

Hudson River, thence south along the west bank of the Hudson River to its intersection with and then counterclockwise along the 6.5-mile radius circle centered at lat. 40°41'30" N., long. 74°09'59" W., to and southwest along the New Jersey Highway Route No. 22 to and clockwise along a 10-mile radius circle centered at lat. 40°41'30" N., long. 74°09'59" W., to LGA VOR/DME 283° radial, thence direct to the point of beginning.

Issued in Washington, DC, on March 22, 1993.

**Harold W. Becker,**  
Manager, Airspace-Rules and Aeronautical Information Division.

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## DEPARTMENT OF JUSTICE

### Parole Commission

#### 28 CFR Part 2

#### Paroling, Recommending, and Supervising Federal Prisoners: Consideration of Recorded Audio and Visual Material at Parole Hearings

**AGENCY:** United States Parole Commission.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Parole Commission adopted a procedural rule relating to the consideration of recorded audio and visual material (including audio and video tapes) at parole hearings. The rule requires the submission of recorded audio and visual material prior to the hearing for review and summarization. The rule notes that the Commission will normally consider only verbal and written evidence at hearings but that recorded audio and visual material will be considered if there is no adequate substitute to enable the Commission to make a finding of fact pursuant to 28 CFR 2.19(c).

**EFFECTIVE DATE:** April 29, 1993.

**FOR FURTHER INFORMATION CONTACT:** Richard Preston, Office of General Counsel, 5550 Friendship Boulevard, Chevy Chase, Maryland 20815, telephone (301) 492-5959.

**SUPPLEMENTARY INFORMATION:** The increased frequency with which recorded audio and visual material has been presented for review at parole hearings requires the Commission to establish a procedural rule to govern the consideration of such material. The procedural rule that follows spells out the heretofore unwritten policy of the Commission concerning the submission of recorded audio and visual material. Since the vast majority of hearings are

conducted at institutions where time and equipment limit the presentation of recorded audio and visual material, the Commission prefers to consider only verbal and written evidence (e.g., affidavits as opposed to videotaped statements) at hearings.

However, recorded material has occasionally been admitted under the "best evidence" rule in parole revocation hearings and prisoners have sometimes presented recorded material for which no adequate substitute could have been found. The Commission recognizes the value of this material in assisting it in making findings of fact and will continue to consider admitting this type of evidence in all cases as long as it is submitted prior to the hearing for review. However, recorded material will only be reviewed at the hearing if the Commission finds that written or oral evidence is either not available, or inadequate to permit a finding of fact pursuant to 28 CFR 2.19(c). For example, the transcript of a videotaped cross-examination of a witness who is not deceased, would not be an adequate substitute for the tape itself if the Commission found that a credibility determination was essential.

#### *Executive Order 12291 and Regulatory Flexibility Statement*

The U.S. Parole Commission has determined that this rule is not a major rule within the meaning of Executive Order 12291. This rule, if adopted, will not have a significant economic impact upon a substantial number of small entities, within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 605(b).

#### **List of Subjects in 28 CFR Part 2**

Administrative practice and procedure, probation and parole, prisoners.

Accordingly, the U.S. Parole Commission makes the following amendment to 28 CFR part 2.

#### *The Amendment*

(1) The authority citation for 28 CFR part 2 continues to read as follows:

**Authority.** 18 U.S.C. 4203(a)(1) and 4204 (a)(6).

(2) 28 CFR part 2, § 2.19 is amended by adding the following new paragraph (b)(4):

#### **§ 2.19 Information considered.**

\* \* \* \* \*

(b) \* \* \*

(4) The Commission will normally consider only verbal and written evidence at hearings. Recorded audio and visual material will be reviewed at

hearings only if there is no adequate substitute to permit a finding under paragraph (c) of this section. Otherwise, recorded audio and visual material should be submitted prior to the hearing for review and summarization, pursuant to paragraph (b)(2) of this section.

\* \* \* \* \*  
Dated: February 23, 1993.

**Edward F. Reilly, Jr.,**

Chairman, Parole Commission.

[FR Doc. 93-7167 Filed 3-29-93; 8:45 am]

BILLING CODE 4410-01-M-P

## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

#### 29 CFR Part 1910

#### Control of Hazardous Energy Sources (Lockout/Tagout)

**AGENCY:** Occupational Safety and Health Administration (OSHA), Labor.

**ACTION:** Final rule; supplemental statement of reasons.

**SUMMARY:** On September 1, 1989, OSHA promulgated a final standard entitled "Control of Hazardous Energy Sources (Lockout/Tagout)," to protect workers from releases of hazardous energy during servicing or maintenance of machines and equipment. The U.S. Court of Appeals for the District of Columbia Circuit, in *UAW v. OSHA*, 938 F.2d 1310, remanded the lockout/tagout standard to OSHA for further consideration on three issues: first, the criteria used by OSHA in setting safety standards under section 3(8) of the Occupational Safety and Health Act of 1970 (the OSH Act); second, justification for the final rule's preference for lockout over tagout; and third, OSHA's determination that the final rule should apply to all general industry workplaces in which hazardous servicing and maintenance operations take place. OSHA has determined that there are clear and definitive criteria which guide and limit the Agency's discretion in establishing safety standards under the OSH Act. In applying these criteria to the lockout/tagout standard, OSHA has determined that the standard complies with the statutory criteria. In addition, on the second remand issue, involving the standard's preference for locks over tags, OSHA has determined that such a preference is warranted by the fact that lock-based safety programs are less susceptible to human error and thus can be expected to save more lives and prevent more injuries than tag-based

programs. On the third remand issue, OSHA reaffirms and further explains its reasons for applying the standard throughout general industry. Finally, the Agency discusses two approaches to regulatory decision-making, formal cost-benefit analysis and risk-risk analysis, which the court suggested in its opinion as possible alternatives for OSHA to consider in setting safety standards.

**DATES:** The final rule became effective January 2, 1990.

**FOR FURTHER INFORMATION CONTACT:** Mr. James F. Foster, OSHA, U.S. Department of Labor, Office of Information and Consumer Affairs, room N-3647, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 219-8151.

#### SUPPLEMENTARY INFORMATION:

##### Introduction

On September 1, 1989, the Occupational Safety and Health Administration (OSHA) promulgated a final rule, entitled "Control of Hazardous Energy Sources (Lockout/Tagout)," to protect workers against hazardous energy release during the maintenance and servicing of machines or equipment. 54 FR 36644, codified at 29 CFR 1910.147. The "lockout/tagout" standard "covers the servicing and maintenance of machines and equipment in which the unexpected energization or startup of the machines or equipment, or release of stored energy could cause injury to employees." 29 CFR 1910.147(a)(1)(i) (emphasis in original). The standard requires employers to develop and implement energy control programs that "ensure that before any employee performs any servicing or maintenance on a machine or equipment where the unexpected energizing, startup or release of stored energy could occur and cause injury, the machine or equipment shall be isolated from the energy source, and rendered inoperative." 29 CFR 1910.147(c)(1). OSHA estimated that the standard would prevent approximately 122 fatalities, 28,400 lost workday injuries, and 31,900 non-lost workday injuries each year. 54 FR at 36652/3. OSHA found that the standard would reduce a significant risk of harm to workers and that it would be feasible to implement. *Id.* at 36684-85.

Parties representing both labor and industry filed petitions for review of the standard in the United States Court of Appeals for the District of Columbia Circuit. The court rejected many of the challenges raised to the standard but remanded for OSHA to further explain its reasoning on several issues. *UAW v. OSHA*, 938 F.2d 1310 (D.C. Cir. 1991). The principal remand issue concerns

the criteria OSHA uses when it sets safety standards. Under section 3(8) of the Occupational Safety and Health Act of 1970 (the OSH Act), such standards must be "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." In response to the National Association of Manufacturers' (NAM) argument that this statutory language is unconstitutionally broad, the court concluded that "the interpretation offered by the Secretary is, in light of nondelegation principles, so broad as to be unreasonable." *UAW v. OSHA*, 938 F.2d at 1310. However, the court held that at least one limiting interpretation—cost-benefit analysis—would avoid the overbreadth problem. In addition, the court stated that "there may be other interpretations that conform to nondelegation principles." *Id.* at 1321. Accordingly, the court remanded to OSHA to identify "intelligible principle[s] that could control its discretion under § 3(8)." \* \* \* *Id.* at 1325.

The second remand issue involves what NAM contended was a rulemaking decision by OSHA that required a substantial expenditure to produce little or no benefit. NAM's contention involved a change from the proposed standard, which allowed an unrestricted lockout-tagout option, to the final rule, which prefers lockout (unless equipment is unblockable) but permits employers with lockable equipment to use tagout programs if they can demonstrate that such programs provide a level of safety equivalent to lockout. According to the court, "[NAM] adduces data suggesting that the incremental safety gains from universal lockout were modest (averting 42 injuries, of which fully 26 would not even involve a lost day of work) and the incremental cost not immaterial (\$2.3 million in the first year and \$400,000 annually thereafter)." 938 F.2d at 1323-24. The court required OSHA to address NAM's argument on remand.

The final remand issue involves OSHA's decision to apply the standard in all general industry workplaces in which hazardous servicing and maintenance operations take place. NAM contended that OSHA should have made industry-by-industry risk findings and only applied the standard to those industries for which it made specific findings of significant risk. The court's remand order requires OSHA "to explain its decision to impose lockout/tagout even where the risk appears to be diminutive or zero." 938 F.2d at 1325.

In response to the court's decision, OSHA has carefully reexamined the criteria it uses to set safety standards

and has reevaluated the lockout/tagout standard in light of those criteria. OSHA interprets the Act as requiring safety standards to meet the following criteria. A safety standard must substantially reduce a significant risk of material harm; the standard must be technologically feasible in the sense that the protective measures being required already exist, can be brought into existence with available technology, or can be created with technology that can reasonably be developed; the standard must be economically feasible in the sense that industry can absorb or pass on the costs without major dislocation or threat of instability; the standard must achieve its regulatory goals in the most cost-effective manner; the standard must be at least as protective as existing national consensus standards; and the standard must be supported by the evidence in the rulemaking record and be consistent with prior agency action. These criteria shape and limit the agency's safety rulemaking discretion. OSHA believes this interpretation of the Act responds to the court's constitutional concern and establishes that the Act does not delegate excessive discretionary authority to OSHA.

OSHA applied this interpretation in developing the lockout/tagout standard. Later in this section, the agency explains how the standard conforms to each criterion. OSHA has also reevaluated its rulemaking decisions on the two other issues remanded by the court and reaffirms those decisions. As discussed in section II, the standard's preference for locks over tags is warranted by the fact that lock-based safety programs are less susceptible to human error and thus can be expected to save more lives and avoid more injuries than tag-based programs. Section III explains OSHA's reasons for applying the standard in all general industry workplaces in which hazardous servicing operations take place even though available injury data showed a wide range of accident rates for different industrial sectors.

OSHA has also evaluated two approaches to regulatory decision-making, formal cost-benefit analysis and risk-risk analysis, that are discussed in the opinion as possible interpretations of section 3(8). As described in section IV, OSHA already performs an extensive analysis, which includes estimations of compliance costs and of deaths and injuries prevented, when promulgating a standard. Moreover, the application of the statutory criteria set forth in section I assures that the agency's discretion is confined and that the standard produces substantial safety benefits at a reasonable cost. Given this reality, the

agency believes that formal cost-benefit analysis is not needed to meet the court's constitutional concerns. With respect to risk-risk analysis, OSHA has determined that study of risk-risk theory's empirical basis is needed before the theory can be evaluated for application in the OSHA rulemaking context.

#### I. The Overbroad Delegation Issue

Section 3(8) of the OSH Act requires that standards be "reasonably necessary or appropriate" to safe or healthful employment:

The term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

In *UAW v. OSHA*, the court noted that the Supreme Court's Benzene decision had interpreted the "reasonably necessary or appropriate" language of section 3(8) to require that OSHA find, before issuing any standard, that a significant risk of harm existed and that the standard would materially reduce that risk. *UD v. API*, 448 U.S. 607, 646 (1980).

Standards that regulate toxic materials or harmful physical agents ("health" standards) must also meet criteria in section 6(b)(5) of the Act. That section requires, "to the extent feasible \* \* \* that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." OSHA has interpreted section 6(b)(5) to mean that health standards must eliminate all significant risk to the extent it is feasible to do so. The Supreme Court upheld that interpretation of section 6(b)(5) in the Cotton Dust case. *ATMI v. Donovan*, 452 U.S. 490 (1981).

