legislation has not posed a bar to full approval. As examples of previous title V approvals which the commenters believe are inconsistent with EPA's proposed action on the Idaho program, as it relates to the Idaho Audit Act, the commenters point to EPA's action on the Oregon, Kansas, and Colorado title V programs. Relying on the recent Ninth Circuit decision in *Western States Petroleum Association* v. *EPA*, 87 F.3d 280 (9th Cir. 1996) (''WSPA''), the commenters state that, where EPA is departing from a prior course of action, more is required of the Agency than conclusory statements concerning the potential impact of the Idaho Audit Act on the State's title V enforcement authority. Instead, the commenters argue that EPA must provide a basis for deviating from its earlier approaches in Oregon, Kansas, and Colorado.

As an initial matter, EPA notes its action on Idaho's title V program is consistent with its approach with respect to the Texas title V program, 61 FR 32693, 32696–32699 (June 25, 1996) (final interim approval), and the Michigan title V program. 61 FR 32391, 32394–32395 (June 24, 1996) (proposed interim approval). Moreover, EPA has notified the States of Arizona, Florida and Ohio that audit privilege and/or immunity laws that these States have enacted, or were contemplating enacting, could interfere with the enforcement requirements of title V and part 70.

With respect to the three programs cited by the commenters as inconsistent with EPA's proposed action on the Idaho program, EPA is still in the process of reviewing the audit privilege and/or immunity statutes in Oregon, Kansas, and Colorado, and their effects on the title V enforcement requirements in those States, in order to determine whether EPA acted inconsistently in approving those programs. If EPA determines that it acted inconsistently in acting on those programs, EPA intends to take appropriate action to follow the *WSPA* Court's mandate that EPA act consistently or explain any departures.

Finally, the commenters challenge the April 5 Title V Memorandum itself arguing that the memorandum imposes requirements on EPA approval of a State

[10] One commenter describes EPA's ''Policy on Flexible State Enforcement Responses to Small Community Violations'' (hereinafter, ''EPA's Policy on Small Community Violations'') as one that ''encourages states to give small communities an unqualified waiver of civil penalties—regardless of any economic benefit or the seriousness of the violation—as an incentive to compliance.'' EPA disagrees with this characterization. Although the policy does encourage States to provide small communities an incentive to request compliance assistance by waiving all or part of a penalty under certain circumstances, it does not encourage States to give small communities ''an unqualified waiver of civil penalties,'' as the commenter asserts. For example, the EPA Policy on Small Community Violations is directed at a very narrowly defined class of potential violators—non profit, government entities with fewer than 2,500 residents that are unable to satisfy all applicable environmental mandates without the State's compliance assistance. The policy directs States to assess a small community's good faith and compliance status before granting any relief from penalties and identifies a number of factors that a State should consider in determining whether relief from civil penalties is appropriate in the particular circumstances. Contrary to the commenter's assertion, EPA's Policy on Small Community Violations does direct a State to consider the seriousness of the violation. *See* EPA's Policy on Small Community Violations, page 4. Although the policy does not direct the State to consider economic benefit in determining the appropriate enforcement response, the policy is available only to those small communities that are financially unable to satisfy all applicable environmental mandates without the State's compliance assistance.

operating permits program in addition to those required by section 502(b)(5)(E) of the Act and the part 70 rules. Because the April 5 Title V Memorandum sets additional substantive and binding standards for approval of State title V operating permits programs not included in the part 70 regulations, the commenters continue, the memorandum is a rule disguised as guidance and must be promulgated in accordance with the Administrative Procedures Act. This requires, among other things, public notice and comment.

EPA disagrees. The April 5 Title V Memorandum does not, as the commenters assert, ''purport to change fundamentally the requirements in section 70.11 by adding provisions that (1) effectively prohibit a state from adopting an audit protection or immunity law and (2) impose at least four new penalty criteria.'' Rather, the memorandum simply recounts and reiterates existing statutory and regulatory requirements for enforcement authority under the title V program and shows how audit privilege and/or immunity laws may prevent a State from meeting those requirements. It creates no new ''substantive and binding standards'' for approval of title V programs, and therefore is not subject to notice and comment rulemaking of the Administrative Procedures Act.[11] Moreover, in explaining why the Idaho Audit Act precludes full approval, EPA is relying on the requirements of title V and part 70 themselves, and not the April 5 Title V Memorandum. Moreover, EPA's application of the title V and part 70 enforcement requirements to the specific circumstances before EPA in the case of the Idaho Audit Act is subject to notice and comment rulemaking.[12]

(B) Effect of the immunity provisions of the Idaho Audit Act on Idaho's ability to issue emergency orders and seek injunctive relief. In the June 17, 1996, Federal Register document, EPA expressed concern that the Idaho Audit Act could be interpreted to interfere with the State's authority to issue emergency orders and seek injunctive relief, as required by section 502(b)(5)(E) and 40 CFR 70.11(a) (1) and (2). First, EPA was concerned with the subsection of the immunity provision of the Idaho Audit Act stating:

> Except as specifically provided, this section does not affect any authority of an environmental agency to require remedial action through a consent order or action in district court or to abate an imminent hazard, associated with the information disclosed in any voluntary disclosure of an environmental violation.

