Environment

The Coast Guard considered the environmental impact of this proposal and concludes that under § 2.B.2.C of Commandant Instruction M16475.1B, this proposal is an action to protect public safety and is categorically excluded from further environmental documentation. A Categorical Exclusion Determination will be made available in the docket.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

Final Regulation

For the reasons set out in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

Part 165—[AMENDED]

1 The authority citation for part 165 continues to read as follows:

Authority: 33 U S.C. 1231, 50 U S.C. 191, 33 CFR 1.05–1(g), 6.04–1 6.04–6 and 160.5, 49 CFR 1 46.

2. A temporary section 165 T01–052 is added to read as follows:

§ 165.T01–052 Safety Zone: Onset, MA. Fire Department Centennial.

Celebration

(a) *Location.* The following area is a safety zone: LL WATERS OF Onset Harbor, MA., from the Shell Point Beach south to buoy C "1" then southwest to a danger buoy at position 41 degrees 44.13' North and 70 degrees 39.83' West then northwest to the mouth of Sunset Cove.

(b) *Effective Dates.* This section becomes effective at 9 p.m. on July 9, 1994. It terminates at 10 p.m. on July 9, 1994, unless terminated sooner by the Captain of the Port. In the event of inclement weather, this section will be in effect on the rain date of July 10, 1994 at the same times.

(c) *Regulations.*

(1) While this safety zone is in effect, no vessel traffic will be allowed into or out of Sunset Cove unless authorized by the COTP or the COTP representative on-scene.

(2) The general regulations governing safety zones contained in 33 CFR 165.23 apply

Dated: May 24, 1994.

H.D. Robinson,

Captain, U.S. Coast Guard, Captain of the Port, Providence, RI.

[FR Doc. 94–13802 Filed 6–6–94; 8:45 am]

BILLING CODE 4910–14–M

33 CFR Part 165

[CGD01–94–049]

RIN 2115–AA97

Safety Zone; Onset, MA Fireworks Display

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone in Onset Harbor, Onset, MA, on July 2, 1994 during the Onset Fire Department Centennial display. While this safety zone is in effect, no vessel traffic will be allowed into or out of Sunset Cove. This safety zone is necessary to protect pleasure craft and personnel aboard these vessels from injury due to potential hazards associated with the fireworks.

EFFECTIVE DATES: This regulation is effective between the hours of 9 p.m. and 10 p.m. on July 2, 1994. In the event of inclement weather, the regulation will be in effect on the rain date of July 3, 1994 at the same times.

FOR FURTHER INFORMATION CONTACT: LT Eric Washburn, Marine Safety Field Office Cape Cod, (508) 968–6556.

SUPPLEMENTARY INFORMATION:

Drafting Information

The principal persons involved in drafting this document are LT E.A. Washburn, Project Manager, and LCDR J.D. Stieb, Project Counsel, First District Legal Office.

Regulatory History

Pursuant to 5 U.S.C. 553, a notice of proposed rulemaking was not published for this regulation and good cause exists for making it effective in less than 30 days after **Federal Register** publication. Due to the date when this office received the application, there was not sufficient time to publish proposed rules in advance of the event. Publishing a NPRM and delaying the event would be contrary to the public interest since the fireworks display is for the celebration of the Fourth of July holiday weekend.

Background and Purpose

On July 2, 1994, the town of Onset, Massachusetts, plans to sponsor an Onset Fire Department Centennial Fireworks display between the hours of 9 p.m. and 10 p.m. The fireworks will be launched from shore at the town beach on Shell Point. Approximately 200 spectator boats are expected to attend this event.

A safety zone is needed to prohibit spectator vessels from transiting or anchoring in the area over which the fireworks will be launched. The safety zone will include all waters from the Shell Point Beach south to buoy C "1" then southwest to a danger buoy at position 41 degrees 44.13' North and 70 degrees 39.83' West then northwest to the mouth of Sunset Cove, between the hours of 9 p.m.and 10 p.m. on July 2, 1994. While this safety zone is in effect, no vessel traffic will be allowed into or out of Sunset Cove.

Regulatory Evaluation

This proposal is not a significant regulatory action under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that order It has been exempted from review by the Office of Management and Budget under that order. It is not significant under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040; February 26, 1979). The Coast Guard expects the economic impact of this proposal to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies of DOT is unnecessary. These regulations will be in effect for only a short period, specifically for one hour on one day The entities most likely to be affected are pleasure craft wishing to view the fireworks from the water. These vessels will still be able to view the fireworks from the water but will be required to do so at a distance more than 300 yards from the staging area, which will not cause them undue hardship. The effect on commercial traffic is negligible due to the minimal amount of commercial vessel traffic in that area.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), the Coast Guard must consider whether this proposal will have a significant economic impact on a substantial number of small entities. "Small entities" include independently owned and operated small businesses that are not dominant in their field and that otherwise qualify as "small business concerns" under section 3 of the Small Business Act (15 U.S.C. 632). For the reasons outlined in the Regulatory Evaluation, the Coast Guard expects the impact to be minimal on all entities. Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this proposal, if adopted, will not have a significant economic impact on a substantial number of small entities.

Collection of Information

This proposal contains no collection of information requirements under the

Paperwork Reduction Act (44 U.S.C. 3501).

Federalism

The Coast Guard has analyzed this proposal in accordance with the principles and criteria contained in Executive Order 12612 and has determined that this proposal does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environment

The Coast Guard considered the environmental impact of this proposal and concludes that under § 2.B.2.C of Commandant Instruction M16475.1B, this proposal is an action to protect public safety and is categorically excluded from further environmental documentation. A Categorical Exclusion Determination will be made available in the docket.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

Final Regulation

For the reasons set out in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—[AMENDED]

1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231, 50 U.S.C. 191, 33 CFR 1.05–1(g), 6.04–1, 6.04–6 and 160.5; 49 CFR 1.46.

2. A temporary section 165.T01–049 is added to read as follows:

§ 165.T01–049 Safety Zone: Onset, MA. Fireworks Display.

(a) *Location.* The following area is a safety zone: All waters of Onset Harbor, MA., from the Shell Point Beach south to buoy C "1" then southwest to a danger buoy at position 41 degrees 44.13′ North and 70 degrees 39.83′ West then northwest to the mouth of Sunset Cove.