OSHA interprets section 6(b)(5) to apply only to health standards and not safety standards, such as the lockout/tagout standard. See *UAW v. OSHA*, 938 F.2d at 1316. Without the constraint of section 6(b)(5), the court believed that the OSH Act did not limit OSHA's safety rulemaking authority sufficiently to comply with the constitutional requirement that delegations of legislative authority not be overbroad. The court also concluded that OSHA's interpretation that safety standards must be technologically and economically feasible did not adequately narrow the agency's discretion because, as it understood OSHA's position, OSHA viewed feasibility of safety standards "only as a ceiling, and not, as for toxics,

as a floor." *Id.* at 1317. Thus, the court thought that OSHA's interpretation of section 3(8) permitted the agency, "once significant risk is found, to require precautions that take the industry to the verge of economic ruin \* \* \* or to do nothing at all." *Id.* The court viewed OSHA as claiming "untrammelled power to dictate the vitality and even survival of whatever segments of American business it might choose," *id.* at 1318, as leaving "opportunities for dangerous favoritism," *id.*, and as permitting imposition of compliance burdens "even where the risk appears to be diminutive or zero." *Id.* at 1325.

Having found OSHA's interpretation unreasonable, the court examined whether any limiting interpretation of the Act would narrow the agency's discretion sufficiently to satisfy the nondelegation doctrine. The court concluded that cost-benefit analysis would be an acceptable limiting interpretation of section 3(8) without specifying any particular form of that methodology. The court also concluded that "there may be other interpretations that conform to nondelegation principles." *Id.* at 1321. Since at least one possible interpretation would satisfy the Constitution, the court remanded for OSHA to either adopt that interpretation or to adopt another interpretation that constrained its safety rulemaking discretion sufficiently.

In response to the court's opinion, OSHA has carefully examined the statutory criteria that apply to safety standards. The agency has paid particular attention to the court's concern that OSHA's interpretation of the statute must not permit the agency free rein to push industries to the "verge of financial ruin" or to do "nothing at all" in the face of a significant risk to worker safety. OSHA certainly did not intend to claim such unfettered authority in the lockout/tagout rulemaking. The preamble to the rule, however, did not contain an explanation of the statutory criteria that apply to safety standards. In light of the court's opinion, OSHA is now setting forth its interpretation of the statutory standards that govern safety rules.

The agency construes the OSH Act as establishing a number of clear principles that limit and guide OSHA's exercise of authority in standards proceedings. OSHA believes that its construction responds to the court's constitutional concerns and establishes that the Act does not vest excessive discretion in the agency. In issuing a standard, OSHA must find that:

(1) The standard will substantially reduce a significant risk of material harm;

(2) Compliance is technologically feasible in the sense that the protective measures being required already exist, can be brought into existence with available technology, or can be created with technology that can reasonably be developed;

(3) Compliance is economically feasible in the sense that industry can absorb or pass on the costs without major dislocation or threat of instability;

(4) The standard employs the most cost-effective protective measures capable of reducing or eliminating significant risk.

In addition:

(5) Under section 6(b)(8) of the OSH Act, any OSHA standard that differs from an existing national consensus standard must effectuate the Act's objectives better than the national consensus standard.

Finally,

(6) Standards must be supported by the evidence in the rulemaking record and be consistent with prior agency practice or supported by some justification for departing from that practice.

These constraints apply to both safety and health rulemaking. The two types of rules differ, however, in that section 6(b)(5) mandates that health rules be as protective as possible: Once significant risk is found, the standard must eliminate that risk to the extent it is technologically and economically feasible to do so. Because section 6(b)(5) does not govern safety rules, OSHA retains more discretion to shape safety standards than health standards. That does not mean, however, that OSHA's discretion to issue safety standards is unconfined. OSHA's discretion is confined at the ceiling because safety standards cannot require of employers more than is feasible. The court thought there was an overbreadth problem because it understood OSHA to claim unbridled discretion below the ceiling to regulate with any degree of stringency it pleased and even to do "nothing at all" in the face of a significant risk to employee safety.

OSHA does not interpret the OSH Act to give it such a wide range of discretion. In setting safety standards, OSHA must act consistently with the Act's overriding purpose, which is to provide a high degree of employee protection. This purpose is evident from a number of statutory provisions. Section 2(b) of the OSH Act expresses the congressional "purpose and policy \* \* \* to assure so far as possible every working man and woman in the Nation safe \* \* \* working conditions \* \* \*." Section 6(a), which applied during the first two years after the Act became

effective, required that when OSHA adopted existing federal and consensus standards the agency must "promulgate the standard which assures the greatest protection of the safety or health of the affected employees" in the event of any conflict. Section 6(b)(8) provides that when promulgating permanent safety or health standards that differ from existing national consensus standards, OSHA must explain "why the rule as adopted will better effectuate the purposes of this Act than the national consensus standard." Since the key purpose of the Act is worker protection, a standard that differs from a national consensus standard will only better effectuate the Act's purposes if it is more protective. In addition, the OSH Act's "general duty" clause, section 5(a)(1), requires each employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing death or serious physical harm to his employees." These and other statutory provisions make clear that the Act's purpose is to achieve a high degree of worker protection, and OSHA develops standards with that purpose in mind. The agency does not believe that the Act gives it the discretion to do "nothing at all" if it finds a significant risk to worker safety in a rulemaking proceeding.

The notice-and-comment rulemaking process established by the Act assures that the agency is made aware of relevant evidence, of regulatory alternatives, and of the likely consequences of various courses of action. After issuing a notice of proposed rulemaking, OSHA holds hearings and affords all interested persons an opportunity to submit written evidence. OSHA invariably receives comments that cover the entire spectrum of interests affected by the standard and finds those comments very useful in developing the final standard. The agency evaluates all comments that are submitted and explains the basis for accepting or rejecting all major suggestions for modifications to the proposed standard. The agency must support all of its findings with evidence in the rulemaking record. The need to explain and support its rulemaking decisions in the face of contrary evidence and argument assures that OSHA's rulemaking decisions conform to the statute's protective purpose while avoiding regulatory extremes.

Another constraint on OSHA's rulemaking discretion is that significant departures from prior practice must be justified. OSHA's history of safety rulemaking offers no basis for believing that the agency is inclined to regulatory

extremes. OSHA has promulgated numerous safety standards, the vast majority of which were not even challenged and none of which could seriously be described as relying on discretion to impose bankruptcy-threatening costs for minimal benefit or of otherwise threatening the vitality or existence of any industrial sector. The policies that have evolved during OSHA's 21-year history of rulemaking activity limit OSHA's discretion in future rulemakings.

It is certainly true that any individual OSHA standard may impose significant costs on industry. Congress decided, however, that affordable costs of providing safe and healthful workplaces are necessary costs of doing business. As the Supreme Court has pointed out:

Congress understood that the Act would create substantial costs for employers, yet intended to impose such costs when necessary to create a safe and healthful working environment. Congress viewed the costs of health and safety as a cost of doing business. \* \* \* Indeed, Congress thought that the financial costs of health and safety problems in the workplace were as large as or larger than the financial costs of eliminating these problems.

*ATMI v. Donovan*, 452 U.S. at 519-522. (emphasis in original).

The legislative history of the Act also demonstrates that Congress knew that some employers would pass compliance costs through to their customers but thought that price increases were justified by the need to achieve safe and healthful workplaces. "We know the costs would be put into consumer goods but that is the price we should pay for the 80 million workers in America." S. Rep. No. 91-1282, 91st Cong., 2d Sess. (1970); H.R. Rep. No. 91-1291, 91st Cong., 2d Sess. (1970), reprinted in Senate Committee on Labor and Public Welfare, *Legislative History of the Occupational Safety and Health Act of 1970*, (Committee Print 1971) ("Leg. Hist.") at 444 (Senator Yarborough). "Of course, it will cost a little more per item to produce a washing machine. Those of us who use washing machines will pay for the increased cost, but it is worth it, to stop the terrible death and injury rate in this country." *Id.* at 324; see also 510-511, 517. Congress also believed that the nation as a whole would receive tangible benefits from the avoidance of workplace injuries and illnesses:

[T]he vitality of the Nation's economy will be enhanced by the greater productivity realized through saved lives and useful years of labor. When one man is injured or disabled by an industrial accident or disease, it is he and his family who suffer the most immediate and personal loss. However, that tragic loss also affects each of us. As a result of occupational

accidents and disease, over \$1.5 billion in wages is lost each year [1970 dollars], and the annual loss to the gross national product is estimated to be over \$8 billion. Vast resources that could be available for productive use are siphoned off to pay workmen's compensation and medical expenses. \* \* \*

Only through a comprehensive approach can we hope to effect a significant reduction in these job death and casualty figures.

*Id.* at 518-19 (Senator Cranston).

OSHA recognized, however, that the costs an OSHA standard imposes must not exceed the limits of economic feasibility. The *UAW v. OSHA* court, lacking a discussion of the agency's interpretation of "economic feasibility" in the lockout/tagout preamble, inferred that the agency equates those limits with "the verge of economic ruin." 938 F.2d at 1317. However, OSHA does not take such a draconian view of economic feasibility under the OSH Act. The Supreme Court has approved OSHA's view that a standard that permits an industry to "maintain long-term profitability and competitiveness" is economically feasible. *ATMI v. Donovan*, 452 U.S. at 530 n. 55. Similarly, the D.C. Circuit has stated that "a standard is economically feasible if the cost of compliance does not threaten the 'competitive structure or posture' of the industry." *National Cottonseed Prods. Ass'n v. Brock*, 825 F.2d 482, 487 (D.C. Cir. 1987), cert. denied, 485 U.S. 1020 (1988), quoting *IUD v. Hodgson*, 499 F.2d 467, 478 (D.C. Cir. 1974). In specific rulemakings, OSHA has placed the line of economic feasibility considerably below industry-wide economic distress or bankruptcy. See for example, 43 FR 27360 (June 23, 1978) (proposed 200 µg/m³ PEL for cotton dust did not raise serious possibility of industry-wide bankruptcy, but impact on weaving sector would be severe, possibly requiring reconstruction of 90 percent of all weave rooms. OSHA concluded that the 200 µg/m³ level was not feasible for weaving and that 750 µg/m³ was all that could reasonably be required). See also 54 FR 29245-46 (July 11, 1989) and *AIISI v. OSHA*, 939 F.2d 975, 1003 (D.C. Cir. 1991) (OSHA raised engineering control level for lead in small nonferrous foundries to avoid the possibility of bankruptcy for about half of small foundries even though the industry as a whole could have survived the loss of small firms.)

A standard that is economically feasible may well have a disparate impact on different firms within an industry. A company with older, less efficient, and less safe machines and equipment will face heavier compliance

costs than a competitor that is more efficient or that uses the latest technology. Indeed, for such a company, the cost of retrofitting existing machines in order to comply with OSHA standards may exceed the cost of replacing those machines. However, it is fully consistent with congressional intent for standards to force employers with inefficient and unsafe workplaces to either modernize their operations, becoming safe and efficient competitors, or go out of business. The D.C. Circuit has stated:

It would appear to be consistent with the purposes of the Act to envisage the economic demise of an employer who has lagged behind the rest of the industry in protecting the health and safety of employees and is consequently financially unable to comply with new standards as quickly as other employers.

*IUD v. Hodgson*, 499 F.2d 467, 478 (D.C. Cir. 1974). Moreover, Congress recognized that a standard that applies uniformly to all employers in an industry will have the beneficial effect of eliminating any competitive advantage that one employer might gain by cutting corners on safety and health. Leg. Hist. at 144, 854, 1188, 1201. Consistent with Congress' intent, OSHA views an economically feasible standard as one that might push industry laggards, but not safety-conscious employers or the industry as a whole, to the "verge of economic ruin."

To summarize, an OSHA safety standard must: (1) materially reduce a significant risk to workers; (2) be both technologically and (3) economically feasible to implement; (4) be cost-effective; (5) effectuate the OSH Act's goals at least as well as any national consensus standard that applies to the same hazard; (6) adequately respond to any contrary evidence and argument in the rulemaking record; and (7) be consistent with past rulemaking policies except to the extent that OSHA justifies a departure from those policies. OSHA believes that these constraints assure that OSHA safety standards are highly protective to workers without imposing an undue burden on employers. The requirement that standards reduce a significant risk at a cost and in a manner that is feasible and cost-effective assures that, even without a formal cost-benefit analysis, OSHA standards "produce a benefit the costs of which are not unreasonable." *NGFA v. OSHA*, 866 F.2d 717, 733 (5th Cir. 1989).

OSHA believes that this interpretation effectuates the Act's purposes and resolves the constitutional concerns that animated the court's remand. In short, OSHA is affirming that its discretion in safety rulemakings is limited, and that

the Act establishes clear criteria to guide the agency's exercise of its authority.

The lockout/tagout standard illustrates how the statutory constraints operate in practice. To assess the risk presented by hazardous energy, OSHA examined accident data collected by a number of groups, including the Bureau of Labor Statistics, the National Institute for Occupational Safety and Health, and OSHA itself. See 54 FR at 36648-52. OSHA's contractor, the Eastern Research Group (ERG), estimated that inadequate lockout/tagout procedures led to 2% of all workplace injuries and 7.1% of fatalities. From ERG's data, OSHA estimated that in 1984 workers suffered 144 fatal injuries, 33,432 lost workday injuries, and 37,561 non-lost workday injuries due to inadequate lockout/tagout programs. Moreover, ERG had found that lockout/tagout injuries tended to be significantly more severe than other workplace injuries, resulting in 24 lost workdays as compared to 16 lost workdays for the average lost-time occupational injury. Based on this evidence, OSHA determined "that the failure to control hazardous energy results in a significant risk to employees." 54 FR at 36684.

