undocumented vessels, with the Coast Guard then becoming the issuing authority for those States?

How should the barge numbering system address undocumented barges numbered in one State and operated routinely or sold for operation in a new State?

Should the barge number issued depend on the State of principal operation like undocumented vessels, or be unrelated to any particular State to reflect the interstate operation of barges?

Should the Coast Guard number undocumented barges in the same manner as documented vessels and barges and maintain the information in the same computer data base?

Should the Coast Guard number undocumented barges in the same manner as it identifies undocumented barges for inspection certificate purposes and maintain the information in the same computer data base?

6. What Factors or Other Information Should Be Considered in Establishing a System for Numbering Undocumented Barges?

Is there any other information you feel may be helpful in assisting the Coast Guard to implement barge numbering with the least negative impact on the States, the Coast Guard and the barge industry?

What other alternatives regarding the numbering of undocumented barges to identify owners of barges found abandoned should be considered?

All comments received by the Coast Guard as a result of this notice will be summarized and provided to NBSAC, TSAC, and NASBLA organization members for their consideration and consultation. The Coast Guard will consider all relevant comments in the development of any regulatory project to establish a mandatory numbering system for undocumented barges over 100 gross tons.

Dated: October 7, 1994.

G.A. Penington,

Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation Safety and Waterway Services.

[FR Doc. 94–25721 Filed 10–17–94; 8:45 am]

BILLING CODE 4910–14–M

Tuesday
October 18, 1994

Part VIII

Environmental Protection Agency

40 CFR Part 227
Clarification of Suspended Particulate Phase Bioaccumulation Testing Requirements for Material Dumped in Ocean Waters; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 227

[FRL-5091-6]

Clarification of Suspended Particulate Phase Bioaccumulation Testing Requirements for Material Dumped in Ocean Waters

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA today is issuing a final rule clarifying that the ocean dumping regulations do not require bioaccumulation testing of the suspended particulate phase of materials to be dumped at sea. This clarification applies to the suspended particulate phase only, and does not affect any other testing requirements contained in the regulations. EPA believes that bioaccumulation testing of the suspended particulate phase is unnecessary and inappropriate. The Agency has never previously interpreted or applied its regulations to require such testing. Thus, EPA is issuing this final rule to remove any possible ambiguity over the testing requirement. This rule supersedes an interim final rule which also clarified that bioaccumulation testing of the suspended particulate phase is not required. The interpretive footnotes added to the ocean dumping regulations by the interim final rule are being deleted in favor of today's rule.

EFFECTIVE DATE: This rule shall be effective November 17, 1994.

ADDRESSES: Copies of comments submitted and the docket for this rulemaking are available for review at EPA's Water Docket, room L-102, 401 M Street SW, Washington, DC 20460. For access to the docket materials, call (202) 260-3027 between 9 a.m. and 3:30 p.m. on weekdays for an appointment.

FOR FURTHER INFORMATION CONTACT: John Lishman, Chief, Marine Pollution Control Branch, Oceans and Coastal Protection Division (4504F), U. S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460; telephone 202/260-8448.

SUPPLEMENTARY INFORMATION:

A. Discussion

1. The Interim Final and Proposed Rulemaking

On May 20, 1994, EPA published an interim final rule in the **Federal Register** interpreting and clarifying the ocean dumping regulations. 59 FR 26,566. The interim final rule, which was immediately effective, made clear that the regulations do not require bioaccumulation testing of the suspended particulate phase of material to be dumped at sea. It accomplished this by adding footnotes at the end of 40 CFR 227.6(c)(2) and 227.27(b) that read:

> This provision shall not be interpreted as requiring bioaccumulation testing of the suspended particulate phase of dumped materials.

EPA issued the interim final rule without advance notice or opportunity for public comment, relying on the "interpretive rule" and "good cause" exceptions to the notice and comment requirements of the Administrative Procedure Act (APA). 5 U.S.C. 553(b)(3)(A) and (B). For additional information regarding the interim final rule, the basis for the rule and the factors supporting its issuance without prior notice and comment, see 59 FR 26,566 (May 20, 1994).

In a separate **Federal Register** notice published on May 20, 1994, EPA sought comment on a proposed rule that also would clarify that bioaccumulation testing of the suspended particulate phase is not required. 59 FR 26573 (May 20, 1994). The proposal included two options to effect this clarification:

(1) Reaffirm the footnotes added to 40 CFR 227.6(c)(2) and 227.27(c) by the interim final rule; and

(2) Amend the first sentence of 40 CFR 227.6(c)(2) by deleting the words "including bioaccumulation;" amend the third sentence of 40 CFR 227.6(c)(2) by deleting the words "either," and "or to bioaccumulation;" and amend 40 CFR 227.27(b) by inserting the following additional sentence between the first and second sentence:

> Suspended particulate phase bioaccumulation testing is not required.