(b) *Effective date.* This section becomes effective at 9 p.m. on July 2, 1994. It terminates at 10 p.m. on July 2, 1994, unless terminated sooner or by the Captain of the Port. In the event of inclement weather, this section will be in effect on the rain date of July 3, 1994 at the same times.

(c) *Regulations.*

(1) While this safety zone is in effect, no vessel traffic will be allowed into or out of Sunset Cove unless authorized by the COTP or the COTP representative on-scene.

(2) The general regulations governing safety zones contained in 33 CFR 165.23 apply.

Dated: May 24, 1994.

H.D. Robinson,

Captain, U. S. Coast Guard, Captain of the Port, Providence, RI.

[FR Doc. 94–13803 Filed 6–6–94, 8:45 am]

BILLING CODE 4910–14–M

POSTAL SERVICE

39 CFR Part 946

Addition of the Delegate of the Chief Postal Inspector for Disposition of Abandoned Property

AGENCY: United States Postal Service.

ACTION: Final rule.

SUMMARY: This final rule amends Postal Service regulations by making clear that the Chief Postal Inspector can delegate the authority to dispose of abandoned property.

EFFECTIVE DATE: June 7, 1994.

FOR FURTHER INFORMATION CONTACT: Postal Inspector-Attorney Frederick I. Rosenberg, (202) 268–5477.

SUPPLEMENTARY INFORMATION: Postal Service regulations concerning the disposition of stolen mail matter and property acquired by the Postal Inspection Service for use as evidence are published in title 39 of the Code of Federal Regulations (CFR) as part 946. Section 946.11, disposition of property declared abandoned, is amended to authorize the Chief Postal Inspector to delegate authority to approve the sharing of property declared abandoned with federal, state, or local law enforcement agencies. This will make section 946.11 consistent with the other sections of part 946.

List of Subjects in 39 CFR Part 946

Claims, Law enforcement, Postal Service.

Accordingly, 39 CFR part 946 is amended as set forth below:

PART 946—RULES OF PROCEDURE RELATING TO THE DISPOSITION OF STOLEN MAIL MATTER AND PROPERTY ACQUIRED BY THE POSTAL INSPECTION SERVICE FOR USE AS EVIDENCE

1. The authority citation for part 946 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 401 (2), (5), (8), 404(a)(7), 2003, 3001.

2. Section 946.11 is revised to read as follows:

§ 946.11 Disposition of property declared abandoned.

Property declared abandoned, including cash, and proceeds from the sale of property subject to this part may be shared by the Postal Inspection Service with federal, state, or local law enforcement agencies. Unless the Chief Postal Inspector determines that cash or the proceeds of the sale of the abandoned property are to be shared with other law enforcement agencies, such cash or proceeds shall be deposited in the Postal Service Fund established by 39 U.S.C. 2003. The authority to make this determination may be delegated by the Chief Postal Inspector.

Stanley F. Mires,

Chief Counsel, Legislative Division.

[FR Doc. 94–13724 Filed 6–6–94, 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 270

[FRL–4892–3]

Extension of Date for Submission of Part A Permit Applications for Facilities Managing Ash From Waste-to-Energy Facilities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of extension of permit application deadline.

SUMMARY: In *City of Chicago* v *Environmental Defense Fund, Inc.*, No 92–1639 (____ U.S. ____, decided May 2, 1994), the Supreme Court held that ash generated by certain municipal waste-to-energy facilities that burn household wastes alone or in combination with nonhazardous wastes from industrial and commercial sources is not exempt from regulation as a hazardous waste under the Resource Conservation and Recovery Act (RCRA). When the decision takes effect, persons who generate such ash will need to determine whether it is a hazardous waste under Subtitle C of RCRA. Ash that is hazardous will need to be managed in compliance with all applicable hazardous waste regulations.

In response to the Court's decision, EPA is today announcing that there has been substantial confusion as to when the owners and operators of facilities managing such ash were required to file applications for RCRA hazardous waste permits. EPA is exercising its authority under 40 CFR 270.10(e)(2) to extend the deadline for filing permit applications

EPA also is announcing today that it considers ash from these combustion facilities to be a newly identified waste for purposes of the land disposal restrictions under sections 3004(d)-(m) of RCRA. Current land disposal restrictions do not apply. Rather, the Agency has a duty to promulgate ash-specific restrictions 6 months from the date of today's document. All other hazardous waste regulations will apply to hazardous ash when the decision takes effect.

EFFECTIVE DATE: June 7, 1994.

ADDRESSES: Docket Clerk, OSW (OS–305), Docket No. F–94–XAPN-FFFFF, U.S Environmental Protection Agency Headquarters, 401 M Street SW., Washington, D.C. 20460. The public docket is located in M2616 at EPA Headquarters and is available for viewing from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding Federal holidays. Appointments may be made by calling (202) 260–9327. Copies cost $0.15/page. Charges under $25.00 are waived.

FOR FURTHER INFORMATION CONTACT: For general information, contact the RCRA/Superfund Hotline, Office of Solid Waste, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC, 20460, (800) 424–9346, TDD (800) 553–7672 (hearing impaired); in the Washington, DC metropolitan area the number is (703) 920–9810, TDD (703) 486–3323.

For more detailed information on specific aspects of this Notice, contact Scott Ellinger, Office of Solid Waste (5306), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, (202) 260–1099.

SUPPLEMENTARY INFORMATION:

Preamble Outline

I. Authority

These actions interpreting the hazardous waste regulations in 40 CFR parts 260–271 are being taken under the authority of sections 2002, 3004, 3005 and 3006 of the Solid Waste Disposal Act of 1970 as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6912, 6924, 6925, and 6926).

II. Background

A. Overview

On May 2, 1994 the Supreme Court issued an opinion interpreting Section 3001(i) of the Resource Conservation and Recovery Act (RCRA), 42 USC 6921(i). *City of Chicago* v. *EDF*, No. 92–1639 (____ U.S. ____, decided May 2, 1994). The Court held that this provision does not exempt ash generated at resource recovery facilities burning household wastes and nonhazardous commercial wastes (hereafter "waste-to-energy facilities") from the hazardous waste requirements of Subtitle C of RCRA. The Court also held that Section 3001(i) terminated a 1980 regulatory exemption for ash generated at waste-to-energy facilities that burn only household wastes. The opinion requires EPA to revise its prior position that both types of ash were exempt from hazardous waste regulation. It abruptly ends nearly a decade of controversy over the regulatory status of ash from these facilities.