OSHA also analyzed the injury reports to determine the underlying causes of lockout/tagout accidents and to develop measures to prevent similar occurrences. Accident data and other evidence showed that employees are injured or killed by uncontrolled energy during servicing/maintenance of industrial equipment (regardless of industrial sector, establishment size, or equipment type) due to five factors: Failure to stop the machine or equipment, failure to disconnect the machine or equipment from the power source before performing service or maintenance, failure to dissipate residual energy, inadvertent reactivation of equipment, or failure to clear all necessary areas before reactivation. The evidence also showed that the hazard could be substantially reduced if employers were required to take four steps:

- (1) Evaluate equipment and servicing practices and develop safe procedures;
  - (2) Use locks or tags to limit worker ability to by-pass or overlook safety procedures;
  - (3) Train workers in implementation of the safety program; and
  - (4) Enforce the safety rules through monitoring and discipline.
- 29 CFR 1910.147(c)(4); (c)(7)(i)-(ii); (c)(6)(i); (c)(7)(iii); (c)(4)(ii).

OSHA estimated that compliance with the four-part safety program would prevent 85% of lockout/tagout related

accidents. Thus, the standard was estimated to prevent approximately 122 fatalities, 28,416 lost workday injuries, and 31,926 non-lost workday injuries annually. OSHA judged this to be a substantial reduction of risk.

OSHA concluded that the standard is technologically feasible because its requirements—locks, tags, procedures, training, periodic inspections, and implementation—are devices and practices already in existence; OSHA found that 90 percent of large firms, 65 percent of medium-sized firms, 45 percent of small firms, and 20 percent of very small firms in high-impact industries already use lockout/tagout procedures. Ex. 71, "Regulatory Impact Analysis" (RIA), pp. IV-3, 4.

To assess economic feasibility, the standard's estimated costs were compared to the gross and net income of affected establishments. Taking into account all costs, including purchase of materials such as locks and tags, modification of equipment and work practices, implementation, planning, administration, training, and periodic inspections, the costs attributable to the standard would total \$214.3 million in the first year and \$135.4 million in subsequent years. OSHA broke down these total figures into the costs that would be incurred by establishments of different sizes in both high- and low-impact industries. RIA, pp. VI-46, 47. For example, OSHA found that first-year compliance costs for high-impact firms would range from \$120 for very small firms to \$28,172 for large ones. OSHA concluded that when measured against operating costs and net income, these costs are negligible. On average, costs would not exceed 0.05% of operating costs or 2.2% of net income for the first year, or 0.03% of operating costs or 0.6-1.5% of net income annually. Based on these figures, OSHA concluded that the standard would not have a significant impact on the financial structure or stability of any size manufacturing firm. RIA, p. VII-5. The agency further noted that the firms currently in compliance were able to compete successfully with those that were not, indicating that the net economic costs of lockout/tagout procedures would not be significant.

OSHA assured that the standard would be cost-effective in a number of ways. Having found that lockout would generally be safer than tagout, OSHA required that any new, overhauled, or modified equipment be equipped with lockout-capable energy isolating devices, which are readily available at no extra cost compared to unlockable devices. This provision improves worker protection, at no cost to employers, by providing an increasing

capability for employers to use lockout rather than tagout procedures. The standard is also cost-effective in excluding from coverage cord-and-plug connected equipment for which adequate protection against inadvertent energization can be obtained by unplugging the equipment and maintaining the plug under the exclusive control of the servicing worker. In addition, the standard is written in performance-oriented language that spells out general obligations but leaves employers free to achieve the regulatory goal at the lowest cost for each workplace. In particular, the standard permits employers to choose locks, tags, or a combination of both based on cost considerations, as long as the choice achieves the requisite level of safety.

OSHA found that the standard would not have a disproportionate impact on small business. Indeed, small businesses would tend to experience less rather than more proportional impact because the standard exempts the cord-and-plug connected equipment that OSHA's contractor found is likely to be used in smaller establishments to perform the same types of tasks as manufacturing-type equipment in the largest establishments. Ex. 3-15, p. 3-134; RIA, p. VI-16. Moreover, OSHA's finding that the standard would have a negligible financial impact on all affected firms assures that the standard will not eliminate or threaten the vitality of any business segment.

The rulemaking process assured that OSHA was made aware of regulatory problems and alternatives, enabling the agency to shape the rule to accommodate competing interests. For example, numerous commenters objected to the proposed standard's placement of locks and tags on an equal plane, saying that tags, but not locks, "could be carelessly bypassed without major effort." 54 FR at 36654. Based on the rulemaking record, OSHA determined that "the use of lockout devices will provide employees with a more secure and more effective means of assuring that equipment will not be reenergized while they are working on it." 54 FR at 36655. However, some employers reported that they had used tags successfully, with one company presenting evidence that it had suffered only one lost-time accident that was marginally related to the use of tags in over 488 million man-hours of work. This company suggested that the key to safety lay not in the use of a specific device but in "good procedures and careful training combined with assurance of accountability." 54 FR at 36654. In light of the entire record,

OSHA decided that the final standard should prefer the use of lockout when equipment is lockable but permit the use of tagout where the employer can "demonstrate that the tagout program will provide a level of safety equivalent to that obtained by using a lockout program." 29 CFR 1910.147(c)(3)(i). Thus, the rulemaking process led to a standard that assures employee protection while giving employers flexibility in choosing how to provide that protection.

OSHA's evaluation of the rulemaking record resulted in other decisions that gave industry flexibility to meet the standard's protective goals. These decisions include:

(1) Not requiring immediate replacement of equipment that is incapable of being locked with lockable equipment;

(2) An exemption for minor servicing activities that are routine, repetitive and integral to the production operation (29 CFR 1910.147(a)(2)(ii) (Note));

(3) An exception to the requirement that an employer document the required energy control procedure when certain conditions exist (29 CFR 1910.147(c)(4)(i) (Note)); and

(4) Alternative requirements to the "one person, one lock" principle for complex group operations (29 CFR 1910.147(f)(3)(i)).

The rulemaking process produced a standard whose cost per life saved is clearly reasonable. Dividing the standard's total annual cost of \$214 million for the first year and \$135 million for subsequent years by the 122 fatalities the standard will avoid annually yields a cost per life saved of between one and two million dollars. This calculation, it should be noted, overstates the standard's cost per life saved, for it does not reflect savings due to accidents avoided or attribute any of the standard's costs to the non-fatal accidents avoided. Moreover, the standard clearly does not impose excessive burdens on employers. The only equipment employers must purchase consists of inexpensive devices such as locks, chains, and tags. The main costs will be for developing lockout/tagout procedures, changing work practices to conform to those procedures, training employees to assure that the procedures are properly implemented, and conducting periodic inspections to assure continued effectiveness of the program. Such administrative and training costs are the type of costs businesses typically incur for a variety of reasons and will obviously not be overly burdensome. Indeed, the fact that many employers voluntarily implemented effective

lockout/tagout programs even before the standard was issued demonstrates that compliance will not be unreasonably burdensome.

The costs of lockout/tagout are consistent with other OSHA safety standards. OSHA's excavation standard, for example, eliminates 74 deaths and over 800 lost workday injuries annually at a cost of about \$306 million, making the cost per life saved about \$4.1 million. 54 FR 45954 (Oct. 31, 1989). OSHA's Grain Handling Facilities standard eliminates 18 deaths and 394 injuries annually at a total net cost of \$5.9 to \$33.4 million, for a cost-per-life saved between \$0.33 and \$1.9 million. 52 FR 49622 (Dec. 31, 1991). The Process Safety Management standard is estimated to prevent 132 fatalities and 767 injuries/illnesses annually in years 1-5 and 264 fatalities and 1534 injuries/illnesses in years 6-10. 57 FR 6402 (Feb. 24, 1992). The compliance costs to achieve these benefits would be \$888.7 million in years 1-5 and \$405.8 million in years 6-10. *Id.* at 6401. Thus, the cost per life saved would be \$6.7 million in years 1-5, would decline to \$1.5 million in years 6-10, and would average \$3.3 million over the ten-year period.

Finally, the lockout/tagout standard is consistent with section 6(b)(8), which requires that OSHA standards, when they differ substantially from an existing national consensus standard, better effectuate the Act's purpose. The proposed lockout/tagout standard was based on a national consensus standard, ANSI Z244.1-1982, "American National Standard for Personnel Protection—Lockout/Tagout of Energy Sources—Minimum Safety Requirements." All of the protective provisions in the final standard are an outgrowth of the proposal and the ANSI standard. The main difference between the two is that the ANSI standard, like the standard OSHA proposed, permitted an unrestricted use of lockout or tagout. As described earlier, OSHA changed to a lockout preference in the final standard because the rulemaking record showed that it was more protective. Since the key purpose of the Act is worker protection, this change clearly effectuated the Act's objective. In addition, OSHA concluded that issuance of the lockout/tagout standard better effectuates the Act than sole reliance on 13 national consensus and established federal standards pertaining to equipment maintenance that OSHA summarily adopted in 1971 but whose scope was limited and whose efficacy was impaired by inconsistencies between different equipment and industries and by inadequate protective requirements.

## II. The Lockout Preference Issue

The proposed standard afforded employers the option of either locking or tagging energy sources to prevent machines or equipment from being energized while employees perform servicing or maintenance. However, the rulemaking record showed that locks were generally more effective than tags at preventing inadvertent reenergization. When a maintenance worker applies a lock properly, reenergization of the equipment is absolutely precluded until the lock is removed. A tag only provides a warning and does not physically prevent another worker from ignoring the warning and energizing the equipment prematurely. Moreover, tags can become detached or damaged by either environmental conditions or by movement of materials, equipment, and personnel through the workplace. A number of parties to the rulemaking proceeding pointed to these inherent limitations of tags in their comments. Some commenters proposed that the final standard require employers to use lockout exclusively.

OSHA rejected the suggestion that the standard mandate universal lockout for two reasons. First, some energy control devices currently in use are incapable of being locked out, and OSHA found insufficient evidence to show that it would be feasible to immediately replace such devices with lockable ones. Therefore, at a minimum the standard had to permit employers with unlockable equipment to use tagout. Second, some employers provided evidence that they had successfully implemented highly protective tagout programs. OSHA decided that employers with demonstrably successful tagout programs should be permitted to continue to use those programs.

To minimize safety hazards from the inherent limitations of tags while still permitting tagout where it is necessary or adequate, OSHA changed the final standard in three ways. First, the standard requires employers who use tagout to train employees in the limitations of tags and in specific precautions that must be taken to minimize the possibility that human error will render the tags ineffective. Tagout training must include the following:

(A) Tags are essentially warning devices affixed to energy isolating devices, and do not provide the physical restraint on those devices that is provided by a lock.

(B) When a tag is attached to an energy isolating means, it is not to be removed without authorization of the authorized person responsible for it, and it is never to be bypassed, ignored, or otherwise defeated.

(C) Tags must be legible and understandable by all authorized employees, and all other employees whose work operations are or may be in the area, in order to be effective.

(D) Tags and their means of attachment must be made of materials which will withstand the environmental conditions encountered in the workplace.

(E) Tags may evoke a false sense of security, and their meaning needs to be understood as part of the overall energy control program.

(F) Tags must be securely attached to energy isolating devices so that they cannot be inadvertently or accidentally detached during use.

29 CFR 1910.147(c)(7)(iii).

Second, the final standard requires employers with lockable equipment to use lockout unless the employer is able to show that the use of tagout will provide a level of safety equal to that of a lockout program. 29 CFR 1910.147(c)(3). This provision was specifically designed to permit those employers who had already developed and implemented effective tagout procedures to continue to use those procedures. Although all employers were afforded this option, OSHA recognized that few employers were likely to choose it. For employers with lockable equipment who had not already developed successful tagout programs, the cost of a lockout program will be lower than tagout; equipment costs are roughly equal and tagout involves additional costs for the tagout-limitation training that must be offered and for other steps employers must take to assure that tagout is as effective as lockout. The lower cost and generally greater effectiveness of lockout would give employers strong incentives to choose that option.

The third change requires that newly installed machines or equipment, and machines or equipment that are replaced or undergo major repair, must be equipped with lockable energy isolating devices. 29 CFR 1910.147(c)(2)(iii). By requiring that lockable equipment replace unlockable equipment in the ordinary course of industrial modernization, this provision will result in a future increase in the use of lockout instead of tagout. The provision imposes no cost on employers because lockable energy isolating devices are readily available and are no more expensive than unlockable ones. RIA, p. VI-20.