EPA also solicited comment on other rulemaking options that would clarify that bioaccumulation testing of the suspended particulate phase is not required. For further information, see 59 FR 26573 (May 20, 1994).

EPA published the interim final rule and the proposed rule in response to a preliminary opinion of the United States District Court, District of New Jersey, dated July 6, 1993. In the preliminary opinion, the Court said that bioaccumulation testing of the suspended particulate phase should have been conducted before the U.S. Army Corps of Engineers granted a permit to the Port Authority of New York and New Jersey to dispose of dredged material from Newark Bay. *Clean Ocean Action, et al.* v. *York, et al.*, Civil No. 93-2402 (DRD) (D. N.J.) ("*Clean Ocean Action I*"). As a result of the preliminary opinion, there was uncertainty as to whether the ocean dumping regulations required permit applicants to perform bioaccumulation testing of the suspended particulate phase. The interim final rule and the accompanying proposal were intended to eliminate any uncertainty that bioaccumulation testing of the suspended particulate phase is not required. For further information on *Clean Ocean Action I*, see the May 20, 1994, **Federal Register** notices accompanying the interim final rule and the proposed rule.

On June 1, 1994, Clean Ocean Action and others filed a second lawsuit against EPA challenging the interim final rule, and specifically the clarification provided with respect to 40 CFR 227.6(c)(2). (The plaintiffs did not challenge the clarification to 40 CFR 227.27(b)). *Clean Ocean Action, et al.* v. *Browner, et al.*, Civil No. 94-2614 (DRD)(D. N.J.)("*Clean Ocean Action II*"). The plaintiffs alleged, among other things, that the interim final rule was not eligible for the interpretive rule or "good cause" exceptions to the notice and comment requirements of the APA. Upon the plaintiffs' request, the Court ordered the Agency to show cause why a preliminary injunction should not be issued preventing EPA from "taking any actions authorized by" the interim final rule.

On June 24, 1994, the Court issued orders denying all injunctive relief that the plaintiffs had requested in both *Clean Ocean Action I* and *Clean Ocean Action II*. Among other things, the Court ruled that even before EPA issued the interim final rule, the ocean dumping regulations did not require bioaccumulation testing of the suspended particulate phase. The June 24, 1994, opinions reversed the July 6, 1993, preliminary opinion on that point. The Court found that the interim final rule was a valid interpretive rule and that EPA had complied with the APA in issuing it without advance notice and opportunity for public comment. The plaintiffs have appealed both orders to the United States Court of Appeals for the Third Circuit.

2. Summary of Comments Received and Agency Response

EPA received eleven letters commenting on the proposal and the interim final rule. These comments and the Agency's responses are summarized in the following section. Detailed responses to the comments are set out in the *"Response to Individual Comments Received on the Interim Final and Proposed Rulemaking on Suspended Particulate Phase*

Bioaccumulation Testing Requirements." This document is available in the rulemaking record, and can be inspected at EPA's Water Docket, the location of which is stated above. The response to comments document also can be obtained from the Agency at the address specified above in the section headed, FOR FURTHER INFORMATION CONTACT.

Of the eight letters commenting on the interim final rule, three (from the Port Authority of New York and New Jersey, BP Oil Company, and the Port of Portland, Oregon) agreed with EPA that suspended particulate phase bioaccumulation testing was not required by the existing ocean dumping regulations, was unnecessary and should not be required. Five comments (from Clean Ocean Action and nine supporting organizations, the Conservation Law Foundation, Coastal Advocates, the St. Simons Island Save the Beach Association, and the Natural Heritage Institute) were critical of the interim final rule. These commenters, except the Natural Heritage Institute, adopted Clean Ocean Action's comment letter. All three comments received by the Agency on the proposed rule (from the BP Oil Company, the Port Authority of New York and New Jersey, and the Massachusetts Port Authority) supported EPA's view that bioaccumulation testing of the suspended particulate phase was not required by the existing ocean dumping regulations and should not be required. The Agency considered all comments prior to taking today's final action.

The individual comments fell into three broad categories:

(a) *The need for bioaccumulation testing of the suspended particulate phase.*

The comments from the environmental advocacy groups adopted Clean Ocean Action's view that the existing regulations require bioaccumulation testing of the suspended particulate phase, that there is a need for bioaccumulation testing of the suspended particulate phase, and that this requirement should not be altered. The main argument advanced in support of the position that bioaccumulation testing of the suspended particulate phase should be required was that adverse sublethal effects to pelagic species from the suspended particulate phase can not be evaluated without performing bioaccumulation testing of the suspended particulate phase itself. None of these commenters submitted data, scientific studies, or factual information of any other nature supporting this view or refuting the technical or scientific basis for EPA's conclusion that bioaccumulation testing of the suspended particulate phase is not necessary. However, other commenters, such as the Port Authorities, provided specific technical arguments supporting the view that suspended particulate phase bioaccumulation tests are unnecessary and should not be required.