Idaho Code 8–809(7). EPA queried what might be included within the ''Except as specifically provided'' clause of that provision and whether the provision specifically authorizing persons to enter into voluntary settlements (Idaho Code section 9–809(4)) could be interpreted to mean that Idaho would be prevented from issuing a unilateral order or seeking a court order requiring an owner or operator to correct a violation on a specified schedule, at least where the violation did not involve an imminent hazard. 61 FR 30570, 30572.

In the comments jointly submitted by IDEQ and the Idaho Attorney General, Idaho stated that no specific provision of the Idaho Audit Act affects the State's authority to issue emergency orders or seek injunctive relief and that these authorities are therefore uncompromised by the Idaho Audit Act. Several of the other commenters agreed with the Attorney General that the immunity provision of the Idaho Audit Act only prohibits the State from recovering civil and criminal penalties from an owner or operator who discovers violations during a voluntary audit and meets the other conditions of the law.

EPA remains concerned regarding why the Idaho legislature included the ''Except as specifically provided'' clause in the provision affirming the State's continued ability to issue emergency orders and seek injunctive relief. EPA is willing to defer, however, to the opinion of the Idaho Attorney General's office that no provision of the Idaho Audit Act does specifically create an exception to the State's ability to issue emergency orders and seek injunctive relief. If, however, during program implementation, EPA determines that the Idaho Audit Act does compromise the State's authority to issue emergency orders and seek injunctive relief as required by title V and part 70, EPA will consider this grounds for withdrawing program approval in accordance with 40 CFR 70.10(c).

Second, EPA expressed concern with the subsection of the immunity provision of the Idaho Audit Act stating that ''appropriate efforts to correct the noncompliance'' for purposes of immunity ''may be demonstrated by the submittal of a permit application or equivalent document within a reasonable time.'' Idaho Code 9–809(3). EPA was concerned that this subsection appeared to allow an owner or operator to continue an unlawful activity for which a permit was required without being subject to penalty or the State's emergency authority or injunctive relief.

The comments submitted by the Idaho Attorney General do not address the effect of Idaho Code 9–809(3) on the State's ability to assess penalties against an owner or operator for the failure to obtain a permit. EPA therefore continues to believe that this issue must be addressed as a condition of full approval. See Section II.A.2.c.i.A above. The Idaho Attorney General did, however, directly address EPA's concern that Idaho Code 9–809(3) might also preclude the State from seeking an emergency order or injunctive relief against an owner or operator who had failed to obtain a permit. The Attorney General unequivocally stated that the Idaho Audit Act does not under any

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[11] One commenter also stated that EPA expressly recognized in its earlier approval of the Oregon title V program that EPA would have to use rulemaking to modify its part 70 rules before EPA could prohibit States from adopting audit privilege and/or immunity laws. The commenter misstates the Agency's position. As an initial, the Oregon audit statute, Oregon Revised Statute 468.963, contains only an audit privilege and does not contain an immunity provision. In proposing interim approval of the Oregon title V program, EPA stated it was in the process of developing a national position regarding EPA approval of environmental programs in States that have environmental audit privileges, and that, therefore, EPA proposed to take no action on the Oregon audit provision in the context of the Oregon title V approval. EPA noted, moreover, that it might consider such a privilege grounds for withdrawing program approval under 40 CFR 70.10(c) in the future if EPA later determined that the Oregon audit provision interfered with Oregon's enforcement responsibilities under title V and part 70. 59 FR 47105, 47106 (September 14, 1994). During the public comment period on EPA's proposal, one commenter stated that EPA's suggestion that a State audit privilege could be grounds for interim approval or withdrawal was bad policy and that Oregon's audit privilege statute was consistent with the Clean Air Act. In addition to responding to the merits of the comment, EPA stated that the commenter's concerns were premature because, as the commenter acknowledged, EPA had not proposed to take any action on Oregon's environmental audit privilege statute in the context of final interim approval of the Oregon program. EPA further stated that any such concerns about EPA's position on the Oregon audit privilege statute would be properly made if EPA later proposed to withdraw Oregon's title V approval based on Oregon's audit privilege or if EPA ''revised part 70 to prohibit environmental audit provisions such as Oregon's.'' 59 FR 61820, 61824 (December 2, 1994). EPA did not say in that Federal Register document that a rulemaking would be required in order for the Agency to disapprove a title V program in a State with an environmental audit privilege and/or immunity statute.

[12] EPA also disagrees with one commenter's assertion that the Congressional review provisions of Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996, P.L. 104–121 (SBREFA), require EPA to submit the April 5 Title V Memorandum to Congress. EPA does not believe that the April 5 Title V Memorandum is subject to Congressional review under SBREFA because it is not a rule and it does not substantially affect the rights or obligations of a nonagency party. Even if the Memorandum were subject to review, EPA has not relied on that Memorandum as a basis for this action, but has instead relied on the requirements of title V and part 70. Therefore, any procedural defect with respect to the April 5 Title V Memorandum is irrelevant to the legal sufficiency of this action.

circumstances alleviate the owner's or operator's responsibility to correct any violations identified in an audit or restrict the State's ability to take an action to abate any noncompliance. Other commenters agreed with this interpretation. EPA is willing to defer to the opinion of the Idaho Attorney General on this issue, subject to the qualification discussed above that EPA will closely monitor the impact of the Idaho Audit Act on the State's ability to issue emergency orders and obtain injunctive relief during program implementation.