NAM argued to the court that OSHA failed to justify the provision that requires employers to use lockout unless they can demonstrate that their use of tagout provides a level of safety equal to lockout. NAM contended that the change from the unrestricted

lockout-tagout option in the proposed rule to the lockout preference in the final rule provided little additional protection while imposing significant additional cost. NAM suggested to the court that the change would avert only 42 injuries annually, of which 26 would not even involve a lost day of work, at a cost of \$2.3 million in the first year and \$400,000 annually thereafter. 938 F.2d at 1323-24. In its remand order, the court instructed OSHA to reevaluate the lockout preference provision in light of the figures offered by NAM.

OSHA has reevaluated the lockout preference provision as well as the other changes that OSHA made to the final standard in light of its finding that lockout is more protective than tagout. The agency reaffirms its finding that lockout is a superior means of protection. Moreover, OSHA concludes that none of the changes impose costs that are not reasonably related to safety gains. Two of the provisions—the lockout preference provision challenged by NAM and the requirement for eventual installation of lockable energy isolating devices—produce safety gains at no cost to employers. The third provision—the requirement for specific tagout training—assures that employees involved in a tagout program understand the limitations of tags. This information is vital if tagout programs are to achieve an acceptable level of effectiveness.

Under the lockout preference provision, which applies only to employers with lockable equipment, employers can freely use lockout. They can use tagout only if they can demonstrate an equal level of safety to lockout. For employers who use lockout, the final standard imposes no additional duties, and therefore no additional costs, over the proposed standard. Employers who choose tagout under the final standard will incur additional costs over the proposed standard: they must expand employee training to assure that employees are aware of the limitations of tagout and must take other steps to assure an equal level of effectiveness. But no employer with lockable equipment is required to incur these additional costs because all such employers may use the less costly lockout option. Hence, whatever additional costs are incurred by employers who choose tagout are not costs imposed by the standard but are costs incurred through their own choice. Moreover, by affording employers the option of using tagout, the standard expands employer choice and avoids imposing on those employers who have already developed successful tagout programs the costs of converting to

lockout. Thus, the lockout preference provision permits all employers to minimize their costs while assuring that workers are adequately protected.

Although the lockout preference provision imposes no cost on employers, it will produce safety benefits to employees by increasing the use of inherently more protective lockout procedures. The provision gives employers a financial incentive to use lockout by imposing additional safety measures, and associated higher costs, on employers with lockable equipment who choose to use tagout. Moreover, the lockout preference provision encourages use of lockout by putting employers on notice that lockout is generally the more effective means of protection. Allowing an unrestricted lockout/tagout option, as the proposed standard did, would imply that OSHA considered both means of protection to be equally effective and would induce some employers to choose the less protective tagout option.

The provision requiring installation of lockable energy isolating devices also produces safety gains for employees at no cost to employers. The provision does not require employers to retrofit existing equipment but only to install lockable devices when they either install new equipment or when equipment undergoes major repair or replacement. Lockable energy isolating devices are readily available at no extra cost. RIA, p. VI-20. Thus, the provision assures an increase, over time, in the percentage of equipment that is lockable while avoiding costs on employers for converting to lockable equipment. In turn, it assures a gradual increase in the use of lockout, with a corresponding increase in worker protection due to the safety advantages of lockout.

Unlike the lockout preference and lockable-device provisions, the provision on tagout-limitation training imposes costs on employers. In its Regulatory Impact Analysis, OSHA attempted to quantify the impact of tagout-limitation training based on the assumption that 15 minutes would need to be added to general energy control training to train each worker involved with tagout procedures on the specific points listed in the standard. This training increment would amount to \$7.2 million in the first year of the standard and would sharply decline thereafter, since the standard requires retraining only when there is a change in job assignments, equipment, or procedures, or when the employer has reason to believe that employee knowledge of energy control procedures is inadequate. RIA, pp. VI-43, VI-45. It is clear, however, that the actual cost of tagout-limitation training will be less.

Fifteen additional minutes will rarely be necessary, since the basic training required by the standard would necessitate training in the characteristics and proper use of tags by employers who rely on tags. The specific items of tagout-limitation training required by the final standard simply clarify this already-existing duty and assure that all employees involved in tagout programs are taught certain specific points that are vital to the safe use of tags. Even in establishments where 15 additional minutes are used, the additional time and cost represent a small percentage of total training costs even as they assure a critical step in worker understanding. OSHA believes that such training is a minimum step that employers must take to assure that tagout programs are sufficiently protective and is entirely consonant with cost.

OSHA has examined the figures NAM presented to the court purporting to show the injuries averted and additional costs of the lockout preference provision. For the following reasons, those injury and cost figures do not accurately reflect the effects of the lockout preference provision and do not in any sense offer a meaningful comparison between the proposed and final standards.

NAM obtained the figures it presented to the court by comparing the Preliminary Regulatory Impact Analysis (Preliminary RIA) for the proposed standard to the RIA for the final standard. NAM subtracted the estimated safety benefits in the final RIA from those in the preliminary RIA to conclude that the final standard would prevent 16 more lost-workday and 26 more non-lost-workday injuries than the proposed. Similarly, NAM compared the cost of the final standard to that of the proposed by subtracting the cost figures reported in the respective RIAs. NAM argued to the court that the final standard differed from the proposed in two ways, first, by adding the lockout preference provision, second, by altering language to clarify an exception to the scope of the standard that applies when minor servicing takes place during normal production operations. NAM suggested that the difference in injury and cost estimates between the final and proposed standards had to be attributed to these two changes and that OSHA had therefore not justified the lockout preference provision.

NAM's approach does not lead to an accurate comparison between the costs and benefits of the proposed and final standards. The differences in compliance costs and injuries averted between a proposed and final standard

cannot be computed simply by comparing the Preliminary RIA with the final RIA. The final RIA, like the final standard itself, incorporates the information the agency gained during the rulemaking process. It is a more accurate assessment of the standard's regulatory impact and supplants the original RIA, which was necessarily based on less complete information. Indeed, the proposed standard explicitly noted that the figures that were being presented reflected a "Preliminary Regulatory Impact Analysis." 53 FR at 15516. OSHA indicated that those figures were subject to change when it invited "public comment on these estimates for incorporation into the final RIA that will accompany the final rule." OSHA believes that the final RIA contains reasonable estimates of the final standard's compliance costs and injuries averted, and OSHA relied on those figures in developing the final rule. The Preliminary RIA played no role in OSHA's ultimate rulemaking decisions.

OSHA believes that the three changes to the final standard discussed in this section will produce substantial safety benefits by minimizing the use of tagout and upgrading tagout's effectiveness where it is used. Although all employers have the option of using tagout, virtually all employers with lockable equipment will choose to use lockout rather than expend the additional money and effort needed to develop tagout programs that are equally effective. OSHA anticipates that the employers who choose the tagout option will be those who already have extensive experience in developing and implementing tagout programs that are demonstrably protective. Employers with unlockable equipment will use tagout but must assure that employees are trained in tagout's limitations. OSHA estimated that the standard would prevent 85% of hazardous energy accidents. RIA, pp. VI-55, 57. In future years, as the percentage of lockable equipment rises to 100%, industry will move to full use of lockout (or equally effective tagout) procedures. OSHA estimated that full use of lockout would prevent 95% of accidents. RIA, p. VI-50. Thus, the changes to the final standard will provide immediate safety benefits and those benefits will increase over time.

OSHA is confident that the final standard will be significantly more protective than the proposed standard. Although OSHA originally estimated that the proposed standard, with an unrestricted lockout/tagout option, would be 85% effective, the evidence in the rulemaking record demonstrated

that the rule would not reach that level of effectiveness because of the inherent limitations of tags. Therefore, in promulgating the final standard, OSHA readjusted its estimate of the proposal's effectiveness to 80%. RIA at V-5, VI-56. The estimated 5% higher effectiveness level of the final standard compared to the proposed translates into seven fewer deaths annually and a corresponding decrease in both lost-workday and non-lost-workday injuries. Having reevaluated the evidence on the relative effectiveness of lockout and tagout, OSHA reaffirms its finding that lockout is the preferred means of protection and concludes that the modifications to the final standard that reflect this finding are cost-effective ways of providing additional protection compared to the unrestricted lockout/tagout option in the proposed standard.

### III. The Disaggregation Issue

The lockout/tagout standard applies in all "general industry" workplaces<sup>1</sup> in which hazards associated with the unexpected energization of machinery and equipment during servicing and maintenance occur. Lockout/tagout hazards are so pervasive and arise during such a wide variety of servicing and maintenance activities that any attempt to define the standard's scope by employer sector within general industry would result in the standard excluding some hazardous servicing and maintenance activities from coverage. To avoid having the standard be underinclusive while at the same time avoiding the imposition of compliance burdens where no hazard exists, OSHA drafted the standard to impose a compliance duty on employers only to the extent that hazardous servicing and maintenance activities in fact take place in their workplaces.

In the rulemaking, OSHA examined records showing that accidents attributable to the failure to control hazardous energy had occurred throughout general industry. See 54 FR at 36646-52. NAM, pointing to evidence that the injury rate varied among industries, contended that OSHA should have eliminated from coverage industry sectors whose reported incident rates were low. The court remanded for OSHA "to explain its

decision to impose lockout/tagout even where the risk appears to be diminutive or zero." 938 F.2d at 1325.

OSHA has reevaluated the evidence on which NAM relied that shows variations in injury rates among industries. For the following reasons, OSHA does not believe that this evidence supports the suggestion that the standard should specifically exclude industrial sectors from coverage under the standard.

As explained earlier, OSHA determined that without the protections of the lockout/tagout standard, workers face a significant risk of material harm every time they perform service or maintenance work on powered industrial equipment. 54 FR 36,647-48, 36,652-53. OSHA also found that hazardous servicing occurs in almost all industrial sectors. Data gathered by ERG according to Standard Industrial Classification code group showed that all manufacturing industries, SICs 20 through 39, have high concentrations of equipment and servicing accidents. Seventeen low impact groups between SICs 40 and 79 have less equipment that requires servicing and lower accident rates than do the manufacturing sectors, but each does engage in some servicing and maintenance activities that require lockout/tagout protection.

Railroads (SIC 40): servicing of climate-controlled railroad cars, machine-shop operations, and material handling equipment;

Public Transit (SIC 41): servicing of vehicles, tire repair machines, hydraulic lifts and hoists;

Trucking and Warehousing (SIC 42): servicing of conveyors, freight elevators, industrial trucks, forklifts, cranes;

Water Transportation (SIC 44): servicing of engine room equipment, heating plants, cranes, hoists;

Transportation by Air (SIC 45): servicing of airplanes, helicopters, mobile passenger loading tunnels, baggage handling equipment such as conveyors, escalators, elevators;

Pipelines Except Natural Gas (SIC 46): servicing of pipelines transporting hazardous substances or substances under high pressure or temperature;

Transportation Services (SIC 47): servicing of railroad car heating, ventilation and refrigeration, grain leveling and car cleaning equipment, weighing and packing equipment;

Communications (SIC 48): servicing of installation hoisting equipment, high voltage equipment;

Electric, Gas and Sanitary Services (SIC 49): servicing of water, steam, irrigation and sewerage pipelines, hoisting apparatus, power transmission devices;

Wholesale Trade-Durable Goods (SIC 50): servicing of manufacturing operations conducted as a secondary business or as part of a vertically integrated operation, servicing

of scrap metal recycling equipment, hoists, conveyors, saws, planers;

Wholesale Trade-Nondurable Goods (SIC 51): servicing of grain elevators and augers, conveyors, hoisting equipment;

Food Stores (SIC 54): servicing of packaging machinery, conveyors, meat cutting equipment, ovens;

Personal Services (SIC 72): servicing of laundry and dry cleaning equipment;

Business Services (SIC 73): servicing of heating, ventilating and air conditioning systems, electrical systems, centrifuges;

Automotive Repair, Services, and Garages (SIC 75): servicing of hoisting equipment, hydraulic lifts, repair machinery;

Misc. Repair Services (SIC 76): servicing of welding repair equipment;

Amusement and Recreation Services (SIC 79): servicing of large rides and other amusement equipment with moving parts.

Summarized at RIA, pp. II-10, 11. Additional sectors with "negligible" concentrations of powered equipment also occasionally have workers involved in servicing or maintenance. RIA summary at pp. II-10, 11.

Low reported accident rates or equipment concentrations for some SIC sectors do not mean that servicing workers in those sectors are not exposed to a significant risk. First, SIC designations reflect only the primary work activity at a workplace, not the entire range of activities. Thus, an accident occurring in an operation in an employer's secondary area of activity may be attributed to the SIC representing the firm's major activity, skewing the data for both SICs. Or an accident may involve employees of a contractor and be reported under the contractor's SIC rather than the SIC in which the hazardous machine or equipment was located. A particular SIC may exhibit a low rate of hazardous energy accidents because relatively little servicing and maintenance takes place in that SIC even though the servicing and maintenance that does take place is just as risky as that in a SIC in which such activities are more common. Moreover, a particular SIC may show a low accident rate because many employers in that SIC are already protecting their employees against lockout/tagout hazards. The fact that responsible employers are protecting their employees would not, however, justify OSHA's failure to issue a standard that requires other employers to provide the same needed protection.