As a result of this decision, ash from waste-to-energy facilities has the same status as other solid wastes. Persons who generate such wastes must determine whether that waste is a hazardous waste under EPA's hazardous waste identification rules at 40 CFR part 261. Since EPA has not listed ash as a hazardous waste, generators must determine whether ash exhibits any of the characteristics of hazardous waste at 40 CFR 261.21–.24. Ash that exhibits a characteristic must be managed in compliance with Subtitle C requirements.

As explained below, the regulatory status of ash has been the subject of confusion for several years. EPA's action today responds by giving owners and operators of facilities that manage ash that is determined to be characteristically hazardous a reasonable opportunity to obtain interim status by applying for a RCRA hazardous waste permit. Without this opportunity, persons managing hazardous ash would be out of compliance with RCRA's permit requirements and face potentially significant civil and criminal penalties.

In this notice EPA is also announcing that it will consider ash that is characteristically hazardous to be a "newly identified" waste under the land disposal restrictions. EPA needs time to determine what treatment standards would be appropriate. By considering such ash to be a newly identified waste under the land disposal restrictions, EPA will have an opportunity to evaluate the efficacy of the existing standards and, if necessary, develop new ash-specific standards.

EPA notes that all other applicable Subtitle C regulations will apply to ash on the date that the Court's decision takes effect. See the discussion of state authorization below for assistance in determining when the Court's decision will affect particular facilities. The Agency interprets the Court's decision to cut-off the exemption for waste management at waste-to-energy facilities at the point that ash is generated. Subsequent management of hazardous ash on-site is subject to regulation under Subtitle C.

B. Nature of Ash From Waste-to-Energy Facilities

Combustion of municipal solid waste, particularly through waste-to-energy facilities, can be an important component of a local government's waste management practices. As of 1990, approximately 196 million tons of municipal solid waste were generated annually in the U.S., 16 percent of which (32 million tons) was combusted. The states with the greatest municipal waste combustion capacity are Florida, New York and Massachusetts. There are approximately 150 municipal waste combustors in the U.S., 80 percent of which are waste-to-energy facilities. The remaining 20 percent incinerate waste without recovering energy.

Approximately 25 percent (by weight) of the waste that is combusted remains as ash, amounting to around eight million tons of municipal waste combustor ash generated annually. Generally, these combustion facilities generate two basic types of ash—bottom ash and air pollution control residuals, commonly referred to as "fly ash." Bottom ash collects at the bottom of the combustion unit and comprises approximately 75–80% of the total ash. Fly ash collects in the air pollution control devices that "clean" the gases produced during the combustion of the waste and comprises around 20–25% of the total. Based on several analytical studies, fly ash generally contains the highest concentrations of inorganic chemical constituents.

Studies also show that ash (usually fly ash) has sometimes exhibited EPA's

Toxicity Characteristic ("TC"). Typically, ash that "fails" the TC leaches lead or cadmium above levels of concern. Because a number of factors can influence whether ash passes or fails the TC (e.g., the nature of the incoming waste stream, the type of combustion unit, the nature of the air pollution control device and the ash sampling location), EPA cannot predict an overall failure rate for ash from municipal waste combustors.

III. Extension of Permit Deadline Due to Substantial Confusion

A. Permit Requirements and Deadline Extensions

RCRA requires any person treating, storing or disposing of hazardous waste to obtain a permit or a pre-permit authorization called "interim status." Section 3005; 40 CFR 270.1(b). To qualify for interim status a facility must meet criteria set out in RCRA section 3005(e), which include filing a permit application.

When EPA promulgates RCRA rules subjecting a new group of facilities to hazardous waste permitting requirements, the permit regulations provide 6 months for the filing of part A of the permit application. 40 CFR 270.10 (e). EPA routinely publishes in the **Federal Register** the specific permit deadline for persons regulated by the new rules. See 270.10 (e), note. Section 270.10(e)(2) provides that EPA can extend the date for permit applications by **Federal Register** notice if it finds that there has been "substantial confusion" as to whether the owner or operator was required to file a permit application and the confusion was due to ambiguities in EPA's regulations. For the reasons explained below, EPA today is exercising its discretion to extend the submission dates for part A permit applications for facilities treating, storing and disposing of ash from waste-to-energy facilities that exhibits a characteristic of hazardous waste.

B. Regulatory History of Waste-to-Energy Ash

In 1980, EPA promulgated a rule exempting household wastes from all RCRA requirements for hazardous wastes. 40 CFR 261.4(b)(1). EPA interpreted this exemption to extend to residuals from the treatment of household wastes, including ash from the combustion of household wastes. The exemption, however, did not address ash from the combustion of household wastes combined with nonhazardous commercial and industrial wastes.

In 1984 Congress added to RCRA a new Section 3001(i), entitled "Clarification of Household Waste Exemption." This provision addressed waste-to-energy facilities burning household wastes and nonhazardous commercial and industrial wastes to produce energy. In July 1985, EPA promulgated a rule that codified this provision. In the preamble accompanying this rule, EPA announced that it interpreted the statute and the rule to exempt the facilities—but not their ash—from Subtitle C, 50 FR 28702, 28725–26 (July 15, 1985). EPA did not publish any statement informing owners of facilities managing ash of any deadline for obtaining RCRA permits.

In the late 1980's, various EPA officials began taking the position that Section 3001(i) could be interpreted to exempt ash from Subtitle C. They also expressed the opinion that ash could be managed safely in nonhazardous waste disposal facilities. The Environmental Defense Fund (EDF) filed citizen suits in two separate U.S. District Courts to enforce the 1985 interpretation of the statute against two specific waste-to-energy facilities. *EDF* v. *City of Chicago*, 727 F. Supp. 419 (N.D. Ill. 1989); *EDF* v. *Wheelabrator Technologies, Inc.*, 725 F. Supp. 758 (S.D.N.Y. 1989). Both courts held that Section 3001(i) exempted ash. On appeal, the Second Circuit ruled in favor of the exemption, but the Seventh Circuit reversed, finding that the statute did not exempt ash. *EDF* v. *City of Chicago*, 948 F.2d 345 (7th Cir. 1991); *EDF* v. *Wheelabrator Technologies, Inc.*, 931 F.2d 211 (2d Cir. 1991), cert. denied 112 S.Ct. 453 (1991). The City of Chicago, which operated the facility adversely affected by the 7th Circuit's decision, appealed to the Supreme Court.