(C) Additional concerns regarding the effect of the disclosure provisions of the Idaho Audit Act on the State's enforcement authority. Several of the commenters, including IDEQ and the Idaho Attorney General, disagreed with EPA's statement that the Idaho Audit Act contains a privilege for environmental audit reports which impermissibly interferes with the enforcement requirements of title V and part 70. The commenters first take issue with EPA's characterization of Idaho Code 9–804 as a ''privilege'' for environmental audit reports arguing that in Idaho such a privilege on the disclosure of information in a judicial action can only be created by constitution, a statute implementing a constitutional right, or by rules of the Idaho Supreme Court. See Idaho Rules of Evidence, Rule 501; Idaho Code 9–808. EPA has again reviewed Idaho Code 9–804 and, on further reflection, agrees that the Idaho statute does not create a true evidentiary privilege—that is, a privilege to refuse to disclose an environmental audit report in a judicial action. Rather, the statute prohibits any State agency from requiring an owner or operator to disclose the contents of an environmental audit report to the State agency.[13] EPA accurately described the effect of the Idaho Audit Act in its June 17, 1996, Federal Register document, but incorrectly characterized it as a ''privilege.'' [14]

[13] One commenter interprets Idaho Code 9–804 as not preventing the State from obtaining environmental audit reports, but only preventing the State from disclosing to the public environmental audit reports that are voluntarily disclosed to the State. EPA disagrees. Idaho Code 9–804 clearly prevents the State from requiring an owner or operator to disclose an environmental audit report to the State. Section 9–340 additionally prevents the State from disclosing to the public an environmental audit report that has been voluntarily provided by an owner or operator to the State.

[14] EPA notes that the Idaho legislature also used the term ''privilege'' to describe the intent of the Idaho Audit Act. *See* Idaho Code 9–802(2) (''the legislature of the state of Idaho recognizes that an environmental audit privilege is necessary'').

The commenters next assert that the Idaho Audit Act does not interfere with IDEQ's authority to seek or use an environmental audit report as evidence in a judicial action because the Idaho Audit Act does not create an evidentiary privilege. Although the Idaho Audit Act is a prohibition on the compelled disclosure of information and not a true evidentiary privilege, EPA still believes that the disclosure provisions of the Idaho Audit Act impermissibly interfere with the enforcement requirements of title V and part 70. The commenters do not controvert the basic fact that the Idaho Audit Act prevents a State agency, such as IDEQ, from requiring an owner or operator to produce an environmental audit report to the State agency under the State's general information gathering authority. Where an audit report produces evidence of noncompliance, the Idaho Audit Act would prevent the State from reviewing that evidence, short of filing an enforcement action in court, to determine whether the violation will be corrected and compliance assured. When a case is far enough advanced that litigation is necessary, little flexibility remains for assuring that compliance is achieved in a timely and efficient manner. Similarly, where an environmental audit reveals evidence of criminal intent on the part of managers or employees, Idaho would be barred from obtaining and using such information unless Idaho otherwise has sufficient information to first file an enforcement action in State court. Although, as the Idaho Attorney General points out, a source must voluntarily disclose the relevant portions of the audit report in order to obtain immunity from civil or criminal penalties, an owner or operator can elect not to disclose violations in an audit report in the hopes that the violations will not otherwise come to the attention of the State agency. Similarly, a facility could elect to disclose the fact of a violation, but not the related evidence of whether the violation was intentional. The decision of whether to disclose all or any part of an environmental audit report to the State rests solely with the owner or operator. EPA therefore believes that, although the Idaho Audit Act does not create a true evidentiary privilege, it still so interferes with the State's information gathering authority as to deprive the State from obtaining appropriate criminal penalties and assuring compliance with the Clean Air Act, as required by section 502(b)(5)(E) of the Act and 40 CFR 70.11.

One commenter also stated that adequate title V enforcement authority cannot depend on access to voluntarily prepared audit reports. If such were the case, the commenter reasoned, State regulators would necessarily lack adequate enforcement authority over those entities which do not conduct audits voluntarily.

EPA agrees that access to voluntarily prepared audit reports is not *per se* a prerequisite for adequate enforcement authority for title V approval. However, such access is important if the report exists and it contains information on criminal intent or whether the violation has been promptly corrected. The lack of such access can adversely affect the adequacy of enforcement authority, at least with respect to the ability to enforce against criminal violations and to verify compliance.

One commenter also stated that State audit protection legislation does not inhibit whistle blowers but instead merely prohibits unauthorized disclosure of an audit report because whistle blowers are free to disclose any ''non-audit'' information to support their allegations without fear of violating the laws.

As an initial matter, EPA notes that this concern is irrelevant in EPA's action on Idaho's title V program. To EPA's knowledge, neither the Idaho Audit Act nor any other provision of Idaho law specifically restricts the information that a whistle blower may disclose to a State agency, and EPA therefore did not raise this as a concern in proposing action on Idaho's title V program.