In addition to the inherent limitations of accident data organized by SIC codes, defining the scope of a standard by SIC codes would restrict the standard's ability to adapt to circumstances that cannot be precisely foreseen when the standard is promulgated. As noted above, a workplace's SIC designation is

<sup>1</sup> The standard does not cover construction, agriculture, and maritime employment; installations under the exclusive control of electric utilities for the purpose of power generation, transmission and distribution; exposure to electrical hazards from work on, near, or with conductors or equipment in electric utilization installations; and oil and gas well drilling and servicing. OSHA determined that these industries and workplaces possessed unique characteristics that required further study. 54 FR 36,657-36,659.

based on its primary activity, but the primary activity in many workplaces changes over time. The coverage of hazardous servicing activity that takes place in a workplace should not depend on the fortuity of the SIC code it happens to be in at any given time. Moreover, SIC codes themselves are periodically redefined at the 3 and 4 digit levels. If the standard's applicability is defined by SIC codes, such redefinitions will affect coverage in a manner that is unpredictable and that may well deny coverage where it is needed.

Even if SIC designations provided a sound means of defining a standard's coverage, the available accident data did not prove that any industry sectors were free of risk from hazardous energy. The data covered a relatively limited time span and were affected by some degree of mis-reporting and under-reporting. For example, the ERG report, which showed no injuries for five low impact SICs (Ex. 3-15, p. 3-9), reflected incidents from only one set of reports during a four-month period in twenty-five states. See RIA, pp. V-2, V-3; Ex. 3-15, pp. 3-5, 3-8. Given the inherently hazardous nature of servicing operations and the limitations of SIC reporting, the absence of injury reports over a four-month period in a limited geographic area did not support an inference of no or low risk.

Accordingly, OSHA expressed the standard's coverage in performance terms rather than SIC codes. The standard applies to all servicing and maintenance activities during which employees can be injured if machines or equipment become unexpectedly energized or if stored energy is released but not to servicing and maintenance that present minimal and readily controlled risk, such as work on electrical equipment that can be deenergized by simply unplugging it, and minor servicing activities that take place during normal production operations. Thus, each covered employer's burden is determined by the frequency and complexity of servicing actually undertaken.

For similar reasons, OSHA decided not to limit the standard to particular equipment. By its terms the standard applies only when the unexpected energization or release of stored energy could cause injury to employees. Machines and equipment that present no hazard are excluded from coverage. The court referred to sewing machines as a type of equipment that might present less of a hazard than larger, more powerful machinery. For sewing machines like those used at home, not of industrial size and configuration, the

standard's cord-and-plug exemption would apply. Industrial sewing machines used in high impact sectors like SIC 23, Apparel Manufacture, plainly present electrical and puncture hazards. Moreover, industrial processes and equipment are constantly changing, and restricting the standard to machines and equipment that are in use at the time of promulgation would fail to recognize that newly developed equipment can be just as hazardous as equipment currently in use. OSHA believes that the best approach is the one it has taken: the standard applies to all machines and equipment for which inadvertent energization during servicing or maintenance will expose employees to injury, and only to such machines and equipment. This approach assures that workers are protected wherever lockout/tagout hazards exist but that compliance burdens are not imposed where there is no hazard.

#### IV. Cost Benefit Relationship

In *UAW v. OSHA*, the D. C. Circuit held that the "reasonably necessary or appropriate" language of section 3(8) could be interpreted to include a cost-benefit balancing formula or other explicit mechanism for judging whether the benefits of safety standards justify the costs. 938 F.2d at 1319. The court ruled that the statutory construction apparently relied on by OSHA in the rulemaking vested unconstitutionally broad discretion in the agency but that the overbreadth could be cured by adoption of a suitably limiting construction. The court stated that adoption of "cost-benefit analysis" would be an acceptable interpretation, but observed that there could be other permissible interpretations that would also cure the overbreadth problem.

Section I sets forth the construction of the statute that OSHA relies on in establishing safety standards. Under OSHA's interpretation, numerous decisionmaking criteria assure that the costs of safety standards are reasonably related to their benefits. Safety standards must substantially reduce a significant risk of material harm with measures that are technologically capable of being done and at costs that most affected employers can absorb or pass on. OSHA must choose the most cost-effective means for meeting the regulatory goals. OSHA's findings as to the costs and benefits of each standard must be supported by substantial evidence based on a rulemaking record. Finally, safety standards must reflect OSHA consideration of significant rulemaking comments, existing consensus standards, and policy

changes. The agency believes that this construction addresses the court's concern that the agency not claim unconstitutionally broad discretion and that it not impose large costs for insignificant safety gains.

OSHA's decisionmaking process thus assures that the resulting standard produces substantial benefits at a reasonable cost. OSHA safety standards therefore meet a qualitative cost-benefit test announced by the Fifth Circuit:

The test under section 3(8) is an intermediate one between the feasibility mandate of section 6(b)(5) and a strict cost-benefit analysis that requires a more formal, specific weighing of quantified benefits against costs. \* \* \* section 3(8) only demands that the expected costs of OSHA regulations be reasonably related to the expected benefits, leaving considerable discretion for the agency as long as it is exercised on substantial evidence and with an adequate statement of reasons.

*National Grain & Feed Ass'n v. OSHA*, 866 F.2d 717, 733 (5th Cir. 1989) (internal quotations omitted). See *National Grain & Feed Ass'n v. OSHA*, 903 F.2d 308, 311 (5th Cir. 1990) (approving OSHA's Supplemental Statement of Reasons for grain dust standard as meeting Fifth Circuit's requirement for cost-benefit justification).

The agency specifically finds that the relationship between the benefits secured by the lockout/tagout standard and the costs it imposes is reasonable. The standard will save approximately 122 lives and 28,400 lost workday injuries each year, at a cost of \$214 million in the first year and \$135 million thereafter. Focusing only on the fatalities the standard is expected to prevent, the cost per life saved is \$1.2 million. 54 FR at 36685/2; RIA at VII-1. When compliance costs are adjusted to account for the cost savings to employers from the accidents prevented, the net cost per life saved falls to \$0.19 million. *Id.* Even these modest figures overstate the cost per life saved, for they do not take into account the non-fatal injuries that will be prevented. The cost per life saved compares favorably with other OSHA safety standards, and OSHA believes that the cost-benefit relationship is favorable by any reasonable measure.

As noted above, OSHA believes that its existing interpretation of section 3(8) satisfies the D.C. Circuit's concern that its rulemaking discretion not be overbroad. However, in light of the court's opinion, the agency believes it would be useful to explain in more detail the manner in which it gathers and uses economic data in promulgating

safety standards as well as the limitations on its use of such data.

Economic analysis is an essential element of both feasibility and cost-effectiveness analysis and an integral part of OSHA's decisionmaking. Economic analysis begins with the initial crafting of a proposed rule. Data and information are gathered systematically on a variety of elements including the costs of possible control and abatement measures, the prevalence of existing control measures, and the impact of work injuries and safe work practices on productivity. OSHA uses this information in conjunction with information such as any new emerging control technologies to select from among the abatement techniques that appear to be the most affordable and efficacious.

When a proposal is published in the *Federal Register*, the economic component of OSHA's analysis is discussed in the preamble along with OSHA's risk and benefit analysis. The full Preliminary Regulatory Impact Analysis is also made available to the public. Included in such information are the underlying data sources and specific methodologies used that support the economic assessments made by the agency. Once such information is published and made available, OSHA encourages the public to comment on the analysis and to provide any additional data or information that may improve the preliminary estimates. Upon the completion of the comment period, OSHA carefully reviews all the additional economic and technical information that the public has provided and uses such information to develop its Final Regulatory Impact Analysis, which contains the economic assessment that is used in crafting the final rule.

Each final rule is strongly influenced by the comments received as to the accuracy of OSHA's preliminary estimates and any new information. In light of all the available evidence, OSHA determines the costs and benefits of the standard as a whole, assesses the overall cost-effectiveness of the standard, and evaluates its overall economic impact on the regulated community.

The agency's "cost-effectiveness" analysis assures that the standard reduces significant risk at the least cost to employers. "Cost-effectiveness analysis" is defined in *The Dictionary of Modern Economics* (Pearce, 1983) as:

\* \* \* a technique closely related to cost-benefit analysis. It differs in that it asks a different question, namely, given a particular objective which is the least-cost way of achieving it? It aids choice between options

but cannot answer the question whether any of the options are worth doing. It is utilized when there are difficulties in associating monetary values with outcomes of projects but where the outcomes can be quantified along some non-monetary dimension.

The lockout/tagout standard's Regulatory Impact Analysis relied primarily on such cost-effectiveness analysis to identify and provide economic comparisons of the various trade-offs between different versions of the final rule. Such analysis provided the agency with information as to the benefits that could be obtained for a given cost. That information was then used in developing what the agency deemed the most cost-effective regulation to address the workplace hazards identified.

In its lockout/tagout decision, the court discussed a form of cost-benefit analysis (hereinafter "formal cost-benefit analysis") that would systematically monetize and weigh costs and benefits of proposed safety standards both within and outside the workplace. The analysis would attempt, among other things, to assign monetary values to saving a human life and to avoiding suffering and would account for indirect effects of the standard attributable to possible reduced wages or increased consumer prices that resulted from employer compliance costs. 938 F.2d at 1320. The court suggested this sort of formal cost-benefit analysis could assure that the agency did not engage in decision-making that is unconstitutionally unfettered.

The court did not indicate that the exact approach it described is the only approach that would pass constitutional muster. Indeed, the court stressed that it was open to OSHA on remand to identify an alternative construction that conformed to nondelegation principles. 938 F.2d at 1321. OSHA has carefully considered the issue remanded by the court. OSHA believes that when considered in their entirety, the criteria it applies to safety rulemaking assure that OSHA's decision-making process is sufficiently constrained to satisfy constitutional principles. Thus, OSHA believes that it has in fact met the court's constitutional concern even while it has not adopted the specific methodology referred to by the court.

OSHA also believes that problems associated with formal cost-benefit analysis militate against its use in safety rulemaking. The formal cost-benefit analysis discussed by the court is generally understood to require that all the costs and benefits of a particular action be identified, monetized and compared. Each stage of this analysis—selection of relevant costs and benefits,

assignment of monetary values, and judgment of relative worth—presents complex policy and factual issues, the resolution of which is not necessarily more precise or rational than resolution of the issues OSHA currently addresses and which could result in significantly protracted agency rulemaking. Even proponents of formal cost-benefit analysis do not consider it a panacea. "There are costs to quantitative analysis \* \* \*. One cost is bad decisions resulting from endowing the estimated numbers with too much confidence and tending to ignore unquantified aspects; this cost is the flip side of dismissing analysis as useless." Lester B. Lave, *The Strategy of Social Regulation: Decision Frameworks for Policy*, The Brookings Institution, Washington, DC (1981) pp. 133-34.

Moreover, in OSHA's judgment, its statutory mandate to achieve safe and healthful workplaces for the nation's employees limits the role monetization of benefits and analysis of extra-workplace effects can play in setting safety standards. Congress enacted the OSH Act for the purpose of "assur[ing] so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. 2(b). "Congress understood that the Act would create substantial costs for employers, yet intended to impose such costs when necessary to create a safe and healthful working environment. Congress viewed the costs of health and safety as a cost of doing business." *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 519-522 (1981). See discussion above at pp. 14-15. In sum, there are significant limitations to formal cost-benefit analysis, both in its capacity to order decision-making and in terms of its relation to achievement of the statutory purposes.

The concurring opinion in *UAW v. OSHA* refers to a related approach, termed "risk-risk" analysis, suggested recently by Professor Wildavsky, a political scientist, and others. See 938 F.2d at 1326-27. OSHA has previously determined that systematic study of risk-risk theory's empirical validity, advantages and disadvantages is needed before the theory can be evaluated for use in the OSHA rulemaking context. In its proposed standard for Air Contaminants in Construction, Maritime and Agriculture industries, for example, OSHA posed a series of questions relating to the theory's empirical basis. 57 FR 26002, 26005-29009 (June 12, 1992). The questions were framed to test whether, as risk-risk theory posits, the net health benefit of the proposed standard would be positive or negative

for the workers who would be affected by the standard's impact on workplace risk and, possibly, income.

OSHA has also noted that apart from the empirical questions raised by risk-risk theory, serious questions exist about the analysis' appropriateness for OSHA given the specific statutory commands of the OSH Act, particularly the Act's focus on workplace rather than societal risks and benefits. Thus, if and when risk-risk analysis is found to have an empirical basis, the agency would have to evaluate the analysis in light of those statutory considerations.

In the meantime, OSHA is confident that the type, level and sophistication of economic analyses it currently performs assure that its standards are protective, cost-effective, and economically and technologically feasible. The Agency has identified several key advantages in its approach to assessing the costs and benefits of a standard in the context of risk and feasibility determinations:

- A necessary first step in reaching an economic feasibility determination is to develop representative compliance scenarios. These help identify very costly regulatory provisions and areas of duplication or internal discrepancy.