Also in the late 1980's, Congress considered a number of bills that would have explicitly exempted ash from Subtitle C requirements. In November 1990, Congress enacted an uncodified amendment to the Clean Air Act prohibiting EPA from regulating ash as a hazardous waste under Section 3001 of RCRA for a period of two years. Clean Air Act Amendments of 1990, Pub.L. No. 101–549, 104 Stat. 2399.

In response to these events, a number of states authorized to implement Subtitle C programs in lieu of EPA began treating ash from waste-to-energy facilities as exempt. Some interpreted their own regulations virtually identical to Section 3001(i). Others promulgated specific ash exemptions. Many of these specific exemptions were accompanied by detailed regulations for the management of ash as a nonhazardous waste. Consistent with the evolving federal position on the regulation of ash, EPA took no action affecting these state programs.

Finally, in September 1992, just before the expiration of the Clean Air Act ash "moratorium," EPA Administrator William Reilly signed a memorandum announcing that the Agency now interpreted Section 3001(i) to exempt ash from waste-to-energy facilities burning household wastes and nonhazardous wastes from Subtitle C requirements. This memorandum also announced that EPA believed that ash could be disposed of safely in landfills meeting new standards for municipal solid waste facilities promulgated in 1991 and codified at 40 CFR part 258.

C. Findings

EPA finds that the events above have created substantial confusion about the status of ash under the rule EPA wrote to codify the exemption in Section 3001(i). Although EPA's 1980 and 1985 preambles indicated that there was no exemption for ash from combined sources, later events suggested that ash was not regulated. Persons may have relied on the two District Court decisions, the 1990 ash moratorium, or the 1992 Reilly memorandum to conclude that Section 3001(i) and 40 CFR 261.4(b)(2) were ambiguous about the status of ash from combined sources. They could quite reasonably have concluded that they could manage ash from combined sources without obtaining hazardous waste permits. If EPA did not act to extend the Part A deadline, however, these facilities would be unable to obtain interim status because the Court's action is not a statutory or regulatory change establishing a new period for obtaining interim status under RCRA section 3005(e). Such facilities would have to cease handling hazardous ash until EPA took final action on their completed permit applications—a process that typically takes several years.

Section 270.10(e)(2) was written to prevent such harsh results. EPA is today invoking its authority to provide a reasonable opportunity for persons managing combined ash to satisfy RCRA's permitting requirements. Applying the substantial confusion approach to facilities managing this ash is consistent with previous precedents. See, e.g., 52 FR 34779–81 (Sept. 15, 1987) (notice of substantial confusion for big city cement kilns).

Persons handling ash from the combustion of 100% household waste could have relied with even greater justification on the Agency's 1980 interpretation of the household waste

exemption to handle such waste without a hazardous waste permit. They are also entitled to an opportunity to satisfy the permit requirement. Since they are becoming subject to Subtitle C without the enactment of a statute or the promulgation of a rule, they do not technically qualify for the normal 6 months provided for persons newly subject to Subtitle C regulation. See section 40 CFR 270.10(e)(1). Section 270.10(e)(1)(ii), which provides 30 days for filing a Part A after a facility "first becomes subject to the [Subtitle C] standards" could apply to these facilities. EPA, however, interprets this provision to apply to facilities whose own actions subject them to Subtitle C rather than to facilities affected by regulatory events. (An example would be a generator that exceeded the small quantity generator monthly waste generation limit.) See generally 45 FR 76630, 76633 (November 19, 1980). Consequently, EPA believes the "substantial confusion" approach is also appropriate for persons who manage 100% household waste. Moreover, it reduces confusion by establishing a single deadline for both types of ash from waste-to-energy facilities.

Accordingly, EPA today establishes that facilities that are handling hazardous ash from waste-to-energy facilities that wish to continue to do so may file Part A applications anytime before December 7, 1994. See the discussion of state authorization below for guidance on where to request and submit an application.

Another statutory requirement for obtaining interim status is the filing of any notification required under section 3010(a) of RCRA. Under section 3010, EPA may require all persons that handle hazardous wastes—including generators and transporters—to notify EPA of the location of their activities within 90 days of the promulgation of a new rule identifying additional characteristics or listing a waste. This provision does not literally apply because EPA is not promulgating or revising a rule. However, failure to satisfy it could cloud a facility's claim that it obtained interim status. In order to prevent this result, EPA is exercising its discretion to waive filing of section 3010 notifications by facilities managing ash from resource recovery facilities. EPA notes that persons who manage ash will be required to obtain EPA identification numbers in the near future. This process will furnish the information that the notifications would have provided.

IV. Land Disposal Restrictions

The RCRA land disposal restrictions (LDRs) prohibit land disposal of hazardous wastes unless those wastes are first treated to substantially reduce toxicity or mobility of the hazardous constituents in the wastes so as to minimize threats to human health and the environment. RCRA sections 3004 (d), (e), (g), (m). The restrictions specify dates on which particular groups of wastes are prohibited from land disposal unless they are treated. RCRA sections 3004 (d), (e), (g). For wastes which are "newly identified or listed" after November 8, 1984, EPA must promulgate treatment standards within 6 months of the date of identification or listing. RCRA section 3004(g)(4).

On June 1, 1990, EPA promulgated treatment standards for constituents in wastes identified as hazardous under the "EP toxicity" characteristic, the predecessor to the current TC. 55 FR 22520. The treatment standards for metal constituents are levels identical to the EP toxicity standards themselves. 40 CFR 268.41. (EPA notes that it must revise these standards under *Chemical Waste Management, Inc.* v. *EPA*, 976 F.2d 2 (D.C. Cir. 1992) (the "Third Third" decision).) Persons generating wastes that fail the current TC test must determine whether their TC wastes exceed these EP levels, and, if they do, comply with the treatment standards.

EPA, however, believes that ash from waste-to-energy facilities is "newly identified" for purposes of the land disposal restrictions. Although technically ash would be identified as hazardous under the existing TC rather than a new characteristic rule, the Supreme Court's decision is bringing ash into the Subtitle C system for the first time (for ash from 100% household waste) or returning it to the system after a period of uncertainty and actual legislative exemption (for ash from combined sources).