The commenter appears to be responding to an issue discussed in the April 5 Title V Memorandum. In that memorandum, EPA expressed concern with State audit privilege and/or immunity statutes that impose special sanctions upon persons who disclose privileged information. See April 5 Title V Memorandum, pp. 5–6. Although irrelevant to action on Idaho's title V program, EPA believes, as stated in the memorandum, that the Clean Air Act provision which gives explicit protection to whistle blowers makes no distinctions with respect to the source of the information relied upon by the whistle blower. EPA believes that it is inconsistent with section 322 of the Clean Air Act for States to remove audit reports from the universe of information which employees may rely upon in reporting violations to local or State authorities.

ii. Comments that the Idaho Audit Act poses a bar to full title V approval. EPA received three comment letters from environmental and public interest groups agreeing with that the Idaho Audit Act is incompatible with the

enforcement requirements of title V and part 70. Several of these organizations also argued that the prohibition against the compelled disclosure of audit reports in the Idaho Audit Act ''is incompatible with the [Clean Air Act's] mandate for public participation in permitting.''

EPA agrees that the prohibition against compelled disclosure contained in the Idaho Audit Act is an unfortunate hindrance to public access to potentially useful and important information affecting public health and the environment. EPA does not believe, however, that the Idaho statute interferes with the public access requirements of title V and part 70 (as opposed to the enforcement requirements) because, by its terms, the Idaho statute does not allow documents and other information which must be collected, developed, and reported pursuant to Federal and State law to be withheld from the State or the public. See Idaho Code 9–805. As noted in the October 27, 1995, Federal Register document proposing action on Idaho's title V program, EPA believes that Idaho's general statutory and regulatory confidentiality provisions allow far more information to be kept confidential from the public than is authorized under part 70 and section 114 of the Clean Air Act. See 60 FR 54999. EPA has required, as a condition of full approval, that Idaho revise these provisions or demonstrate to EPA's satisfaction that they meet the requirements of title V and part 70. EPA does not believe, however, that the Idaho Audit Act independently interferes with the title V requirements for public access to information.

One commenter also stated that the Idaho Audit Act precludes interim approval and requires disapproval. Section 70.4(d)(3)(vii) states that to qualify for interim approval the State must have ''authority to enforce permits, including the authority to assess penalties against sources that do not comply with their permits or with the requirement to obtain a permit.'' EPA believes that to qualify for interim approval a State must have basic authority to enforce permits and the requirement to obtain a permit, including the authority to assess penalties, during the interim approval period. EPA has stated, however, that interim approval can be appropriate, for example, even though a permitting authority does not have the authority to assess civil penalties at the full $10,000 per day per violation required by section 70.11(a)(3)(i) or does not have any criminal authority. See Memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, to Regional Air Division Directors, entitled ''Interim Title V Approval Issues,'' dated August 2, 1993. Similarly, EPA has granted or proposed to grant interim approval to States that have affirmative defenses to liability that EPA believed exceeded the defenses allowed as a matter of Federal law, and thus must be revised as a condition of full approval, as long as the State has the general authority to assess civil penalties for violations. See 59 FR 61824–61825 (conditioning full approval of Oregon's title V program on changes to or clarifications regarding the effect of Oregon's criminal bypass statute)[15]; 61 FR 32394 (proposing to condition full approval of Michigan's title V program on revisions to or clarifications regarding the effect of its startup, shutdown, and malfunction provisions). EPA believes that the situation in Idaho is similar in that the State of Idaho does have authority to assess civil and criminal penalties for violations of title V permit requirements in many cases. The Idaho Audit Act creates a limited, although, EPA believes, impermissible, exception to that authority. If, during the interim approval period, Idaho's enforcement authority proves inadequate to address a particular violation, EPA always has concurrent authority to enforce permit terms and conditions and the requirement to obtain a permit. See section 113 of the Act (civil and criminal liability provisions under the Clean Air Act). EPA therefore does not believe that the Idaho Audit Act precludes interim approval.

Two commenters did not urge disapproval, but instead commented that, because the Idaho Audit Act contains a sunset provision by which it expires at the end of 1997, the Idaho legislature must address renewal of the law in its next regular session at the beginning of 1997. The commenters therefore argue that EPA should not grant Idaho the full two-year interim approval period in which to address this issue, but should instead give Idaho only until April 15, 1997, which is presumably the date by which the commenters believe the 1997 legislative session will have concluded. Although EPA does have the authority to allow States less than two years to correct interim approval issues, EPA has thus far allowed all States the full two years within which to address the initial interim approval issues. EPA believes that Idaho should receive the same benefits as other permitting authorities in having the full two years to respond to this initial interim approval issue. EPA has identified 27 other interim approval issues that the State of Idaho must address during the two year interim approval period and proposed to give Idaho the full two years to address these other issues. EPA received no other comments on this proposal. Even if Idaho could address the interim approval issue relating to the Idaho Audit Act in less than two years, EPA believes that having the same interim approval period for all of the 28 identified interim approval issues will lessen the administrative burden on the State.

iii. Summary. In summary, based on the opinion of the Idaho Attorney General, EPA is satisfied that the immunity provisions of the Idaho Audit Act do not compromise the State's ability to issue emergency orders and seek injunctive relief to assure compliance with title V requirements. EPA will closely monitor the Idaho title V program during implementation to assure that this is the case. If, during program implementation, EPA determines that the Idaho Audit Act does compromise the State's authority to issue emergency orders and seek injunctive relief as required by title V and part 70, EPA will consider this grounds for withdrawing program approval in accordance with 40 CFR 70.10(c).