- Cost and benefit estimates, based upon the compliance scenarios, help identify high cost and low benefit provisions that may require additional study. This often results in the development of more efficient regulatory alternatives.

- A comparison of the estimated costs with industry profit and revenue estimates (i.e., economic feasibility assessment) helps to identify sectors where high economic burdens may need to be mitigated through some form of regulatory relief, such as extended compliance dates.

There are, of course, limits to the accuracy of the cost and benefit information OSHA can develop. Such limitations include:

- *Inaccurate or incomplete data*—OSHA frequently is regulating in areas where data are incomplete. For health standards, exposure data are often lacking or do not provide the accuracy that the agency needs. Often, industry data do not record the specific cause of accidents or illnesses. OSHA surveys designed to collect the necessary data are limited by budget and resource constraints. In addition, surveys take time to develop and complete, and require a careful tradeoff of quantity of information requested with the likelihood and accuracy of response. Finally, the accuracy of the results are constrained by data disaggregation problems.

- *Reliance on assumptions*—The Supreme Court, in the *Benzene* decision, required OSHA to demonstrate significant risk. For health standards, such as benzene, risk estimates are commonly based upon mathematical models (e.g., dose response curves) and the benefits are quantified by estimating the number of future fatalities that would be prevented under various exposure reductions. For safety standards risk is based upon the assumption that past accident patterns are representative of future ones. OSHA estimates benefits by determining the percentage of accidents that will be prevented by compliance with the standard (e.g., locking out or tagging out energy sources).

- *Quantification issues*—The anticipated benefits accruing from an OSHA standard are usually understated because many benefits cannot be quantified with any degree of accuracy (e.g., potential productivity gains). In addition, since the quantified benefits are usually in assorted units of measure (e.g., number of lives saved, injuries prevented, etc.) cost-effectiveness ratios are partial or incomplete.

- *Decreasing accuracy as the estimates are disaggregated*—Every model and survey is subject to certain limitations. For example, subsector analysis decreases in accuracy as survey data are disaggregated. Thus, OSHA has more confidence in the accuracy of its estimate of the aggregate annual cost of the lockout/tagout standard than it has in the individual industry estimates. Moreover, costs for individual firms can be expected to vary depending on specific circumstances—some firms may not experience any costs while others would experience costs above the average for their industry.

This effect is also evident in the benefit estimates of a safety standard. As stated above, these estimates are based upon the assumption that past accident patterns are representative of future ones. While at the aggregate this may be true, this can lead to some perverse results if data are disaggregated. Since there are only a finite number of discrete events (e.g., accidents, fatalities, injuries), disaggregation (by industry, size of firm, location) will often reveal the existence of a hazard but no previous history of problems (e.g., zero accidents of the type under consideration). This is one of the reasons that the Department has maintained that quantitative cost-benefit analysis based on such data should not be used to exclude specific groups from protection. At the extreme, it is always possible to find individual firms or workers with no history of accidents

even though others using the same or similar practices have incurred problems.

But some technical limitations and resource constraints are unavoidable in any system for gathering and evaluating broad-based cost and benefit data. Over all, the Agency is confident that the Regulatory Impact Analysis provided sufficient detail and guidance for the development of the lockout/tagout standard, resulting in a standard consistent with all constitutional requirements. To the degree that OSHA determines that added forms of economic analysis can improve the decisionmaking process and improve the quality of its regulations, the agency will continue to explore and incorporate new approaches.

**Authority:** This document was prepared under the direction of David C. Zeigler, Acting Assistant Secretary for Occupational Safety and Health, U. S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. It is issued under sections 3, 4, 6 and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 652, 653, 655, 657), in response to the decision of the U. S. Court of Appeals for the District of Columbia Circuit in *UAW v. OSHA*, 938 F.2d 1310 (1991).

Signed at Washington, DC, this 23rd day of March, 1993.

David C. Zeigler,

Acting Assistant Secretary of Labor.

[FR Doc. 93-7077 Filed 3-29-93; 8:45 am]

BILLING CODE 4510-26-P

## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

#### 30 CFR Part 944

#### Utah Permanent Regulatory Program

**AGENCY:** Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

**ACTION:** Final rule.

**SUMMARY:** OSM is announcing its decision to approve a proposed amendment to the Utah permanent regulatory program (hereinafter, the "Utah program") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The proposed amendment consists of changes to provisions of the Utah Coal Mining Rules pertaining to termination of jurisdiction. The amendment is intended to revise the Utah program to be consistent with the corresponding Federal regulations.

**EFFECTIVE DATE:** March 30, 1993.

**FOR FURTHER INFORMATION CONTACT:**  
Robert H. Hagen, Director, Albuquerque Field Office, Office of Surface Mining Reclamation and Enforcement, 505 Marquette Avenue, NW., Suite 1200, Albuquerque, NM 87102; Telephone (505) 766-1486.

**SUPPLEMENTARY INFORMATION:**

- I. Background on the Utah Program.
- II. Proposed Amendment.
- III. Director's Findings.
- IV. Summary and Disposition of Comments.
- V. Director's Decision.
- VI. Procedural Determinations.

**I. Background on the Utah Program**

On January 21, 1981, the Secretary of the Interior conditionally approved the Utah State program for the regulation of coal exploration and coal mining and reclamation operations on non-Federal and non-Indian lands (the Utah program). General background information on the Utah program, including the Secretary's findings, the disposition of comments, and an explanation of the conditions of approval, appears in the January 21, 1981, *Federal Register* (46 FR 5899). Actions taken subsequent to approval of the Utah program are codified at 30 CFR 944.15, 944.16, and 944.30.

**II. Proposed Amendment**

By letter dated November 5, 1992 (Administrative Record No. UT-801), Utah submitted to OSM a proposed amendment to the Utah program pursuant to the SMCRA, 30 U.S.C. 1201-1328, and the Federal regulations at 30 CFR chapter VII (the Federal regulations). Utah submitted the proposed amendment in response to a required amendment at 30 CFR 944.16(p) that OSM placed on the Utah program in the September 11, 1992, final rule *Federal Register* notice (57 FR 41692, Administrative Record No. UT-777). The provision of the Utah Coal Mining Rules that Utah proposed to amend is Utah Administrative Rule (Utah Admin. R.) 645-100-452, concerning termination of jurisdiction.

OSM published a notice in the January 14, 1993, *Federal Register* (58 FR 4390), announcing receipt of the amendment and inviting public comment on its adequacy (Administrative Record No. UT-822). The public comment period closed February 16, 1993.

**III. Director's Findings**

After a thorough review pursuant to SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17, the Director finds, as discussed below, that Utah's November 5, 1992, proposed

amendment is no less effective than the corresponding Federal regulation.

In response to a required program amendment codified at 30 CFR 944.16(p), Utah proposed to revise Utah Admin. R. 645-100-452, which sets forth those conditions that necessitate reassertion of regulatory jurisdiction over coal mining and reclamation operations after bond release.

Existing Utah Admin. R. 645-100-452 provides that, following a termination under Utah Admin. R. 645-100-451, the Division will reassert jurisdiction over a site if it is demonstrated that the bond release or written determination referred to under Utah Admin. R. 645-100-451 was based upon fraud, collusion, or misrepresentation of a material fact by the permittee. Utah proposed to delete the phrase "by the permittee" from Utah Admin. R. 645-100-452 because fraud or collusion could apply to any party (not just the permittee) involved in the bond release process.

Proposed Utah Admin. R. 645-100-452 is substantively identical to, and is therefore no less effective than, the corresponding Federal regulation at 30 CFR 700.11(d)(2). The Director approves the proposed rule and removes the required amendment at 30 CFR 944.16(p).

**IV. Summary and Disposition of Comments**

**1. Public Comments**

The Director solicited public comments and provided an opportunity for a public hearing on the proposed amendment. No public comments were received, and because no one requested an opportunity to testify at a public hearing, no hearing was held.

**2. Agency Comments**

Pursuant to 30 CFR 732.17(h)(11)(i), the Director solicited comments on the proposed amendment from the Administrator of the U.S. Environmental Protection Agency (EPA), the Secretary of the U.S. Department of Agriculture, and the heads of other Federal agencies with an actual or potential interest in the Utah program.

**A. Bureau of Land Management**

By letter dated December 15, 1992, the U.S. Bureau of Land Management said that it had no concerns regarding the proposed amendment (Administrative Record No. UT-809).

**B. Fish and Wildlife Service**

By letter dated December 17, 1992, the U.S. Fish and Wildlife Service said that it had no comments on the

proposed amendment (Administrative Record No. UT-811).

**C. Bureau of Mines**

By letter dated December 18, 1992, the U.S. Bureau of Mines said that it had no comments on the proposed amendment (Administrative Record No. UT-810).

**D. Department of Labor**

By letter dated January 14, 1993, the Mine Safety and Health Administration (MSHA) stated that the proposed amendment does not conflict with current MSHA regulations (Administrative Record No. UT-819).

**E. U.S. Environmental Protection Agency (EPA) Concurrence**

Pursuant to 30 CFR 732.17(h)(11)(ii), the Director is required to obtain the written concurrence of the Administrator of EPA with respect to those aspects of a State program amendment that relate to air or water quality standards promulgated under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) and the Clean Air Act, as amended, (42 U.S.C. 7401 *et seq.*).

The change that Utah proposed to its rule does not pertain to air or water quality standards. Nevertheless, OSM requested EPA's concurrence on the proposed amendment. EPA did not respond to OSM's request for concurrence.

**F. State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)**

Pursuant to 30 CFR 732.17(h)(4), OSM solicited comments from the Utah SHPO and ACHP. Neither the SHPO nor the ACHP commented on the proposed amendment.

**V. Director's Decision**

Based on the above finding, the Director (1) approves Utah's November 5, 1992, proposed revision to the Utah program at Utah Admin. R. 645-100-452 and (2) removes the required amendment 30 CFR 944.16(p).

The Federal regulations at 30 CFR part 944, which codify decisions concerning the Utah program, are being amended to implement this decision. This final rule is being made effective immediately to expedite the State program amendment process and to encourage States to bring their programs into conformity with the Federal standards without undue delay. Consistency of State and Federal standards is required by SMCRA.

## VI. Procedural Determinations

### 1. Executive Order 12291

On July 12, 1984, the Office of Management and Budget (OMB) granted OSM an exemption from sections 3, 4, 7, and 8 of Executive Order 12291 for actions related to approval or conditional approval of State regulatory programs, actions, and program amendments. Therefore, preparation of a regulatory impact analysis is not necessary, and OMB regulatory review is not required.

### 2. Executive Order 12778

The Department of the Interior has conducted the reviews required by section 2 of Executive Order 12778 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR parts 730, 731, and 732 have been met.

### 3. National Environmental Policy Act

No environmental impact statement is required for this rule since section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

### 4. Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

### 5. Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal which is the subject of this rule is based upon counterpart Federal regulations for

which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

### List of Subjects in 30 CFR 944

Intergovernmental relations, Surface mining, Underground mining.

Dated: March 22, 1993.

Raymond L. Lowrie,  
Assistant Director, Western Support Center.

For the reasons set out in the preamble, title 30, chapter VII, subchapter T, of the Code of Federal Regulations is amended as set forth below.

### PART 944—UTAH

1. The authority citation for part 944 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

2. Section 944.15 is amended by adding a new paragraph (v) to read as follows:

#### § 944.15 Approval of amendments to State regulatory program.

(v) The revision to Utah Admin. R. 614-100-452, termination of jurisdiction, as submitted to OSM on November 5, 1992, is approved effective March 30, 1993.

#### § 944.16 [Amended]

3. Section 944.16 is amended by removing paragraph (p).

[FR Doc. 93-7248 Filed 3-29-93; 8:45 am]

BILLING CODE 4310-05-M

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 55

[FRL-4602-4]

### Outer Continental Shelf Air Regulations

AGENCY: Environmental Protection Agency ("EPA").

ACTION: Final rule.

SUMMARY: The EPA is finalizing the update of the Outer Continental Shelf ("OCS") Air Regulations proposed in

the Federal Register on December 31, 1992. Requirements applying to OCS sources located within 25 miles of states' seaward boundaries must be updated periodically to remain consistent with the requirements of the corresponding onshore area ("COA"), as mandated by Section 328(a)(1) of the Clean Air Act ("the Act"), as amended by the Clean Air Act Amendments of 1990. The portion of the OCS Air Regulations that is being updated pertains to the requirements for OCS sources for which the Santa Barbara County Air Pollution Control District (Santa Barbara APCD) and the Ventura County Air Pollution Control District (Ventura County APCD) are the designated COAs. This final action incorporates the requirements contained in "Santa Barbara County Air Pollution Control District Requirements Applicable to OCS Sources" (March 10, 1993) and "Ventura County Air Pollution Control District Requirements Applicable to OCS Sources" (March 10, 1993).

EFFECTIVE DATE: This action is effective April 29, 1993.

