Consistent with EPA policy, EPA nonetheless consulted closely with the Governor of New York and his staff early and throughout the process of developing New York's regulations to allow them to have meaningful and timely input in the development of its Title V Operating Permit Program. EPA worked closely with the Governor's legal staff in drafting the legislation and regulations for this program.

F. Executive Order 13175

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.''

This rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

G. Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

This rule will not have a significant impact on a substantial number of small entities because Part 70 approvals under Section 502 of the CAA do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because this approval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities.

H. Unfunded Mandates

Under sections 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to state, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval action promulgated 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 requirements. Accordingly, no additional costs to state, local, or tribal governments, or to the private sector, result from this action.

I. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use ''voluntary consensus standards'' (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

The EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

List of Subjects in 40 CFR Part 70

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

Dated: October 19, 2001.

William J. Muszynski,

Acting Regional Administrator, Region 2

[FR Doc. 01–26927 Filed 10–24–01; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 70

[NJ001; FRL–7090–5]

Clean Air Act Proposed Full Approval of Operating Permit Program; New Jersey

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is taking proposed action to fully approve the operating permit program of the State of New Jersey. New Jersey's operating permit program was submitted in response to the directive in the 1990 Clean Air Act (CAA) Amendments that States develop and submit to EPA, programs for issuing operating permits to all major stationary sources and to certain other sources within the States' jurisdiction. EPA granted interim approval to New Jersey's operating permit program on May 16, 1996. New Jersey revised its program to satisfy the conditions of the interim approval and submitted the corrected program on May 31, 2001. This action approves those revisions. In addition, EPA is also taking proposed action to approve the following changes to New Jersey's Operating Permit Rule: (1) N.J.A.C.7:27–22.29(a) and 22.29(e) were changed to incorporate the final nitrogen oxide regulations under 40 CFR Part 76 as required by EPA; and N.J.A.C. 7:27–22.1 was changed to add the definition of a fuel cell system and to add fuel cell systems with a power output of less than 500 kilowatts to the list of exempt activity.

DATES: Comments on this proposed action must be received in writing by November 26, 2001.

ADDRESSES: Written comments on this action should be addressed to Steven C. Riva, Chief, Permitting Section, Air Programs Branch, EPA–Region 2, 290 Broadway, New York, New York 10007–1866. Copies of the State's submittal and other supporting information used in developing the proposed full approval are available for inspection during normal business hours at the following location: U.S. Environmental Protection Agency, Region 2, 290 Broadway, 25th Floor, New York, New York 10007–1866.

FOR FURTHER INFORMATION CONTACT: Steven C. Riva, Chief, Permitting Section, Air Programs Branch, at the above EPA office in New York or at telephone number (212) 637–4074.

SUPPLEMENTARY INFORMATION: This section provides additional information by addressing the following questions:

What is the operating permit program?
What is being addressed in this document?
What are the program changes that EPA is approving?
What is involved in this proposed action?

What Is the Operating Permit Program?

Title V of the Clean Air Act Amendments (CAA) of 1990 and its implementing regulations at 40 CFR Part 70 require all States to develop and implement operating permit programs that meet certain criteria. Operating permit programs are intended to consolidate into a single federally enforceable document all CAA requirements that apply to a particular source. This consolidation of all of the applicable requirements for a facility, the source, the public, and the permitting authorities can more easily determine what CAA requirements apply and how compliance with those requirements is determined. Sources required to obtain an operating permit under this program include: ''major'' sources of air pollution and certain other sources specified in Section 501 of the CAA or in EPA's implementing regulations (see 40 CFR 70.3).

The EPA reviews state programs pursuant to Section 502 of the CAA and the Part 70 regulations, which together outline the 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 which would be effective for 2 years. If a state does not have in place a fully approved program by the time the interim program approval expires, the federal operating permit program promulgated under 40 CFR Part 71 will be implemented. Due to unexpected circumstances that affected States' timeliness in developing a fully approvable program, EPA took final action to extend the effective date of all interim approvals until December 1, 2001. EPA's action required all States with interim approvals to submit a full program on or before June 1, 2001 which would allow EPA a period of six months to render a decision on the approvability of the State submittal. Any State that fails to have a fully approved program in place by December 1, 2001 will be required to cease all permitting activities under the interim program. At such point, the federal operating permit program promulgated under 40 CFR Part 71 will take effect immediately. All sources subject to the federal program that do not have final Part 70 permits already issued to them by the state are required to submit a Part 71 application and the appropriate fees within one year to their respective EPA Regional offices pursuant to 40 CFR Part 71.