EPA dealt with a similar situation in a 1990 LDR rule. In that notice, EPA interpreted section 3004(g)(4) for mineral processing wastes brought into RCRA by a decision of the U.S. Court of Appeals for the District of Columbia Circuit holding that EPA had improperly considered them to be exempt from Subtitle C under the statute's "Bevill amendment". (The mineral processing wastes also sometimes exceed the TC and EP toxicity levels for metals.) In that notice, EPA explained that section 3004(g)(4) is ambiguous as to whether it applies to wastes brought into the system after 1984 due to regulatory reinterpretation. See 55 FR 22667 (June 1, 1990). EPA determined that it was preferable to read section 3004(g)(4) to include such wastes because that reading was more consistent with the policy goals that prompted Congress to establish a separate schedule for new wastes in the first place: the need to study such wastes separately to set appropriate treatment standards, and the established priority of subjecting older wastes to the land ban first. *Id.*

EPA also noted that, before it developed specific treatment standards for the newly-identified mineral processing wastes, the wastes could be regulated under existing treatment standards for EP toxicity metals. EPA determined that it would not be appropriate to apply those treatment standards, however, because it had not analyzed and tested the wastes to determine whether those standards would meet the statuary requirements of reduced toxicity and mobility. *Id.*

Ash from 100% household waste clearly fits this precedent. It, too, is being regulated under Subtitle C for the first time as the result of a court decision narrowing an Agency interpretation of an existing Subtitle C exemption. Further, as explained in more detail below, EPA needs to determine whether exiting EP toxicity treatment standards will meet land treatment standard requirements for this ash. Accordingly, EPA interprets section 3004(g)(4) to apply to this ash. EPA will not apply the current treatment standards for the EP toxicity characteristic to ash which is identified as hazardous under the TC. Section 3004(g)(4) will require EPA to promulgate treatment standards for this ash within 6 months of the date of this notice.

Ash from combined sources is not entering Subtitle C jurisdiction for the first time—it was not exempt under EPA's original household waste exemption, and was not originally viewed as exempt under section 3001(i). Nevertheless, EPA believes that it would be appropriate and consistent with the goals of the LDRs to view it as a newly identified waste under section 3004(g)(4). Section 3004(g)(4) is ambiguous as to wastes reentering Subtitle C after several years of confusion and two years of clear statutory exemption. Moreover, EPA has not studied ash to determine what treatment standards would meet the requirements of Section 3004(m) of RCRA, and in fact is reviewing what the appropriate treatment standards are for all of the wastes with metal constituents exhibiting the Toxicity Characteristic. 58 FR 48116 (Sept. 14, 1993). Congress priority scheme for land disposal restrictions directs EPA to promulgate standards for post-1984 wastes in chronological order. If EPA were required to immediately determine

whether the current EP toxicity standards for ash were appropriate, it would have to postpone work on treatment standards for new listings and a new characteristic promulgated several years prior to the *City of Chicago* decision. Additionally, EPA needs time to determine whether current treatment standards are appropriate for ash.

For these reasons, EPA will also consider ash from combined sources to be newly identified for purposes of the land disposal restrictions. Furthermore, it will not apply the existing treatment standards for EP toxicity. As a result of this decision, Section 3004(g)(4) requires EPA to promulgate treatment standards for combined ash within 6 months of the date of this notice.

V. Other Subtitle C Requirements

EPA is not extending compliance dates for any other aspect of the hazardous waste regulations. Facilities generating, transporting, or treating, storing or disposing of hazardous ash must, as a matter of federal law, comply with the substantive requirements of 40 CFR parts 260–270 on the effective date of the Court's decision. (See the discussion of state authorization below to determine when the decision takes effect under authorized state RCRA programs.) EPA reminds generators, transporters and treatment, storage and disposal facilities that they must promptly obtain EPA identification numbers. See, e.g., 40 CFR 262.12. EPA intends to issue an implementation strategy in the near future that will provide additional information on complying with other RCRA requirements.

To facilitate compliance with Subtitle C, EPA has developed draft guidance for the sampling of ash from waste-to-energy facilities. EPA has already released this draft. Interested parties may obtain a copy by calling the RCRA/Superfund Hotline, Office of Solid Waste, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (800) 424–9346, TDD (800) 553–7672 (hearing impaired); in the Washington, DC metropolitan area, the number is (703) 920–9810, TDD (703) 486–3323. EPA soon will publish a separate **Federal Register** notice requesting comment on the draft.

EPA notes that by following certain waste management practices, some facilities may not need interim status or a RCRA permit. For example, under federal regulations, generators of hazardous ash may accumulate and treat ash onsite in tanks or containers for up to 90 days without obtaining hazardous waste permits under 40 CFR 262.34. See also 51 FR 10186 (May 24, 1986.)

VI. State Authorization and Implementation

A. Permit Deadline Extension

1. General Principles

Section 3006(b) of RCRA allows states to obtain authorization to implement state hazardous waste programs in lieu of federal law. To obtain authorization, a state must show that its program is equivalent to the Federal program. EPA interprets this requirement to mean that state laws and rules must be no less stringent than federal requirements. Section 3009, however, expressly allows states the option of establishing more stringent requirements.

Forty-eight states and territories are now authorized for all of the RCRA requirements established prior to November 1984 (the RCRA "base program"). In these states, the state's definition of hazardous waste—including any exemptions—operates in lieu of the federal definition. Changes to the federal definition do not automatically revise independently promulgated state regulations. Rather, the states are required to revise their programs and submit the revisions to EPA for approval. The revision does not take effect under federal law until EPA approves the revision. As explained below, in a few of these states, the Court's decision may not take effect on its federal law effective date. EPA believes that there are very few states in this category.

Where the Court's decision does eliminate an exemption for ash, the hazardous waste characteristic most likely to apply to ash is the TC as determined by the Toxicity Characteristic Leaching Procedure ("TCLP") promulgated by EPA in 1990. This rule was promulgated under one of the Hazardous and Solid Waste Amendments of 1984 ("HSWA"). Section 3006(g) provides that rules promulgated under HSWA take effect in all states at the same time, displacing state rules unless the state rules are more stringent. EPA implements the new HSWA rule until the state adopts an equivalent provision, submits it to EPA, and obtains EPA approval. 50 FR 28728–30. (July 15, 1985). The TC and TCLP displaced the 1980 EP toxicity characteristic and leaching procedure. The EP, however, also remains in effect as a matter of state law in many states.