After considering all comments on this issue, EPA continues to believe that suspended particulate phase bioaccumulation testing should not be required. As EPA explained at length in the two rulemaking notices published on May 20, 1994, the Agency believes this is the case for three principal reasons: (1) Exposure to the suspended particulate phase in the environment does not provide sufficient time for bioaccumulation to occur; (2) bioaccumulation testing of marine organisms in the solid phase provides a worst case indication of bioaccumulation potential, so that separate suspended particulate phase testing is unnecessary in any event; and (3) no reliable laboratory tests are available for bioaccumulation in the suspended particulate phase.

Further, the commenters are incorrect that bioaccumulation testing of the suspended particulate phase is necessary to determine whether significant adverse sublethal effects result from the suspended particulate phase. The potential for such effects from the suspended particulate phase of dredged material is determined by application of the results of bioaccumulation bioassays on the solid phase according to procedures acceptable to EPA and the Corps of Engineers. These assist in determining the biological availability of contaminants and the potential for those contaminants to cause sublethal or chronic effects. The factors listed in the 1977 and 1991 Green Books for interpreting solid phase bioaccumulation testing results are relevant to determining the potential for sublethal effects on pelagic organisms. Specifically, the potential for contaminants to biomagnify within aquatic food chains is addressed. Toxicologic importance of contaminants to all species (including pelagic organisms) also is addressed. 1991 Green Book at 6–6; see also 1977 Green Book at G15. Moreover, as noted above and as explained in the preamble to the May 20, 1994, Interim Final Rule (59 FR 26,566), bioaccumulation testing of the solid phase provides a worst case indication of bioaccumulation potential of the suspended particulate phase.

The potential for significant adverse sublethal effects from the suspended particulate phase is also determined by application of the results of acute toxicity bioassays on the suspended particulate phase according to procedures acceptable to EPA and the Corps of Engineers. Under those approved procedures, a safety factor is applied to the acutely toxic concentration to assure protection from chronic sublethal effects. 1991 Green Book at 6–2; see also 1977 Green Book at D19. The safety factor used typically is 1% of the acutely toxic concentration, although the factor can be adjusted, either upwards or downwards, on the basis of the scientific evidence applicable to a particular material to be dumped. See 40 CFR 227.27(a)(3). This product of the safety factor times the acutely toxic concentration is used to establish the limiting permissible concentration ("LPC") (see 40 CFR 227.27). The LPC is compared to the predicted concentration of suspended material after consideration of initial mixing. 40 CFR 227.29. Exceedence of the LPC by the dumped material suspended in the water column would mean the regulatory criteria are not met. See 40 CFR 227.13(c)(3). Thus, the procedures and tests do in fact consider the potential for chronic sublethal effects. The 1% safety factor was developed by the National Academy of Sciences in a voluminous study entitled "*Water Quality Criteria: 1972.*" This safety factor has been used for over 20 years to estimate safe chronic values from acute concentration values.

Given the absence of scientific arguments to the contrary, and for all of the foregoing reasons, EPA is taking final action clarifying that the ocean dumping regulations do not require bioaccumulation testing of the suspended particulate phase.

(b) *Lack of notice and comment on the interim final rule.*

The environmental advocacy groups argued that the interim final rule should not have been issued without advance notice and opportunity for comment because it was ineligible for the interpretive rule and good cause exemptions to the APA. These comments are directed at the procedural validity of the interim final rule, not the appropriateness of today's rule. In any event, as noted above, the United States District Court for the District of New Jersey has issued an opinion on Clean Ocean Action's motion for a preliminary injunction in *Clean Ocean Action II* denying injunctive relief on the grounds that the interim final rule was a valid interpretive rule, as EPA had argued.

(c) *Regulatory revisions are required to address several issues unrelated to requirements for bioaccumulation* *testing of the suspended particulate phase.*

EPA received several comments from the regulated community advocating a variety of amendments to the ocean dumping regulations. Some of the issues raised by those commenters were requests for: (1) Specific deadlines for EPA/Corps review of permit applications; (2) revised definitions in the regulations that would expand the present language for such terms as "trace contaminant," "benthic organisms," "bioassay," and "bioaccumulation;" (3) use of a single benthic species for solid phase bioaccumulation tests; (4) development of specific regulatory provisions to address capping of dredged material; and (5) revisions to regional guidance manuals, to include specific information on such factors as appropriate test temperatures, and sediment renewal rates.

These comments raise issues that are beyond the scope of today's rulemaking. The Agency is currently preparing a proposal that will include more comprehensive revisions to the ocean dumping regulations, particularly with respect to the disposal of dredged material. The Agency will consider the suggestions while preparing that proposal.