EPA continues to believe, however, that the immunity provisions as well as the disclosure provisions of the Idaho Audit Act impermissibly interfere with the enforcement authorities required for full title V approval. Accordingly, Idaho must revise both the immunity and disclosure provisions of the Idaho Audit Act, Idaho Code title 9, chapter 8, to ensure that it does not interfere with the requirements of section 502(b)(E)(5) of the Clean Air Act and 40 CFR 70.11 identified in the June 17, 1996, Federal Register document and this notice for adequate authority to pursue civil and criminal penalties and otherwise assure compliance. Alternatively, Idaho must demonstrate to EPA's satisfaction, through an Attorney General's opinion that these required enforcement authorities are not impaired by the Idaho Audit Act.

B. Section 112(l) Submittal

There were no comments on EPA's proposed delegation of the NESHAPs as adopted by Idaho and as they apply to title V sources and EPA's proposed

[15] Oregon ultimately established to EPA's satisfaction that its affirmative defense to criminal liability for upsets and bypasses was consistent with Federal law and thus received full approval of its program. See 60 FR 50106, 50107 (September 28, 1995).

approval of a streamlined mechanism for future NESHAP delegations.

III. Final Action

A. Title V

EPA is promulgating final interim approval of the operating permits program submitted by Idaho on January 20, 1995, and supplemented on July 14, 1995, September 15, 1995, and January 12, 1996. The State must make the following changes to receive full approval:

1. Applicability

Idaho must demonstrate to EPA's satisfaction by the end of the interim approval period that its program covers all sources required to be permitted under part 70. EPA has proposed a change to the part 70 rules that would make the definition of ''major source'' in 40 CFR 70.2 consistent with the August 7, 1980, limitation in the Idaho rule. See 59 FR 44460, 44527 (August 29, 1994). However, EPA has not yet taken final action on that proposed change. If EPA finalizes its proposed revision to the definition of ''major source'' before the end of Idaho's interim approval period, Idaho will not be required to revise its definition of ''major facility'' to delete the ''August 7, 1980'' limitation. In any case, however, Idaho must revise the reference to ''fugitive emissions'' in IDAPA 16.01.01.008.14.h.iii to refer instead to any ''air pollutant'' and must otherwise make any changes needed to demonstrate that its program covers all required sources.

2. Temporarily Exempt Sources

Idaho must demonstrate to EPA's satisfaction that the application and permitting deadlines for Phase II sources and sources with solid waste incineration units meet the requirements of part 70.

3. New Sources

Idaho must demonstrate to EPA's satisfaction that all sources in Idaho applying for a title V permit for the first time are required to submit a permit application within 12 months after becoming subject to title V.

4. Option To Obtain Permit

Idaho must demonstrate to EPA's satisfaction that it has the authority required by 40 CFR 70.3(b)(3).

5. Fugitive Emissions

Idaho must address the requirement of 40 CFR 70.3(d) that fugitive emissions from title V sources be included in permit applications and permits in the same manner as stack emissions regardless of whether the source category in question is included in the list of sources contained in the definition of major source.

6. Insignificant Activities

Idaho must define by regulation or guidance the terms used in IDAPA 16.01.01.317, provide documentation that the units and activities are appropriate for inclusion as insignificant, assure that all activities that are insignificant based on size or production rate be listed in each permit, and remove any director's discretion provision that would allow the State to determine that an activity not previously reviewed by EPA is insignificant (except for clearly trivial activities).

7. Permit Content

Idaho must eliminate the qualification in IDAPA 16.01.01.322.01 and 16.01.01.322.03 that requires inclusion of only those requirements that are ''identified in the application'' at the time of permit issuance because this restriction impermissibly relieves the permitting authority from including in a permit applicable requirements that are not identified in a permit application. Alternatively, Idaho must otherwise demonstrate to EPA's satisfaction that it has the authority to include in a title V permit all applicable requirements consistent with 40 CFR 70.6.

8. Exemption From Applicable Requirements

Idaho must eliminate the provision in IDAPA 16.01.01.325.01.c that allows Idaho to exempt sources from otherwise applicable requirements or, alternatively, must demonstrate to EPA's satisfaction that this provision is consistent with the requirements of part 70.

9. Emissions Trading

Idaho must demonstrate that its emissions trading provisions meet the requirements of 40 CFR 70.4(b)(12)(iii) and 40 CFR 70.6(a)(8). EPA also recommends that the requirement of IDAPA 16.01.01.322.05 that a company contemporaneously record in a company log a change from one trading scenario to another should be specifically referred to in the list of requirements a source must meet in IDAPA 16.01.01.383.03 in order to make a ''Type II'' permit deviation.

10. Alternative Emission Limits

Idaho must demonstrate to EPA's satisfaction that its operating permit program meets the requirement of 40 CFR 70.6(a)(1)(iii) that a permit with an allowable alternative emission limit contain provisions to ensure that any resulting emissions limit has been demonstrated to be quantifiable, accountable, enforceable and based on replicable procedures.

11. Reporting of Permit Deviations

Consistent with 40 CFR 70.6(a)(3)(iii)(B), the Idaho program must be revised to require prompt reporting of deviations from all permit requirements, not just those deviations attributable to startup, shutdown, scheduled maintenance, upset, or breakdown.[16]

12. Acid Rain Provisions

Idaho must demonstrate to EPA's satisfaction that its program includes the provision of 40 CFR 70.6(a)(4)(i) that no permit revision is required for increases in emissions that are authorized by allowances acquired pursuant to the acid rain program, provided that such increases do not require a permit revision under any other applicable requirement.