ADDRESSES: Copies of the documents relevant to this action are available for public inspection during normal business hours at the following locations:

Rulemaking Section II (A-5-3), Air and Toxics Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105.

Environmental Protection Agency, Jerry Kurtzweg ANR 443, 401 "M" Street, SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Christine Vineyard, Rulemaking Section II (A-5-3), Air and Toxics Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105. Telephone: (415) 744-1195.

### SUPPLEMENTARY INFORMATION:

#### Background

On December 31, 1992 in 57 FR 62537, EPA proposed to approve the following requirements into the Outer Continental Shelf Air Regulations: "Santa Barbara County Air Pollution Control District Requirements Applicable to OCS Sources" (December 15, 1992) and "Ventura County Air Pollution Control District Requirements Applicable to OCS Sources" (December 15, 1992), with some modifications as set forth in the proposal.

These requirements represent the first update of part 55 and are being promulgated in response to the submittal of rules from local air

pollution control agencies. EPA has evaluated the above requirements to ensure that they are rationally related to the attainment or maintenance of federal or state ambient air quality standards or part C of title I of the Act, that they are not designed expressly to prevent exploration and development of the OCS and that they are applicable to OCS sources. 40 CFR 55.1. EPA has also evaluated the rules to ensure that they are not arbitrary or capricious, 40 CFR 55.12(e). In addition, EPA has excluded administrative or procedural rules.

A 30-day public comment period was provided in 57 FR 62537. EPA received one comment letter that did not result in a change to the final rule. Please refer to Docket A-92-70, available at the addresses given above, for the response to comments.

#### EPA Action

In today's notice, EPA takes final action to incorporate the proposed changes into 40 CFR part 55. No changes were made to the proposal set forth in the December 31, 1992 notice of proposed rulemaking. EPA is approving the submittal as modified in the proposal under section 328(a)(1) of the Act, 42 U.S.C. 7627. The intended effect of approving these requirements is to regulate emissions from OCS sources in accordance with the requirements onshore. Section 328(a) of the Act requires that EPA establish requirements to control air pollution from OCS sources located within 25 miles of states' seaward boundaries that are the same as onshore requirements. To comply with this statutory mandate, EPA must incorporate applicable onshore rules into part 55 as they exist onshore.

#### Administrative Requirements

##### A. Executive Order 12291 (Regulatory Impact Analysis)

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

##### B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 requires each federal agency to perform a Regulatory Flexibility Analysis for all rules that are likely to have a "significant impact on a substantial number of small entities." Small entities include small businesses, organizations, and governmental jurisdictions.

As was stated in the final OCS regulation, the OCS rule does not apply to any small entities, and the structure of the rule averts direct impacts and mitigates indirect impacts on small

entities. This consistency update merely incorporates onshore requirements into the OCS rule to maintain consistency with onshore regulations as required by Section 328 of the Act and does not alter the structure of the rule.

The EPA certifies that this notice of final rulemaking will not have a significant impact on a substantial number of small entities.

#### C. Paperwork Reduction Act

The Office of Management and Budget (OMB) has approved the information collection requirements contained in the final OCS rulemaking dated September 4, 1992 under the provisions of the Paperwork Reduction Act, 44 U.S.C. 35012 *et seq.* and has assigned OMB control number 2060-0249. This consistency update does not add any further requirements.

#### List of Subjects in 40 CFR Part 55

Administrative practice and procedures, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Nitrogen oxides, Outer Continental Shelf, Ozone, Particulate matter, Permits, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: March 10, 1993.

John C. Wise,  
Acting Regional Administrator.

Title 40 of the Code of Federal Regulations, part 55, is amended as follows:

#### PART 55—[AMENDED]

1. The authority citation for part 55 continues to read as follows:

**Authority:** Section 328 of the Clean Air Act (42 U.S.C. 7401 *et seq.*) as amended by Public Law 101-549.

2. Section 55.8 is amended by adding the following parenthetical phrase to the end of the section:

**§ 55.8 Monitoring, reporting, inspections, and compliance.**

\* \* \* \* \*

(Approved by the Office of Management and Budget under the control number 2060-0249)

3. Section 55.14 is amended by revising paragraphs (e)(3)(ii)(F) and (e)(3)(ii)(H) to read as follows:

**§ 55.14 Requirements that apply to OCS sources located within 25 miles of states' seaward boundaries, by state.**

\* \* \* \* \*

(e) \* \* \*

(3) \* \* \*

(ii) \* \* \*

(F) *Santa Barbara County Air Pollution Control District Requirements*

*Applicable to OCS Sources, March 10, 1993.*

\* \* \* \* \*

(H) *Ventura County Air Pollution Control District Requirements Applicable to OCS Sources, March 10, 1993.*

\* \* \* \* \*

4. Appendix A to part 55 is amended by revising paragraphs (b) (6) and (8) under the heading California to read as follows:

*Appendix A to 40 CFR Part 55—Listing of State and Local Requirements Incorporated by Reference Into Part 55, by State*

\* \* \* \* \*

California \* \* \*

(b) \* \* \*

(6) The following requirements are contained in *Santa Barbara County Air Pollution Control District Requirements Applicable to OCS Sources, March 10, 1993:*

- Rule 102—Definitions (Adopted 7/30/91)
- Rule 103—Severability (Adopted 10/23/78)
- Rule 201—Permits Required (Adopted 7/2/79)
- Rule 202—Exemptions to Rule 201 (Adopted 3/10/92)
- Rule 203—Transfer (Adopted 10/23/78)
- Rule 204—Applications (Adopted 10/23/78)
- Rule 205—Standards for Granting Applications (Adopted 7/30/91)
- Rule 206—Conditional Approval of Authority to Construct or Permit to Operate (Adopted 10/15/91)
- Rule 207—Denial of Application (Adopted 10/23/78)
- Rule 210—Fees (Adopted 5/7/91)
- Rule 301—Circumvention (Adopted 10/23/78)
- Rule 302—Visible Emissions (Adopted 10/23/78)
- Rule 304—Particulate Matter-Northern Zone (Adopted 10/23/78)
- Rule 305—Particulate Matter Concentration-Southern Zone (Adopted 10/23/78)
- Rule 306—Dust and fumes-Northern Zone (Adopted 10/23/78)
- Rule 307—Particulate Matter Emission Weight Rate-Southern Zone (Adopted 10/23/78)
- Rule 308—Incinerator Burning (Adopted 10/23/78)
- Rule 309—Specific Contaminants (Adopted 10/23/78)
- Rule 310—Odorous Organic Sulfides (Adopted 10/23/78)
- Rule 311—Sulfur Content of Fuels (Adopted 10/23/78)
- Rule 312—Open Fires (Adopted 10/2/90)

- Rule 317—Organic Solvents (Adopted 10/23/78)
- Rule 318—Vacuum Producing Devices or Systems—Southern Zone (Adopted 10/23/78)
- Rule 321—Control of Degreasing Operations (Adopted 7/10/90)
- Rule 322—Metal Surface Coating Thinner and Reducer (Adopted 10/23/78)
- Rule 323—Architectural Coatings (Adopted 2/20/90)
- Rule 324—Disposal and Evaporation of Solvents (Adopted 10/23/78)
- Rule 325—Storage of Petroleum and Petroleum Products (Adopted 12/10/91)
- Rule 326—Effluent Oil Water Separators (Adopted 10/23/78)
- Rule 327—Organic Liquid Cargo Tank Vessel Loading (Adopted 12/16/85)
- Rule 328—Continuous Emission Monitoring (Adopted 10/23/78)
- Rule 331—Fugitive Emissions Inspection and Maintenance (Adopted 12/10/91)
- Rule 332—Petroleum Refinery Vacuum Producing Systems, Wastewater Separators and Process Turnarounds (Adopted 6/11/79)
- Rule 333—Control of Emissions from Reciprocating Internal Combustion Engines (12/10/91)
- Rule 342—Control of Oxides of Nitrogen (NO<sub>x</sub> from Boilers, Steam Generators and Process Heaters) (03/10/92)
- Rule 505—Breakdown Conditions Sections A., B.1., and D. only (Adopted 10/23/78)
- Rule 603—Emergency Episode Plans (Adopted 6/15/81)
- \* \* \* \* \*
- (8) The following requirements are contained in *Ventura County Air Pollution Control District Requirements Applicable to OCS Sources*, March 10, 1993:
- Rule 2—Definitions (Adopted 5/8/90)
- Rule 5—Effective Date (Adopted 5/23/72)
- Rule 6—Severability (Adopted 11/21/78)
- Rule 7—Zone Boundaries (Adopted 6/14/77)
- Rule 10—Permits Required (Adopted 7/5/83)
- Rule 11—Application Contents (Adopted 8/15/78)
- Rule 12—Statement by Application Preparer (Adopted 6/16/87)
- Rule 13—Statement by Applicant (Adopted 11/21/78)
- Rule 14—Trial Test Runs (Adopted 5/23/72)
- Rule 15—Permit Issuances (Adopted 7/5/83)
- Rule 16—Permit Contents (Adopted 12/2/80)
- Rule 18—Permit to Operate Application (Adopted 8/17/76)
- Rule 19—Posting of Permits (Adopted 5/23/72)
- Rule 20—Transfer of Permit (Adopted 5/23/72)
- Rule 21—Expiration of Applications and Permits (Adopted 6/23/81)
- Rule 23—Exemptions from Permits (Adopted 1/8/91)
- Rule 24—Source Recordkeeping and Reporting (Adopted 11/21/78)
- Rule 26—New Source Review (Adopted 10/22/91)
- Rule 26.1—New Source Review—Definitions (Adopted 10/22/91)
- Rule 26.2—New Source Review—Requirements (Adopted 10/22/91)
- Rule 26.3—New Source Review—Exemptions (Adopted 10/22/91)
- Rule 26.6—New Source Review—Calculations (Adopted 10/22/91)
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- Rule 62.7—Asbestos—Demolition and Renovation (Adopted 6/16/92)
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- Rule 66—Organic Solvents (Adopted 11/24/87)
- Rule 67—Vacuum Producing Devices (Adopted 7/5/83)
- Rule 68—Carbon Monoxide (Adopted 6/14/77)
- Rule 71—Crude Oil and Reactive Organic Compound Liquids (Adopted 9/11/90)
- Rule 71.1—Crude Oil Production and Separation (Adopted 6/16/92)
- Rule 71.2—Storage of Reactive Organic Compound Liquids (Adopted 9/26/89)
- Rule 71.3—Transfer of Reactive Organic Compound Liquids (Adopted 6/16/92)
- Rule 71.4—Petroleum Sumps, Pits, Ponds, and Well Cellars (Adopted 6/16/92)
- Rule 72—New Source Performance Standards (NSPS) (Adopted 6/19/90)
- Rule 74—Specific Source Standards (Adopted 7/6/76)
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- Rule 74.7—Fugitive Emissions of Reactive Organic Compounds at Petroleum Refineries and Chemical Plants (Adopted 1/10/89)
- Rule 74.8—Refinery Vacuum Producing Systems, Waste-water Separators and Process Turnarounds (Adopted 7/5/83)
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- Rule 74.10—Components at Crude Oil Production Facilities and Natural Gas Production and Processing Facilities (Adopted 6/16/92)
- Rule 74.11—Natural Gas-Fired Residential Water Heaters—Control of NO<sub>x</sub> (Adopted 4/9/85)
- Rule 74.12—Surface Coating of Metal Parts and Products (Adopted 5/16/89)
- Rule 74.15—Boilers, Steam Generators and Process Heaters (Adopted 3/28/89)
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- Appendix IV—A—Soap Bubble Tests
- Rule 100—Analytical Methods (Adopted 7/18/72)
- Rule 101—Sampling and Testing Facilities (Adopted 5/23/72)
- Rule 102—Source Tests (Adopted 11/21/78)
- Rule 103—Stack Monitoring (Adopted 6/4/91)
- Rule 154—Stage 1 Episode Actions (Adopted 9/17/91)

- Rule 155—Stage 2 Episode Actions  
(Adopted 9/17/91)  
Rule 156—Stage 3 Episode Actions  
(Adopted 9/17/91)  
Rule 158—Source Abatement Plans  
(Adopted 9/17/91)  
Rule 159—Traffic Abatement  
Procedures (Adopted 9/17/91)

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[FR Doc. 93-6863 Filed 3-29-93; 8:45 am]  
BILLING CODE 6560-50-P

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

#### 43 CFR Public Land Order 6960

[WY-930-4210-06; WYW-111611]

#### Withdrawal of Public Mineral Estate for East Fork Elk Winter Range; Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Public land order.

**SUMMARY:** This order withdraws 10,535.30 acres of public mineral estate from location or entry under the United States mining laws for a period of 20 years for the Bureau of Land Management to protect the natural elk feeding ground, winter range, and capital investments in the area. The lands have been and remain open to mineral leasing.

**EFFECTIVE DATE:** March 30, 1993.

**FOR FURTHER INFORMATION CONTACT:** Tamara J. Gertsch, BLM Wyoming State Office, P.O. Box 1828, Cheyenne, Wyoming 82003, 307-775-6115.