What Is Being Addressed in This Document?

New Jersey's operating permit program substantially, but not fully, met the requirements of Part 70; therefore, EPA granted the New Jersey operating permit program interim approval on May 16, 1996, which became effective on June 17, 1996 (*See* 61 FR 24715). EPA identified four issues that needed correction before NJ would be eligible for full program approval. NJ submitted a corrected program to the EPA on May 31, 2001 which addressed each of the four deficiencies. This document describes the changes made in New Jersey's operating permit program that corrected those deficiencies.

What Are the Program Changes Made by New Jersey?

1. Nonmajor Sources

The first condition for full program approval of NJ's operating permit program was a rule revision to require nonmajor sources subject to Section 111 standards promulgated after July 21, 1992 to apply for an operating permit unless EPA exempts such sources in future rulemaking. In accordance with the above directive, in its proposed changes to N.J.A.C. 7:27–22, NJ included changes to N.J.A.C. 7:27–22.2(b) to require all nonmajor sources subject to Section 111 standards to apply for an operating permit unless the EPA completed a rulemaking exempting such sources. However, based on a clarification of EPA's interpretation of 40 CFR 70.3(b)(1) and (b)(2), NJ did not adopt the above-noted change. As a result, N.J.A.C. 7:27–22.2(b) currently reads as follows: ''A nonmajor facility not included in (a) above shall become subject to this subchapter if EPA completes a rulemaking requiring an operating permit for that category of nonmajor facilities pursuant to 40 CFR 70.3(b)(1) or (2).''

It is EPA's position that 40 CFR 70.3(b)(1) allows states to defer nonmajor section 111 sources from title V permitting requirements until EPA affirmatively addresses whether these sources are to be permitted. Therefore, if a section 111 standard is promulgated after July 21, 1992 and the standard does not address whether nonmajor sources subject to it must obtain title V permits consistent with 40 CFR 70.3(b)(2), then States can defer the permitting of these sources until EPA completes the rulemaking described in 40 CFR 70.3(b)(1). Based on its reference to 40 CFR 70.3(b)(1) and (2), N.J.A.C. 7:27–22.2 essentially requires all sources, major and nonmajor, that are subject to Section 111 of the CAA to apply for an operating permit unless they are specifically exempted by the EPA in its final rulemaking. Nonetheless, NJ may still exercise its discretion provided under 40 CFR 70.3(b)(1) to defer permitting of these nonmajor sources.

It is important to note the difference between a deferral and an exemption. Under a deferral, while sources are allowed to defer the process of obtaining a Part 70 permit until a later date, they are still required to comply with all applicable provisions of the standard to which they are subject. An exemption, on the other hand, is granted by EPA in its rule promulgation. An exemption not only relieves the subject sources from the permitting requirement; it also relieves them from the substantive requirements. In the case of NJ, while NJ chooses to defer the permitting requirement for all nonmajor sources, except nonmajor sources under section 129 of the CAA, through its reference to 40 CFR 70.3(b)(1), NJ still enforces all applicable requirements to which a nonmajor source is subject.

The above discussion relative to nonmajor sources subject to section 111 of the Act does not apply to solid waste incineration units subject to section 129 of the Act. Specifically, section 129(e) of the Act requires solid waste incineration units to operate pursuant to a title V permit and the introductory phrase in 40 CFR 70.3(b)(1) excludes such units from being exempted from title V permitting for any period of time. As a result, although solid waste incineration units are subject to standards promulgated under sections 111 and 129, the exemption in 40 CFR 70.3(b)(1) does not apply to section 129 sources. Based on this clarification, EPA has determined that NJ's existing rule provisions at N.J.A.C. 7:27–22.2(b) are acceptable for full program approval.