13. State-Only Enforceable Requirements

Idaho must demonstrate to EPA's satisfaction that its regulations define ''State Only'' requirements in a manner consistent with the provisions of 40 CFR 70.6(b)(2), namely, that no requirement that is required under the Act or under any of its applicable requirements may be ''State Only.''

14. General Permits

Idaho must revise its regulations authorizing general permits to be consistent with 40 CFR 70.6(d), including provisions that: (a) Require the permitting authority to grant the conditions and terms of a general permit to sources that qualify; (b) require specialized general permit applications to meet the requirements of title V; and (c) govern enforcement actions for operation without a permit if the source is later determined not to qualify for the conditions and terms of the general permit. As discussed above, EPA now believes that IDAPA 16.01.01.335.05, which provides that the issuance of authorization to operate under a general operating permit is a final agency action for purposes of administrative and judicial review, is consistent with the requirements of 40 CFR 70.6(d)(2) and

[16] The Idaho regulations use the term ''permit deviation'' to refer to certain changes authorized by the permit flexibility provisions contained in 40 CFR 70.6(9) and (10) and section 502(b)(10) of the Act. See IDAPA 16.01.01.383. The part 70 regulations use the term ''permit deviation'' to refer to permit violations. See 40 CFR 70.6(a)(3)(iii)(B). This notice uses the term ''permit deviation'' in the same way as the part 70 regulations.

no revisions to this provision are required.

15. Operational Flexibility

Idaho must address to EPA's satisfaction the requirement in 40 CFR 70.4(b)(12) that the permitting authority attach a copy of the notice of a permitted operational change to the relevant permit.

16. Off-Permit Provisions

Idaho must revise its regulations to require a source to record an off-permit change in a log at the facility on the same day that the change is made.

17. Permit Renewals

Idaho must revise its regulations to ensure that an application for a permit renewal will not be considered timely if it is filed more than 18 months before permit expiration.

18. Completeness Determination

Idaho must revise its regulations to ensure that applications will be deemed complete within 60 days of receipt for all sources, or establish to EPA's satisfaction that no sources will in fact fall within the exception of IDAPA 16.01.01.361.02.a.ii.

19. Administrative Amendments

Idaho must delete from the list of changes in IDAPA 16.01.01.384.01.a that may be accomplished by administrative amendment the following categories: compliance orders (IDAPA 16.01.01.384.01.a.vi) and applicable consent orders, judicial consent decrees, judicial orders, administrative orders, settlement agreements, and judgments (IDAPA 16.01.01.384.01.a.vii).

20. Minor Permit Modifications

Idaho must revise its rules to prohibit the issuance of any permit until after the earlier of expiration of EPA's 45-day review period or until EPA has notified the permitting authority that EPA will not object to issuance of the permit modification.

21. Group Processing of Minor Permit Modifications

Idaho must delete the ''director's discretion'' provision of IDAPA 16.01.01.385.07.b.iv or make a showing consistent with 40 CFR 70.7(e)(3)(i)(B) for alternative thresholds. In addition, as with Idaho's procedures for minor modifications, Idaho must revise its rules to prohibit the issuance of any permit until after the earlier of expiration of EPA's 45-day review period or until EPA has notified the permitting authority that EPA will not object to issuance of the permit modification.

22. Reopenings

Idaho must revise its regulations to require that the EPA notice contain no more information than that specified by 40 CFR 70.7(g)(1).

23. Public Participation

Idaho must demonstrate to EPA's satisfaction that its restrictions on the release to the public of permits, permit applications, and other related information under its laws governing confidentiality do not exceed those allowed by 40 CFR 70.4.(b)(3)(viii) and section 114(c) of the Clean Air Act.

24. Permits for Solid Waste Incineration Units

Idaho must ensure that no permit for a solid waste incineration unit may be issued by an agency, instrumentality, or person that is also responsible, in whole or in part, for the design and construction or operation of the unit.

25. Maximum Criminal Penalties

Idaho must demonstrate to EPA's satisfaction that it has sufficient authority to recover criminal penalties in the maximum amount of not less than $10,000 per day per violation, as required by 40 CFR 70.11(a)(3)(ii).

26. False Statements and Tampering

Idaho must demonstrate to EPA's satisfaction that it has the criminal enforcement authorities required by 40 CFR 70.11(a)(3)(iii), which require that criminal fines be recoverable in a maximum amount of $10,000 per day per violation against any person who knowingly makes any false material statement, representation, or certification in any form, in any notice or report required by a permit, or who knowingly renders inaccurate any required monitoring device or method.

27. Environmental Audit Statute

Idaho must revise both the immunity and disclosure provisions of the Idaho Audit Act, Idaho Code title 9, chapter 8, to ensure that they do not interfere with the requirements of section 502(b)(E)(5) of the Clean Air Act and 40 CFR 70.11 that EPA identified in the June 17, 1996, Federal Register document and this notice for adequate authority to pursue civil and criminal penalties and otherwise assure compliance. Alternatively, Idaho must demonstrate to EPA's satisfaction through an Attorney General's opinion that these required enforcement authorities are not compromised by the Idaho Audit Act.