For detailed responses to the full comments as submitted, see the response to comments document in the rulemaking record.

B. Conclusion

Several commenters who supported the Agency's clarification of the regulations urged the Agency not to take final action adding the footnotes to 40 CFR 227.6(c) and 40 CFR 227.27(b) as proposed. Even though EPA believes the addition of the footnotes would adequately clarify that bioaccumulation testing of the suspended particulate phase is not required, the Agency agrees that the second option described in the May 20, 1994, proposal (the deletion of language from 40 CFR 227.6(c)(2), and the addition of language to 40 CFR 227.27(b), as proposed) would result in greater clarity and ensure that there is no ambiguity on this issue. Accordingly, the Agency has taken final action implementing the second option proposed and deleting the footnotes that were added to 40 CFR 227.6(c) and 40 CFR 227.27(b) by the interim final rule.

Supporting Documentation

A. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is "significant", and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to lead to a rule that may:

(1) Have an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations, of recipients thereof;

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

This Rule clarifies the Agency's long-standing interpretation of the regulations and does not change existing practice or impose economic burdens. Thus, it has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866, and therefore is not subject to OMB review.

B. Paperwork Reduction Act

The Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, is intended to minimize the reporting and record-keeping burden on the regulated community, as well as to minimize the cost of Federal information collection and dissemination. In general, the Act requires that information requests and record-keeping requirements affecting ten or more non-Federal respondents be approved by the Office of Management and Budget. Since today's rule would not establish or modify any information or record-keeping requirements, it is not subject to the requirements of the Paperwork Reduction Act.

C. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, EPA must prepare a Regulatory Flexibility Analysis for regulations having a significant impact on a substantial number of small entities. The RFA recognizes three kinds of small entities, and defines them as follows:

(1) Small governmental jurisdictions—any government of a district with a population of less than 50,000.

(2) Small business—any business which is independently owned and operated and not dominant in its field, as defined by the Small Business Administration regulations under the Small Business Act.

(3) Small organization—any not-for-profit enterprise that is independently owned and operated and not dominant in its field.

As discussed above in the discussion of Executive Order 12866, today's final rule is not a significant regulatory action. Accordingly, EPA has determined that today's rule would not have a significant impact on a substantial number of small entities, and that a Regulatory Flexibility Analysis therefore is unnecessary.

List of Subjects in 40 CFR Part 227

Environmental protection, Dredged material, Ocean dumping, Testing requirements, Water pollution control.

Dated: October 11, 1994.

Carol M. Browner,

Administrator.

For the reasons set out in this preamble, part 227 of title 40 of the Code of Federal Regulations is amended as follows:

PART 227—[AMENDED]

1. The authority citation for part 227 continues to read as follows:

Authority: 33 U.S.C. 1412 and 1418.

§ 227.6 [Amended]

2. Section 227.6(c)(2) is amended by removing from the first sentence the words "including bioaccumulation" removing from the third sentence the words "either" and "or to bioaccumulation", and by removing Footnote 1 at the end thereof.

§ 227.27 [Amended]

3. Section 227.27(b) is amended by adding between the first and second sentence thereof the following additional sentence: "Suspended particulate phase bioaccumulation testing is not required", and by removing Footnote 2 at the end thereof.

[FR Doc. 94-25744 Filed 10-17-94; 8:45 am]

BILLING CODE 6560-50-P

Tuesday
October 18, 1994

Part IX

Department of the Interior

Bureau of Indian Affairs

Tribal-State Compacts Approval; Class III (Casino) Gambling; Umatilla Indian Reservation Confederated Tribes, Oregon; Notice

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Indian Gaming; Notice

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Amendment to Approved Tribal-State Compact.

SUMMARY: Pursuant to 25 U.S.C. 2710, of the Indian Gaming Regulatory Act of 1988 (Pub. L. 100–497), the Secretary of the Interior shall publish, in the **Federal Register**, notice of approved Amendments to Tribal-State Compacts for the purpose of engaging in Class III (casino) gambling on Indian reservations. The Assistant Secretary—Indian Affairs, Department of the Interior, through her delegated authority, has approved the Confederated Tribes of the Umatilla Indian Reservation and the State of Oregon Gaming Compact, which was executed on August 17, 1994.

DATES: This action is effective October 18, 1994.

FOR FURTHER INFORMATION CONTACT: Nancy Pierskalla, Acting Director, Indian Gaming Management Staff, Bureau of Indian Affairs, Washington, D.C. 20240, (202) 219–4068.

Dated: October 6, 1994.

Ada E. Deer,

Assistant Secretary—Indian Affairs.

[FR Doc. 94-25705 Filed 10–17–94; 8:45 am]

BILLING CODE 4310-02-U