However, EPA believes that it would be helpful to revise N.J.A.C. 7:27–22.2(b) to specifically include the introductory phrase in 40 CFR 70.3(b)(1), which excludes major sources, affected sources, or solid waste incineration units from being exempted from title V permitting for any period of time, in order to eliminate any confusion for sources. In an October 3, 2001 letter, William O'Sullivan, Administrator, Air Quality Permitting Program, Department of Environmental Protection, State of New Jersey, stated that NJ interprets 7:27–22.2(b) to incorporate 40 CFR 70.3(b)(1) in its entirety. Mr. O'Sullivan further stated in this letter that NJ does require the permitting of sources subject to section 129 of the Act. Such sources (both major and nonmajor) have been applying for title V permits in NJ. However, NJ agrees with EPA that for purposes of clarity to the subject sources that they would incorporate 40 CFR 70.3(b)(1), including the introductory phrase, into N.J.A.C.7:27–22.2(b) in a future rulemaking so as to eliminate any confusion for subject sources. This change will also help ensure that solid waste incineration units apply for and obtain title V permits consistent with the deadlines established in sections 129(e) and 503(c) and (d) of the Act, and in the regulations developed pursuant to these Act provisions.

Although EPA views this rule change to be beneficial to sources for clarification purposes, EPA does not believe it to be crucial for granting full program approval because it is shown in NJ's October 3, 2001, commitment letter that they are complying in substance. Since EPA's original determination that NJ's rule was deficient relative to the permitting of nonmajor sources subject to section 111 of the Act was incorrect and given that NJ is requiring nonmajor sources subject to a section 129 standard to apply for title V permits, EPA considers this issue resolved for purposes of granting the State of New Jersey full program approval.

2. Affirmative Defense

The second condition for full approval of NJ's operating permit program was a rule and/or legislation revision to ensure conformance with 40 CFR 70.6(g). Specifically, NJ has general air legislation (N.J.S.A.26:2C–19.1 through 19.5) which allows an affirmative defense for startups, shutdowns, equipment maintenance and

malfunctions and its operating permit rule (N.J.A.C.7:27–22.3(nn) and 22.16(l)) discusses when it can be used. This legislation is separate and apart from the title V enabling legislation and applies generally to New Jersey's rules. The Part 70 regulations allow an affirmative defense in emergency situations only and does not extend this defense to startups, shutdown, equipment maintenance or malfunctions per se. EPA found NJ's general affirmative defense provisions to be inconsistent with the Part 70 regulations. 40 CFR 70.6(g) provides that the emergency affirmative defense is only applicable to technology-based emission limits and not health-based emission limits. The definition of ''emergency'' also limits excursions resulting from sudden and unforeseeable events. As a condition of full approval, EPA required NJ to revise its legislation as cited above to limit its affirmative defense for title V purposes only to emergency situations resulting from violations of technology-based emission standards. Alternatively, NJ could submit an opinion from the State Attorney General clarifying that the NJ Law prohibits the use of an affirmative defense for violations of health based emission limitations. In addition, EPA required NJ to revise both the legislation and N.J.A.C.7:27–22 to limit the use of its affirmative defense, for title V purposes, to sudden and unforeseeable events that are beyond the control of the source. This addition would ensure that the affirmative defense is only applicable during emergency situations.

Since the time this issue arose in NJ's interim approval, EPA has differentiated the issue before it. The startup, shutdown and malfunction affirmative defense cited in New Jersey's legislation (N.J.S.A. 26:2C–19.1–19.5) is separate and apart from the emergency affirmative defense under 40 CFR 70.6(g)(1). In terms of conforming with 40 CFR 70.6(g)(1), NJ defines ''emergency'' in N.J.A.C. 7:27–22.1 of its rule as follows:

''Any situation arising from sudden and reasonably unforeseeable events beyond the control of a facility such as an act of God, * * * to exceed a technology-based emission limit set forth in its operating permit. This term shall not include noncompliance caused by improperly designed equipment, lack of preventive maintenance, careless or improper operation or operator error.''

As a result, NJ's rule already meets the requirements EPA placed upon it through EPA's interim approval of NJ's title V program to conform with 40 CFR 70.6(g)(1). In addition, NJ has inserted a sentence in the general provisions of its permits to state that any emergency affirmative defense asserted under 40 CFR Part 70 must follow the procedures set out in 40 CFR Part 70. As a result, this portion of the affirmative defense issue under NJ's interim approval has been resolved.