28. Correction of Typographical Errors and Cross-References

Idaho must correct the following typographical errors and erroneous cross references:

a. IDAPA 16.01.01.006.31: The reference in the definition of ''emissions unit'' should be to 42 U.S.C. sections 7561 through 7561*o* rather than to 42 U.S.C. sections 7561 through 7561.

b. IDAPA 16.01.01.008.05.f: The reference in subsection (f) to the definition of ''applicable requirement'' should be to 42 U.S.C. section 7661*c*(b), rather than to section 7661a(b) (ie., to section 504(b) of the Clean Air Act rather than to section 502(b)).

c. IDAPA 16.01.01.008.12: The reference to the general permit regulation in the definition of ''general permit'' should be to section 3*35* (ie., IDAPA 16.01.01.335), rather than to section 322.

d. IDAPA 16.01.01.008.14: The reference in the definition of ''major facility'' to the definition of ''facility'' should be to section 006.3*5* (i.e., IDAPA 16.01.01.006.35), rather than to 006.34.

e. IDAPA 16.01.01.322.10.1.i: The reference in the requirements for the initial compliance plan should be to ''a verifiable sequence of actions'' rather than to ''a variable sequence of actions.''

f. IDAPA 16.01.01.384.01.a.vi: The reference to compliance schedule in this subsection should be to section 322.12.d (i.e., IDAPA 16.01.01.322.12.d), rather than to section 322.13.d.

g. IDAPA 16.01.01.385.01.a.iv: The words ''of title I of the Clean Air Act'' or some other description of the type of provisions being referred to appears to have been omitted after the phrase ''as a modification under any provision.''

h. IDAPA 16.01.01.387.02.a.iii: The word ''least'' appears to have been omitted from the phrase ''shall be sent at one (1) day.''

The scope of the Idaho title V program approved in this notice applies to all title V sources (as defined in the approved program) within the State of Idaho except any sources within Indian Country.

This interim approval, which may not be renewed, extends until January 6, 1999. During this interim approval period, Idaho is protected from sanctions, and EPA is not obligated to promulgate, administer, and enforce a Federal operating permits program in Idaho. Permits issued under a program with interim approval have full standing with respect to title V and part 70. In addition, the 1-year time period under State law for submittal of permit applications by subject sources and the 3-year time period for processing the

initial permit applications begin upon the effective date of this interim approval.

If Idaho fails to submit a complete corrective program for full approval by July 6, 1998, EPA will start an 18-month clock for mandatory sanctions. If Idaho then fails to submit a corrective program that EPA finds complete before the expiration of that 18-month period, EPA will be required to apply one of the sanctions in section 179(b) of the Act, which will remain in effect until EPA determines that Idaho has corrected the deficiency by submitting a complete corrective program. Moreover, if the Administrator finds a lack of good faith on the part of Idaho, both sanctions under section 179(b) will apply after the expiration of the 18-month period until the Administrator determines that Idaho has come into compliance. In any case, if, six months after application of the first sanction, Idaho still has not submitted a corrective program that EPA has found complete, a second sanction will be required.

If EPA disapproves Idaho's complete corrective program, EPA will be required to apply one of the section 179(b) sanctions on the date 18 months after the effective date of the disapproval, unless prior to that date Idaho has submitted a revised program and EPA has determined that it corrected the deficiencies that prompted the disapproval. Moreover, if the Administrator finds a lack of good faith on the part of Idaho, both sanctions under section 179(b) shall apply after the expiration of the 18-month period until the Administrator determines that Idaho has come into compliance. In all cases, if, six months after EPA applies the first sanction, Idaho has not submitted a revised program that EPA has determined corrects the deficiencies, a second sanction is required.

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

B. Section 112(l)

With this interim approval EPA is delegating Idaho the authority to implement and enforce 40 CFR part 61, subparts A, C, D, E, F, J, L through P, V, Y, BB, and FF, and 40 CFR part 63, subparts A, D, L, and M, as these rules apply to title V sources.[17] EPA will retain implementation and enforcement authority for these rules as they apply to non-part 70 sources. EPA has reconsidered its proposed action to delegate the radionuclide NESHAP regulations found under 40 CFR part 61 and has determined that Idaho does not have adequate resources to implement and enforce these regulations at present. In this respect, EPA is retaining authority to implement and enforce 40 CFR part 61 subparts B, H, I, K, Q, R, T, and W as these regulations apply to all sources in Idaho.

EPA is also granting approval under the authority of section 112(l)(5) and 40 CFR 63.91 of a mechanism for receiving delegation of section 112 standards that are unchanged from the Federal standards, but only as these standards apply to title V sources (See section 5.1.2.b of EPA's ''Interim Enabling Guidance for the Implementation of 40 CFR Part 63,'' Subpart E, EPA–453/R–93–040, November 1993). Under this streamlined approach, once Idaho adopts a new or revised NESHAP standard into State law, Idaho will only need to send a letter of request to EPA requesting delegation for the NESHAP standard. EPA would in turn respond to this request by sending a letter back to the State delegating the appropriate NESHAP standards 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 by EPA within 10 days of this letter of delegation, the delegation would then become final. Notice of such delegations will periodically be published in the Federal Register.

Because EPA has determined that Idaho's enforcement authorities do not meet the requirements of 40 CFR 70.11, EPA is promulgating interim, rather than full, approval of Idaho's request for delegation. In this respect, it is important to note that, although EPA is delegating authority to Idaho on an interim basis to enforce the NESHAP regulations as they apply to title V sources, EPA retains oversight authority for all sources subject to these Federal Clean Air Act 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.