By virtue of the authority vested in the Secretary of the Interior by section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (1988), it is ordered as follows:

1. Subject to valid existing rights, the following described public mineral estate is hereby withdrawn from location or entry under the United States mining laws (30 U.S.C. ch. 2 (1988)), but not from leasing under the mineral leasing laws, to protect the East Fork Elk Winter Range and natural feeding ground:

#### Sixth Principal Meridian

- T. 42 N., R. 105 W.,  
Sec. 2, lots and 3 and 4, S $\frac{1}{2}$ NW $\frac{1}{4}$ , and N $\frac{1}{2}$ SW $\frac{1}{4}$ ;  
Sec. 3, lots 1 to 4, inclusive, S $\frac{1}{2}$ N $\frac{1}{2}$ , S $\frac{1}{2}$ ;  
Sec. 4, lots 1 to 4, inclusive, and S $\frac{1}{2}$ N $\frac{1}{2}$ ;  
Sec. 5, lots 1 to 4, inclusive, S $\frac{1}{2}$ NE $\frac{1}{4}$ , SE $\frac{1}{4}$ NW $\frac{1}{4}$ , and SW $\frac{1}{4}$ SW $\frac{1}{4}$ ;  
Sec. 6, lots 2 to 7, inclusive, SW $\frac{1}{4}$ NE $\frac{1}{4}$ , SE $\frac{1}{4}$ NW $\frac{1}{4}$ , E $\frac{1}{2}$ SW $\frac{1}{4}$ , W $\frac{1}{2}$ SE $\frac{1}{4}$ , and SE $\frac{1}{4}$ SE $\frac{1}{4}$ ;

- Sec. 7, lots 1 to 3, inclusive, NE $\frac{1}{4}$ , E $\frac{1}{2}$ NW $\frac{1}{4}$ , NE $\frac{1}{4}$ SW $\frac{1}{4}$ , N $\frac{1}{2}$ SE $\frac{1}{4}$ , and SE $\frac{1}{4}$ SE $\frac{1}{4}$ ;  
Sec. 8, W $\frac{1}{2}$ , and W $\frac{1}{2}$ SE $\frac{1}{4}$ ;  
Sec. 9, NE $\frac{1}{4}$ ;  
Sec. 10, N $\frac{1}{2}$ ;  
Sec. 18, lots 1 to 4, inclusive, E $\frac{1}{2}$ , and E $\frac{1}{2}$ W $\frac{1}{2}$ ;  
Sec. 19, lots 1 and 2, E $\frac{1}{2}$ W $\frac{1}{2}$ , NW $\frac{1}{4}$ NE $\frac{1}{4}$ , E $\frac{1}{2}$ NW $\frac{1}{4}$ , NE $\frac{1}{4}$ SW $\frac{1}{4}$ , and NW $\frac{1}{4}$ SE $\frac{1}{4}$ ;  
Sec. 30, lot 2.  
T. 43 N., R. 105 W.,  
Sec. 31, lots 3 and 4;  
Sec. 32, N $\frac{1}{2}$ , and SE $\frac{1}{4}$ ;  
Sec. 33, and 34;  
T. 42 N., R. 106 W.,  
Sec. 1, lots 1 to 4, inclusive, S $\frac{1}{2}$ N $\frac{1}{2}$ , and SW $\frac{1}{4}$ ;  
Sec. 2, lots 1 and 2, and S $\frac{1}{2}$ NE $\frac{1}{4}$ ;  
Sec. 11, S $\frac{1}{2}$ ;  
Sec. 12, E $\frac{1}{2}$ , E $\frac{1}{2}$ W $\frac{1}{2}$ , NW $\frac{1}{4}$ NW $\frac{1}{4}$ , E $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ , and E $\frac{1}{2}$ W $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ ;  
Sec. 13, E $\frac{1}{2}$ , and NE $\frac{1}{4}$ NW $\frac{1}{4}$ ;  
Sec. 14;  
Sec. 22, SE $\frac{1}{4}$ SE $\frac{1}{4}$ ;  
Sec. 23, E $\frac{1}{2}$ ;  
Sec. 24, NE $\frac{1}{4}$ ;  
Sec. 25, S $\frac{1}{2}$ ;  
Sec. 27, E $\frac{1}{2}$ E $\frac{1}{2}$ ;  
T. 43 N., R. 106 W.,  
Sec. 35, E $\frac{1}{2}$ NW $\frac{1}{4}$ , NE $\frac{1}{4}$ SW $\frac{1}{4}$ , and NW $\frac{1}{4}$ SE $\frac{1}{4}$ .

The areas described aggregate 10,535.30 acres in Fremont County.

2. The withdrawal made by this order does not alter the applicability of those public land laws governing the use of the lands under lease, license, or permit, or governing the disposal of their mineral or vegetative resources other than under the mining laws.

3. This withdrawal will expire 20 years from the effective date of this order unless, as a result of a review conducted before the expiration date pursuant to section 204(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714(f) (1988), the Secretary determines that the withdrawal shall be extended.

Dated: March 15, 1993.

Bruce Babbitt,  
Secretary of the Interior.

[FR Doc. 93-7177 Filed 3-29-93; 8:45 am]

BILLING CODE 4310-22-M

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 69

[CC Docket No. 86-10; DA 93-294]

#### Provision of Access for 800 Service

AGENCY: Federal Communications Commission.

ACTION: Policy statement.

**SUMMARY:** The Chief, Common Carrier Bureau (the Bureau) adopted an Order

permitting the administrator of the 800 Number Administration Service Center (NASC), upon written customer authorization, to make Responsible Organization (RESPORG) changes in the Service Management System (SMS). The Bureau also concluded that there could be a separate rate element for this service in the SMS tariff. In addition, the Bureau dismissed without prejudice a request that the NASC also be permitted to make 800 traffic routing changes. This action will promote fair competition in the provision of 800 services. This action was taken pursuant to a Petition for Declaratory Ruling filed July 10, 1992 by Sprint Communications Company (Sprint).

**EFFECTIVE DATE:** This order is effective April 29, 1993.

**FOR FURTHER INFORMATION CONTACT:** Gary Phillips, (202) 632-4047, Policy and Program Planning Division, Common Carrier Bureau.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Bureau's Order, adopted March 10, 1993, and released March 11, 1993 (DA 93-294). The full text of this decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 239), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Services, Inc., 2100 M Street, NW., suite 140, Washington, DC 20037, (202) 857-3800.

#### Summary of the Order

1. 800 service is an interexchange service in which a subscriber agrees in advance to pay for all calls made to its 800 number from a specified area. Local Exchange Carriers (LECs) will soon implement a new "data base" system of 800 access. Under this system, LECs will identify the 800 service provider for each 800 call by querying a regional data base (Service Control Point or SCP) that contains 800 service information associated with each 800 number. This 800 service information will be loaded into each SCP via the SMS, a centralized data base system. All 800 service records must be loaded into the SMS for downloading to the regional SCPs. In addition, all changes in 800 service records must be entered in the SMS. The NASC administers the 800 SMS.

2. Only one entity—the RESPORG—will be permitted to access each customer record in the SMS to make changes to that record, including a RESPORG change. With the implementation of 800 data base access, a customer's current 800 carrier will generally become that customer's

RESPORG. Subscribers will be able to change RESPORGs, however, at any time, and the FCC has held that they may choose any entity to serve as their RESPORG, provided that entity meets tariffed RESPORG eligibility criteria.

3. On July 10, 1992, Sprint filed a petition for declaratory ruling requesting that the Commission authorize the NASC administrator to make certain 800 traffic routing and RESPORG changes to the SMS. In particular, Sprint asked that the FCC authorize the NASC to make SMS or RESPORG changes that would be contrary to the interests of the incumbent RESPORG. Sprint argued that if a subscriber's 800 service provider is serving as its RESPORG and the subscriber wants to shift some or all of its traffic to another carrier, or if it wants to change RESPORGs, the existing RESPORG would receive advance notice of these changes. Sprint claimed that this situation would raise competitive concerns in that it would give the RESPORG an opportunity to take measures to dissuade its customer from making the changes.

4. The Bureau granted Sprint's petition in part and dismissed it without prejudice in part. Specifically, the Bureau concluded that the NASC should be permitted, with written customer authorization, to make RESPORG changes. The Bureau reasoned that the public interest would not be well served by a system requiring that an 800 service provider acting as RESPORG receive advance notice that a customer is, at a minimum, transferring its 800 account coordination to a third party—often a competitor—and quite possibly shifting most of its 800 business to a competitor as well. The Bureau also concluded that there could be a separate rate element for this service in the SMS tariff. At the same time, however, the Bureau found that the record did not contain sufficient information about the benefits or costs of authorizing the NASC to make traffic routing changes, and it therefore dismissed this request without prejudice.

#### Ordering Clause

5. Accordingly, pursuant to the authority contained in §§ 0.91(a) and 0.291 of the Commission's Rules, 47 CFR 0.91(a) and 0.291, *It is ordered*, That the Petition for Declaratory Ruling filed July 10, 1992, by Sprint is hereby granted to the extent indicated herein, and otherwise is dismissed without prejudice.

#### List of Subjects for 47 CFR Part 69

Communications common carriers, Telephone.

Federal Communications Commission.

Cheryl A. Tritt,

Chief, Common Carrier Bureau.

[FR Doc. 93-7154 Filed 3-29-93; 8:45 am]

BILLING CODE 6712-01-M

#### DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

#### 50 CFR Part 663

[Docket No. 920372-3054]

RIN 0648-AE07

#### Pacific Coast Groundfish Fishery

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Final rule.

**SUMMARY:** The Secretary of Commerce (Secretary) announces implementation of a flexible starting date for the "regular" season for the fixed gear (nontrawl) sablefish fishery off California, Oregon, and Washington, and 72-hour closed periods both immediately before and immediately after the regular season. The flexible starting date for the regular season would precede by 3 days the earliest sablefish fixed gear season opening in the Gulf of Alaska. This action is intended to preserve traditional fishing opportunities for many smaller Pacific coast nontrawl vessels by preventing premature achievement of the nontrawl harvest guideline by intensive early season fishing by large nontrawl vessels prior to the opening of the Gulf of Alaska sablefish fishery. It is necessary to maintain stability in the nontrawl sablefish fishery, to extend the Pacific coast nontrawl sablefish fishery to the maximum extent practicable, and to minimize the safety risks that would arise for operators of small vessels if they were compelled to fish in severe winter weather to assure themselves a portion of the annual harvest guideline.

**EFFECTIVE DATE:** April 1, 1993.

**ADDRESSES:** Copies of the Environmental Assessment/Regulatory Impact Review (EA/RIR) are available from the Pacific Fishery Management Council, 2000 SW First Avenue, suite 420, Portland, Oregon 97201.

**FOR FURTHER INFORMATION CONTACT:** William L. Robinson at 206-526-6140, Rodney R. McInnis at 310-980-4030, or the Pacific Fishery Management Council at 503-326-6352.

**SUPPLEMENTARY INFORMATION:** The Pacific Fishery Management Council (Council) makes recommendations to the Secretary for the management of fisheries under the Pacific Coast Groundfish Fishery Management Plan (FMP). This action is being taken under procedures for addressing socio-economic issues set forth at section III.B.4.(c) of the appendix to 50 CFR part 663. An analysis of the biological, social, and economic impacts involved in changing the beginning of the nontrawl sablefish season is contained in the draft EA/RIR that is available from the Council (see ADDRESSES).

#### Background

Sablefish constitutes one of the most valuable components of the groundfish fisheries off the coast of Washington, Oregon, and California (the Pacific coast) and Alaska. Although taken in both trawl and nontrawl fisheries, sablefish is the principal species harvested by the nontrawl fleet.

Nontrawl fishing effort in the Pacific coast sablefish fishery has increased dramatically during recent years, resulting in shorter seasons. Contributing to this effort increase, especially early in the year, has been participation by large nontrawl vessels that traditionally fish off Alaska. Delayed openings of the Alaska nontrawl sablefish fishery have resulted in a 3-4 month "window" where operators of nontrawl fishing vessels can fish in the Pacific coast sablefish fishery prior to leaving for Alaska. The result has been rapid achievement of the nontrawl sablefish harvest guideline off Washington, Oregon, and California, and preemption of fishing opportunities for many smaller, local vessels that fish only the Pacific coast fishery. These vessel operators traditionally have relied on a longer season that has given them the ability to focus fishing effort during periods of better weather. Now, competition for the available harvest forces operators of smaller vessels to take greater risks fishing in severe winter weather. Increased early season fishing effort for sablefish also encourages the harvest of sablefish nearer to the late winter spawning season when flesh quality and product yield may not be as good as later in the season. A more detailed discussion of the background appears in the preamble to the proposed rule at 57 FR 53313 (November 9, 1992).

The Council considered public comment on several alternative dates at its September and November 1991 meetings and considered the advice of its advisory subpanel, Scientific and Statistical Committee, Groundfish