The actual issue before EPA during the interim approval of NJ's title V operating permit program was the existence of NJ's general legislation, providing an affirmative defense for startups, shutdowns, maintenance and malfunctions, under N.J.S.A. 26:2C–19.1–19.5. As already stated, this affirmative defense went beyond the emergency affirmative defense permitted under 40 CFR 70.6(g)(1). More importantly, it created a possible conflict between the state affirmative defense and affirmative defenses established under federal requirements such as the New Source Performance Standards (NSPS) and New Emission Standards for Hazardous Air Pollutants (NESHAP).

As a result of the sharper delineation of the issue before us, EPA has since re-evaluated alternatives that may resolve this issue. EPA recognizes States' discretion to grant an affirmative defense for violations of State requirements without jeopardizing their operating permit programs. EPA believes limiting the affirmative defense to violations of non-federally promulgated standards would in turn limit its application to technology-based standards, rather than health-based standards. It should however, be noted that under N.J.S.A. 26:2C–19.3, New Jersey's general startup, shutdown, maintenance and malfunction affirmative defense cannot be used for public health or welfare violations. As a result, this protection already exists in the legislation itself. Regardless, in promulgating federal emissions standards such as the NSPS and NESHAP, EPA evaluated the appropriateness of allowing sources to exceed certain emission limits under particular circumstances. Where EPA allowed for such excursions within the standard, EPA had already taken into consideration the limitations of add-on controls that may cause unexpected excess emissions as well as health concerns associated with the excursion. The situation under which an excursion may be allowed had also been evaluated. Consequently, depending on the standard in question, some may excuse excursions and some may not. Therefore, EPA finds it more suitable to defer to the provisions of the federal emissions standard for appropriate actions regarding violations of a particular standard.

On January 30, 2001, EPA informed NJ that as an alternative to the legislation and rule changes described in the May 16, 1996 **Federal Register** notice for correcting this deficiency, NJ should (1) submit an opinion from the Attorney General stating that the affirmative defense provisions of N.J.S.A.26:2C–19.1 through 19.5 are applicable to non-federally promulgated standards only and (2) include a statement in the General Provisions of each permit that reflects the Attorney General's opinion. On May 31, 2001, NJ submitted an Attorney General's opinion clarifying the inapplicability of the State's affirmative defense, N.J.S.A.26:2C–19.1 through 19.5, to federally delegated standards. NJ also submitted language to be added to Section F (the general provisions of NJ operating permits) stating that its affirmative defense for startups, shutdowns, maintenance and malfunctions under N.J.S.A.26:2C–19.1 through 19.5 does not apply to federally delegated regulations, including but not limited to NSPS, NESHAP or MACT.

3. Administrative Amendments

The third condition for full program approval of New Jersey's operating permit program was a rule revision to ensure that the administrative amendment procedure is properly used to incorporate preconstruction permits into operating permits. NJ's rule had allowed a preconstruction permit to be incorporated into the operating permit via the administrative amendment process if it was issued through public participation requirements substantially equivalent to those for operating permits. EPA identified this as a deficiency in the interim approval because a public participation process that is ''substantially equivalent'' to, may not actually meet, the requirements of the NJ operating permit rule. The public comment and EPA comment sections of NJ's operating permit rule are stipulated in N.J.A.C.7:27–22.11 and 22.12, respectively. As a condition of the interim approval, EPA required NJ to correct this deficiency by revising N.J.A.C. 7:27–22.20(b)(7) to require the preconstruction permit to undergo a process that meets 22.11 and 22.12 as opposed to a process that is substantially equivalent to 22.11 and 22.12. NJ revised its operating rule accordingly on August 2, 1999. A copy of the New Jersey Register (31 N.J.R. 2202) notice was submitted with the full program package on May 31, 2001.