Sixteen states are now authorized for the TC and TCLP (see list in Table 1). EPA continues to implement the TC and the TCLP in the remaining states. EPA takes the position that, where it implements the TC, it uses federal permitting procedures. Consequently, EPA will implement the permit deadline extension announced today in all states where it implements the TC. Owners and operators in those states would file Part A applications with EPA Regional Offices. (See list in Table 2.) Where a state has been authorized to implement the TC, however, state permit procedures are in effect. Today's deadline extension is not in effect in those states. Moreover, since the extension makes permit requirements less stringent, states are not required to adopt equivalent extensions. If any of these states chooses to provide equivalent relief, owners and operators would file permit applications with the state agency.

To summarize, in order to determine the impact of today's action, persons handling ash must determine (1) the impact of the Court's decision on the RCRA program in each state (primarily an issue of whether a state's base program contains an *authorized* exemption for ash) and (2) whether the entity authorized to implement the TC and TCLP has extended its permit deadline.

2. Application of Principles: Status of Court Decision and Permit Exemption in Individual States

a. Unauthorized states. In the eight states and territories where EPA implements all portions of the RCRA program (see Table 1 for a list of these states and territories), including the base program, the Court's decision will eliminate EPA's interpretative ash exemption on the opinion's effective date. Since EPA implements the TC, the permit deadline extension will take effect today. Owners and operators of facilities who wish to obtain interim status to manage hazardous ash may file Part A applications with EPA Regional Offices. (See list in Table 2.)

b. Authorized states. The issues in authorized states are very complex. Table 3 summarizes the status of the decision and the permit deadline for major categories of states. This text presents a few explanatory notes.

Table 1.—List of States and Territories Without RCRA Subtitle C Base Program Authorization

Wyoming
Hawaii
Alaska
Iowa
Puerto Rico
Virgin Islands
American Samoa
Northern Mariana Islands

List of States and Territories Authorized for the Toxicity Characteristic

Alabama
Florida
Georgia
Kentucky
Mississippi
North Carolina
South Carolina
Tennessee
Minnesota
Arkansas
Texas
Arizona
California
Guam
Nevada
Idaho

Table 2.—U.S. EPA Regional Contacts for the Part A Permit Application

U.S. EPA Region 1, RCRA Support Section, JFK Federal Building, Boston, MA 02203–2211, (617) 573–5750, CT, ME, MA, NH, RI, VT

U.S. EPA Region 2, Air and Waste Management Division, Hazardous Waste Facilities Branch, 26 Federal Plaza, room 1037, New York, NY 10278, (212) 264–0504, NJ, NY, PR, VI

U.S. EPA Region 3, RCRA Programs Branch (3HW50), 841 Chestnut Street, Philadelphia, PA 19107, (215) 597–8116 (PA, DC), (215) 597–3884 (VA, WV, DE, MD), DE, DC, MD, PA, VA, WV

U.S. EPA Region 4, Hazardous Waste Management Division, RCRA Permitting Section, 345 Courtland Street, NE, Atlanta, GA 30365, (404) 347–3433, AL, FL, GA, KY, MS, NC, SC, TN

U.S. EPA Region 5, RCRA Activities, P.O. Box A3587, Chicago, IL 60690 (Call State Offices), IL, IN, MI, MN, OH, WI

U.S. EPA Region 6, Hazardous Waste Management Division, First Interstate Bank Tower, 1445 Ross Avenue, Suite 1200, Dallas, TX 75202–2733, (214) 655–8541, AR, LA, NM, OK, TX

U.S. EPA Region 7, RCRA Branch, Permitting Section, 726 Minnesota Avenue, Attn: WSTM/RCRA/PRMT, Kansas City, KS 66101, (913) 551–7654, IA, KN, MO, NE

U.S. EPA Region 8, Hazardous Waste Management Division, 999 18th Street, Suite 500, Denver, CO 80202–2405, (303) 294–1361, CO, MT, ND, SD, UT, WY

U.S. EPA Region 9, Hazardous Waste Management Division, Attn: H–2–3, 75 Hawthorne Street, San Francisco, CA 94105, (415) 744–2098, AZ, CA, HI, NV, AS, GU, No. Mariana Is.

U.S. EPA Region 10, Waste Management Branch, HW–105, 1200 Sixth Avenue, Seattle, WA 98101, (206) 553–0151, AK, ID, OR, WA

TABLE 3.—PERMIT DEADLINE: IMPLEMENTATION IN AUTHORIZED STATES

State has no ash exemption	State has unauthorized ash exemption	State has authorized ash exemption
TC Authorization: EPA [1]		
1. Court decision in effect	1. Court decision in effect	1. Decision may not be in effect (state law issue).
2. No deadline extension needed	2. Deadline extension in effect	2. Deadline extension not in effect. EPA will extend deadline when it approves program revision.
3. No state program revision needed	3. State must revise state law and inform EPA informally. 4. Owners/operators file notifications and Part A's with EPA Regional Office.	3. State must revise program and submit for review under 40 CFR 271.21(e)(2)(ii). 4. Owners/operators file notifications and Part A's with EPA Regional office.
TC Authorization: State		
1. Court decision in effect	1 Court decision in effect	1. Decision may not be in effect (state law issue).
2. No deadline extension needed	2. Deadline extension not in effect. State may provide equivalent relief.	2. Deadline extension not in effect. State may provide equivalent relief when it eliminates exemption.
3. No state program revision needed	3. State must revise state law and inform EPA informally. 4. Owner/operators file with State if State grants relief.	3. State must revise program and submit for review under 40 CFR 271.21(e)(2)(ii). 4. Owner/operators file with State if State grants relief.

[1] Note: EP toxicity characteristic may still be in effect under state law. States that have ash exemptions may determine whether they want to provide similar relief for EP permitting deadline.

(i) States with no ash exemption.

Since states may maintain more stringent RCRA programs, some states may never have exempted ash from hazardous waste requirements. The *City of Chicago* decision has no impact in these states. No permit deadline extensions are needed.

(ii) States with unauthorized ash exemptions.