[17] With the exception of the radionuclide NESHAP regulations found in part 61, subparts B, H, I, K, Q, R, T, and W.

III. Administrative Requirements

A. Docket

Copies of the State's submittal and other information relied upon for the final interim approval, including the letters of public comment received and reviewed by EPA on the proposal, are contained in the Idaho title V 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 final action. The docket is available for public inspection at the location listed under the **ADDRESSES** section of this document.

B. Executive Order 12866

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

C. Regulatory Flexibility Act

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. Similarly, NESHAP rule or program delegations approved under the authority of section 112(l) of the Act do not create any new requirements, but simply confer Federal authority for those requirements that Idaho is already imposing. Because this action does not impose any new requirements, EPA has determined it does not have a significant impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act

EPA has determined that the action promulgated today under section 502 and section 112(l) of the Act 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.

E. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in

today's Federal Register. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 70

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

Dated: November 21, 1996.

Chuck Clarke,

Regional Administrator.

Part 70, title 40 of the Code of Federal Regulations is amended as follows:

PART 70—[AMENDED]

1. The authority citation for part 70 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

2. Appendix A to part 70 is amended by adding the entry for Idaho in alphabetical order to read as follows:

Appendix A to Part 70—Approval Status of State and Local Operating Permits Programs

* * * * *

Idaho

(a) Idaho Division of Environmental Quality: submitted on January 20, 1995, and supplemented on July 14, 1995, September 15, 1995, and January 12, 1996; interim approval effective on January 6, 1997; interim approval expires January 6, 1999.

(b) Reserved.

* * * * *

[FR Doc. 96–31121 Filed 12–5–96; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF DEFENSE

48 CFR Part 231

[DFARS Case 96–D334]

Defense Federal Acquisition Regulation Supplement; Restructuring Costs

AGENCY: Department of Defense (DoD).

ACTION: Interim rule with request for comments.

SUMMARY: The Director of Defense Procurement has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 8115 of the National Defense Appropriations Act for Fiscal Year 1997 (Pub. L. 104–208) concerning the reimbursement of external restructuring costs associated with a business combination.

DATES: *Effective date:* December 6, 1996.

Comment date: Comments on the interim rule should be submitted in writing to the address shown below on or before February 4, 1997, to be considered in the formulation of the final rule.

ADDRESSES: Interested parties should submit written comments to: Defense Acquisition Regulations Council, Attn: Ms. Sandra G. Haberlin, PDUSD (A&T) DP (DAR), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062. Telefax number (703) 602–0350. Please cite DFARS Case 96–D334 in all correspondence related to this issue.

FOR FURTHER INFORMATION CONTACT: Ms. Sandra G. Haberlin, (703) 602–0131.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule amends DFARS 231.205–70, External restructuring costs, to implement Section 8115 of the National Defense Appropriations Act for Fiscal Year 1997 (Pub. L. 104–208). Section 8115 restricts DoD from using fiscal year 1997 funds to reimburse external restructuring costs associated with a business combination undertaken by a defense contractor unless certain conditions are met. These conditions include either that (1) the audited savings for DoD resulting from the restructuring will be at least twice the costs; or (2) the savings for DoD will exceed the costs allowed and the Secretary of Defense determines that the business combination will result in the preservation of a critical capability that might otherwise be lost to the Department.

B. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense to issue this rule as an interim rule. Urgent and compelling reasons exist to promulgate this rule without prior opportunity for public comment. This rule implements Section 8115 of the National Defense Appropriations Act for Fiscal Year 1997 (Pub. L. 104–208), which was effective upon enactment on September 30, 1996. However, comments received in response to the publication of this rule will be considered in formulating the final rule.

C. Regulatory Flexibility Act

The interim rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive fixed-price basis, and do not require application of the cost principle contained in this rule. In addition, this rule only applies to those entities that incur restructuring costs associated with a business combination under contracts funded by fiscal year 1997 funds. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected DFARS subpart also will be considered in accordance with Section 610 of the Act. Such comments must be submitted separately and cite DFARS Case 96–D334 in correspondence.

D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the interim rule does not impose any new reporting or recordkeeping requirements which require Office of Management and Budget approval under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 231

Government procurement.

Michele P. Peterson,

Executive Editor, Defense Acquisition Regulations Council.

Therefore, 48 CFR Part 231 is amended as follows:

1. The authority citation for 48 CFR Part 231 continues to read as follows:

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

PART 231—CONTRACT COST PRINCIPLES AND PROCEDURES

2. Section 231.205–70 is amended by revising paragraph (a), and by adding paragraphs (c) (3) and (d) (10) to read as follows:

231.205–70 External restructuring costs.

(a) *Scope.* This subsection prescribes policies and procedures for allowing contractor external restructuring costs when net savings would result for DoD. This subsection also implements Section 818 of the National Defense Authorization Act for Fiscal Year 1995 (Pub. L. 103–337) and Section 8115 of the National Defense Appropriations Act for Fiscal Year 1997 (Pub. L. 104–208).

* * * * *

(c) * * *

(3) Additionally, for business combinations that occur after September 30, 1996, no fiscal year 1997 appropriated funds may be obligated or expended to reimburse a contractor for restructuring costs associated with external restructuring activities unless—

(i) The audited savings for DoD resulting from the restructuring will