4. Permit Fees

The fourth, and final, condition for full program approval of New Jersey's operating permit program was the submittal of a revised fee demonstration showing that the legislative limit of $9.51 million on program appropriation will not render the NJ program inadequately funded. The New Jersey Air Pollution Control Act (NJAPCA) delineates the fee collection schedule for the operating permit program during the initial years of program implementation. While EPA found NJ's adoption of the presumptive minimum of $25 per ton (in 1989 dollars adjusted by the CPI) to be acceptable for purposes of determining adequate funding for the NJ program, EPA found the appropriation cap of $9.51 million stipulated in the legislation to be problematic. This provision allows NJ to collect the presumptive minimum fees from all affected sources but prevents any appropriation in excess of $9.51 million for purposes of administering the operating permit program. It was difficult to determine whether $9.51 million was or was not adequate to fund the NJ program. Therefore, as a condition of the interim approval, EPA required NJ to submit a revised fee demonstration to show that $9.51 million would adequately fund the operating permit program. If the fee demonstration showed otherwise, NJ would be required to take actions to correct this deficiency prior to full program submittal. In the May 31, 2001, full program submittal, NJ informed EPA that this program deficiency is no longer an issue because the legislative cap on appropriation does not apply to State fiscal year 1998 and thereafter. A copy of the pertinent section of the legislation (N.J.A.P.C.A. 26:2C–9.5d) was submitted to show that there no longer is a limit on operating permit program appropriations.

What Is Involved in This Proposed Action?

The State of New Jersey has fulfilled the conditions of the interim approval granted on

May 16, 1996. EPA is therefore taking proposed action to fully approve the State's operating permit program. EPA is also taking proposed action to approve other program changes made by the State since the interim approval was granted.

Administrative Requirements

A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, entitled ''Regulatory Planning and Review.''

B. Paperwork Reduction Act

This action will not impose any collection information subject to the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, other than those previously approved and assigned OMB control number 2060–0243. For additional information concerning these requirements, *see* 40 CFR Part 70. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

C. Executive Order 13045

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to Executive Order 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

D. Executive Order 13132

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) revokes and replaces Executive Order 12612 (Federalism) and Executive Order 12875 (Enhancing the Intergovernmental Partnership). Under section 6(c) of Executive Order 13132, EPA may not issue a regulation that has federalism implications and that preempts state law unless the agency consults with state and local officials early in the process of developing the proposed regulation.

EPA has concluded that this proposed rule may have federal implications. For example, under the authority of section 505 of the Act, 42 U.S.C. 7661(d), EPA may object to a permit issued under the NJ's Title V Operating Permit Program. Should NJ fail to revise the permit based upon EPA's objection, EPA has the authority under this section of the Act to issue a federal permit for the facility under 40 CFR Part 71. However, it will not impose direct compliance costs on State or local governments, nor will it preempt State law. Thus, the requirements of sections 6(b) and Executive Order 13132, entitled Federalism (64 FR 43255, August 10, 1999) require EPA to develop an accountable process to ensure ''meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

Under section 6(b) of Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal Government provides the funds. Therefore, section 6(c) of the Executive Order does not apply to this rule.

Consistent with EPA policy, EPA nonetheless consulted closely with the Governor of NJ and her staff early and throughout the process of developing NJ's regulations to allow them to have meaningful and timely input in the development of its Title V Operating Permit Program. EPA worked closely with the Governor's legal staff in drafting the legislation and regulations for this program.

E. Executive Order 13175

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.''

This rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

F. Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

This rule will not have a significant impact on a substantial number of small entities because Part 70 approvals under Section 502 of the CAA do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because this approval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities.

G. Unfunded Mandates

Under sections 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to state, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval action promulgated 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 requirements. Accordingly, no additional costs to state, local, or tribal governments, or to the private sector, result from this action.

H. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use ''voluntary consensus standards'' (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

The EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

List of Subjects in 40 CFR Part 70

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

Dated: October 19, 2001.

William J. Muszynski,

Acting Regional Administrator, Region 2.

[FR Doc. 01–26928 Filed 10–24–01; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 2

[ET Docket No. 00–258; RM–9911; FCC 01–256]

New Advanced Wireless Services

AGENCY: Federal Communications Commission.

ACTION: Denial of Petition for Reconsideration of Notice of Proposed Rule Making.

SUMMARY: This document responds to the Petition for Reconsideration filed by Satellite Industry Association. The petition requested that we reconsider our decision not to allocate the 2500–2520 MHz and 2670–2690 MHz bands for Mobile Satellite Service use for 3G services. We affirm our finding that the Mobile Satellite Service has sufficient spectrum without those band segments.