EPA knows that, during the years of confusion over the status of ash, some states exempted ash from their Subtitle C programs. Most of these states, nowever, did not submit these provisions to EPA for authorization reviews. Although they arguably may have made the state programs less stringent than the federal program, EPA would have taken no action to force the states to eliminate them.

(A) Effect of court's decision.

Some of these states adopted provisions resembling 3001(i) and interpreted them to exempt ash. Whether the *City of Chicago* decision requires these states to abandon these interpretations is an issue of state law that can be answered authoritatively only by state officials.

Other states promulgated rules under their solid waste authorities that established ash-specific management standards that implicitly—or explicitly—transferred ash management from their hazardous waste programs to their solid waste programs. The status of these provisions is again an issue of state law.

(B) Effect of today's deadline extension.

Since the state never obtained authorization for its exemption for ash, its authorized program still regulates ash as a hazardous waste. The regulated

community, however, could have been confused about the status of ash, so the relief provided by the deadline extension would be appropriate. Whether or not the extension is in effect, however, depends on which entity is authorized to implement the TC. As explained above, where EPA implements the TC, it will apply today's notice. Where states implement the TC, today's notice cannot operate to revise state permit rules. The state would need to determine whether it wanted to provide equivalent relief.

(C) Requirements for program revision.

As a result of the court's decision, states with unauthorized ash exemptions now have state law requirements that are less stringent than the federal Subtitle C program. EPA is today notifying those states that they must revise their laws and regulations to eliminate the less stringent provisions. Although EPA is not today initiating any withdrawals of state programs, it advises states to take timely action to eliminate their ash exemptions. Since these provisions are not part of states' authorized RCRA programs, no Subtitle C program revisions will be necessary. Rather, EPA advises states to notify Regional Offices informally by letter when they have eliminated their exemptions.

(D) Where to file Part A applications.

Where EPA implements the TC, owners and operators must file Part A applications with the appropriate EPA Regional Office.

Where a state that is authorized to implement the TC decides to extend the filing deadline, owners and operators must file with the state hazardous waste agency.

(iii) States with authorized ash exemptions.

EPA may have authorized a few ash exemptions during the late 1980's and early 1990's. EPA has not found any such authorization during a limited review prior to the publication of this emergency notice. Consequently, EPA believes that there are very few states in this category. Nevertheless, in case such states exist, EPA is explaining their obligations.

(A) Effect of court decision.

Whether or not the decision affected the state law or rule that EPA authorized is a state law issue. State officials will need to make that determination. If a state determines that its state provision is still in effect, both the state law and the authorized RCRA program will continue to exempt ash until such time as the state revises its program and obtains EPA approval for its revision.

(B) Effect of today's permit deadline extension.

If ash is still exempt under both state law and the authorized program, no permits are currently required. Today's filing date extension would not take effect. As explained in (D.) below, in some cases EPA will announce an extension when it approves a revision eliminating an ash exemption.

(C) State program revisions.

Where ash exemptions remain in effect, state programs will be less stringent than the federal program. Formal state program revisions, including notice and comment rulemaking, will be required under 40 CFR 271.21(e)(2)(ii). The deadline for these revisions will be July 1, 1995 under 40 CFR 271.21(e)(2)(ii). An additional year is available where states must make statutory changes. 40 CFR 271.21(e)(2)(v).

(D) Where to file Part A applications.

At the time that the state receives EPA authorization for the revision that eliminates its ash exemption, if EPA is still implementing the TC, it will make a finding of substantial confusion and extend the Part A deadline for that state. Owners and operators desiring interim status will need to file applications with the appropriate EPA Regional Office. EPA will not be able to provide this relief where a state is authorized to implement the TC. Those states must determine whether they want to extend permit deadlines. If they do, owners and operators wishing to obtain interim status will need to file applications with the appropriate state agency.

B. Land Disposal Restrictions

The LDRs are HSWA rules initially implemented by EPA. Moreover, EPA has established that it will not delegate its authority to set treatment standards to states. EPA views determinations linked to the need for and scope of treatment standards as similarly nondelegable. This includes today's interpretation that ash from waste-to-energy facilities is a newly identified waste under section 3004(g)(4). This interpretation is effective in all states, including those authorized to implement the delegable portions of the land disposal restrictions.

VII. Good Cause Finding

Section 270.10(e)(2) does not require notice and comment rulemaking for substantial confusion notices. Rather, it simply requires EPA to publish a "notice" in the **Federal Register**. To the extent that this notice is a rulemaking for the purposes of section 553 of the Administrative Procedure Act (APA), EPA believes that it has "good cause" under section 553(b)(3)(B) of the APA to extend the permit application deadline without prior notice and opportunity for comment. First, EPA believes that its determination regarding the existence of regulatory confusion is an "interpretative rule" for which notice and comment is not required under section 553(b)(3)(A) of the APA. It clarifies and explains existing law rather than creating new duties. Moreover, the establishment of a due date for Part A permit applications is a procedural rule also exempt from notice and comment under section 553(b)(3)(A) of the APA. The effect of establishing this new date is that EPA will not take enforcement action for operation without a RCRA permit against a facility that submits its application in compliance with this notice and that meets the other conditions of RCRA section 3005(e). Finally, EPA views the issues of whether confusion existed and whether it was "substantial" as subjects on which comment would not be useful and would not serve the public interest.

EPA's findings concerning the land disposal restrictions are also "interpretative rules" exempt from notice and comment requirements. They provide EPA's views on the scope of section 3004(g)(4) of RCRA. Moreover, EPA would have good cause to eliminate notice and comment even if these determinations are regarded as legislative rules. The land disposal restrictions would take effect for ash approximately 25 days after the Court issued its opinion. It would be impossible for facilities managing ash to come into compliance with the restrictions in that short time. See 55 FR 22521 (June 1, 1990) (Third Third LDR rule—EPA provides 90 days for persons managing wastes subject to new treatment standards to come into compliance.) The Court's decision thus creates an emergency justifying use of the "good cause" exemption under section 553(b)(3)(B) of the APA.

VIII. Regulatory Requirements

A. Executive Order 12866

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a "significant regulatory action" because it involves novel policy issues arising out of legal mandates. However, OMB waived review of this action.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C 601 *et seq.*) requires the Agency to prepare and make available for public comment, a regulatory flexibility analysis that describes the impact of a

proposed or final rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). No regulatory flexibility analysis is required if the Administrator certifies that the rule will not have a significant economic impact on a substantial number of small entities.