FOR FURTHER INFORMATION CONTACT: Rodney Small, Office of Engineering and Technology, (202) 418-2452.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Memorandum Opinion and Order,* ET Docket No. 00–258, FCC 01–256, adopted September 6, 2001, and released September 24, 2001. The full text of this Commission decision is available on the Commission's Internet site at www.fcc.gov. It is available for inspection and copying during normal business hours in the FCC Reference Information Center, Room CY–A257, 445 12th Street, SW., Washington, DC, and also may be purchased from the Commission's duplication contractor, Qualex International, (202) 863–2893, Room CY–B402, 445 12th Street, SW., Washington, DC 20554.

Summary of the Memorandum Opinion and Order

1. In this *Memorandum Opinion and Order* (''MO&O''), we deny a petition for reconsideration filed by the Satellite Industry Association (''SIA'') of the *Notice of Proposed Rule Making and Order,* 66 FR 7483, January 23, 2001, in this proceeding. SIA requested that we reconsider our decision not to allocate the 2500–2520 MHz and 2670–2690 MHz bands for Mobile Satellite Service (''MSS'') use for 3G services, but we affirm our prior determination that reallocation of the 2.5 GHz band to the MSS is unwarranted because sharing between terrestrial and satellite systems would present substantial technical challenges in that band and MSS already has access to a significant amount of spectrum below 3 GHz to meet its needs in the foreseeable future.

2. In its petition for reconsideration, SIA maintains that there is no evidence that spectrum sharing between fixed services and MSS will result in interference and that existing MSS spectrum allocations are insufficient. SIA cites Telecommunications Industry Association (''TIA'') joint working group TR14.11/TR34.2 as finding in its Telecommunications System Bulletin (''TSB'') 86 that sharing between fixed services and MSS is feasible. SIA also argues that the geographic separation of MSS and Instructional Television Fixed Service/Multichannel Multipoint Distribution Services (''ITFS/MMDS'') users should significantly alleviate any potential interference between the services. Finally, SIA argues that interference from MSS spacecraft was addressed by the International Telecommunication Union (''ITU'') over the 1994–1996 period and power flux density limits were developed to protect fixed services operating in the 2500–2520 MHz and 2670–2690 MHz bands. SIA contends that these limits have been incorporated into the ITU's Radio Regulations, and ITFS/MMDS interests have presented no technical evidence to support their claim that those limits are insufficient to protect ITFS/MMDS licensees from MSS interference. Therefore, SIA contends that we must reconsider our decision to dismiss its petition for reconsideration and request comment on the merits of allocating the 2500–2520 MHz and 2670–2690 MHz bands to MSS on a shared basis with fixed services.

3. Commenters opposed SIA's petition for reconsideration on both procedural and substantive grounds. We agree with these commenters that SIA's petition for reconsideration relies on facts that have not been presented to the Commission previously. Section 1.429(b) of our rules states:

A petition for reconsideration which relies on facts which have not previously been presented to the Commission will be granted only under the following circumstances:

(1) The facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission;

(2) The facts relied on were unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or

(3) The Commission determines that consideration of the facts relied on is required in the public interest.

4. SIA submitted its petition for rulemaking in April 2000, significantly after the October 1999 TSB 86 document was published and even more significantly after the 1994–1996 ITU work that SIA cites in its petition for reconsideration. Thus, SIA properly should have cited the TSB 86 document and the ITU work in its petition for rulemaking. Even in its petition for reconsideration, SIA does not explain the relevance of this material to its petition. TSB 86 is titled ''Criteria and Methodology to Assess Interference Between Systems in the Fixed Service and the Mobile-Satellite Service in the Band 2165–2200 MHz'' and thus was prepared for analyzing interference in another frequency band for space-to-Earth satellite links. Further, the working group that prepared TSB 86 ''was formed under the auspices of TIA following a number of informal discussions among representatives of the mobile satellite and terrestrial fixed microwave point-to-point service industry sectors.'' Thus, contrary to SIA and Globalstar, TSB 86 does not appear relevant either to the 2500–2690 MHz band or to the ITFS/MMDS point-to-multipoint licensees that use that band.