The ruling of the Supreme Court in *City of Chicago* v. *Environmental Defense Fund, Inc.* will result in additional costs for waste management facilities and some of those costs will be borne by small entities. The Agency does not have estimates of those costs. Today's rule extends the date by which affected facilities must submit a Part A permit application. This action will lower the costs to small entities that will have to comply with the Court's ruling. Therefore, pursuant to 5 U.S.C. 605b, I certify that this regulation will not have a substantial impact on small entities.

C. Paperwork Reduction Act

The Office of Management and Budget (OMB) has approved the information collection requirements contained in this rule under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* and has assigned OMB control numbers 2050–0009; 2050–0120; 2050–0028; 2050–0034; 2050–0039; 2050–0035 ; 2050–0024.

This collection of information has an estimated average burden per respondent as stated below:

OMB No.	Title	New respondents	Average burden (hours)	Total additional burden (hours)
2050–0009	Part B Permit Application	6	242	1457
2050–0120	General Facility Standards	6	91	547
2050–0028	Notification (for EPA ID)	62	4.35	270
2050–0034	Part A Permit Application	68	72	4903
2050–0039	Hazardous Waste Manifest	12	1.8	22
2050–0035	Generator Standards	62	1.1	68
2050–0024	Biennial Report	62	20	1240

These estimates include time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Chief, Information Policy Branch; EPA; 401 M St., SW. (Mail Code 2136); Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, marked "Attention: Desk Officer for EPA."

Dated: May 27, 1994.

Carol M. Browner,

Administrator

[FR Doc. 94–13668 Filed 6–6–94; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Part 195

[Docket No. PS–121; Amdt. 195–51]

RIN 2137–AB 46

Pressure Testing Older Hazardous Liquid and Carbon Dioxide Pipelines

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Final rule.

SUMMARY: This final rule provides that operators may not transport a hazardous liquid in a steel interstate pipeline constructed before January 8, 1971, a steel interstate offshore gathering line constructed before August 1, 1977, or a steel intrastate pipeline constructed before October 21, 1985, unless the pipeline has been pressure tested hydrostatically according to current standards or operates at 80 percent or less of a qualified prior test or operating pressure. In addition, this final rule creates a comparable requirement for carbon dioxide pipelines constructed before July 12, 1991, except for production field distribution lines in rural areas. The purpose of this final rule is to ensure that the affected pipelines have an adequate safety margin between their maximum operating pressure and test pressure. This safety margin is essential to prevention of particular kinds of pipeline accidents.

EFFECTIVE DATES: The changes to part 195, except § 195.306(b), take effect July 7, 1994. The final rule under § 195.306(b) takes effect August 8, 1994, unless RSPA receives, by July 7, 1994, comments that illustrate that disallowing the use of petroleum as a test medium for pressure testing required by this rulemaking is not in the public interest. Upon receipt of such comments, RSPA will publish a document in the **Federal Register** withdrawing the final rule under § 195.306(b).

ADDRESSES: Written comments must be submitted in duplicate and mailed or hand-delivered to the Dockets Unit, room 8421, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Identify the docket and amendment number stated in the heading of this notice. Comments will become part of this docket and will be available for inspection or copying in room 8421 between 8:30 a.m. and 5 p.m. each business day.

FOR FURTHER INFORMATION CONTACT: L. M. Furrow, (202) 366–2392, regarding the subject matter of this final rule document, or Dockets Unit (202) 366–4453, for copies of this final rule document or other material in the docket.

SUPPLEMENTARY INFORMATION:

Background.

Any steel pipeline may contain hidden physical defects that result from the manufacture or transportation of pipe and from pipeline construction. Over the operational life of the pipeline, new physical defects can be created by external forces acting on the pipeline. When a physical defect is large enough, it can cause the pipeline to fail during operation. Also, during pipeline operation, internal or environmental stresses can cause smaller defects to grow and become large enough to cause the pipeline to fail.

Adequate pressure testing can disclose hidden physical defects in a pipeline. Pressure testing involves raising a pipeline's internal pressure above its maximum operating pressure (MOP) for a time sufficient for leaks to develop from defects. A test that is adequate in pressure level and duration will disclose physical defects that are large enough to cause pipeline failure

during operation. In addition, an adequate pressure test will provide a proven margin of safety against failure during operation from the growth of defects.

Line pipe research has demonstrated that 125 percent of MOP is the minimum test level adequate to protect hazardous liquid pipelines against failure in operation from physical defects. A pressure test at this level for a sufficient duration provides a 25 percent proven margin of safety against failures caused by the growth of physical defects.

Under § 195.302, new steel pipelines must be pressure tested to provide at least a 25 percent proven margin of safety. Hazardous liquid pipelines must be pressure tested hydrostatically, but carbon dioxide pipelines may be tested pneumatically, using inert gas or carbon dioxide as the test medium (see § 195.306). Portions of existing steel pipelines that are replaced, relocated, or otherwise changed are also subject to this pressure testing requirement. The requirement became effective as follows for pipelines subject to part 195: January 8, 1971, for interstate pipelines transporting hazardous liquid (35 FR 17183); August 1, 1977, for interstate offshore gathering lines transporting hazardous liquid (41 FR 34039); October 21, 1985, for intrastate pipelines transporting hazardous liquid (50 FR 15895); and July 12, 1991, for pipelines transporting carbon dioxide in a supercritical state (56 FR 26922).

Section 195.302 also requires that certain older pipelines transporting highly volatile liquids (HVL) must have at least a 25 percent proven margin of safety. These pipelines are onshore steel interstate pipelines constructed before January 8, 1971, and onshore steel intrastate pipelines constructed before October 21, 1985. If an older HVL pipeline has not been hydrostatically tested to part 195 standards, § 195.302(b) permits operators to provide the proven margin of safety either by hydrostatic testing or by establishing the pipeline's MOP under § 195.406(a)(5) at 80 percent or less of a qualified prior test or operating pressure. Establishing MOP under § 195.406(a)(5) and hydrostatic testing to part 195 standards provide equivalent proven margins of safety.

Apart from these older HVL pipelines, the 25 percent proven margin-of-safety requirement does not apply to older pipelines constructed before the dates (stated above) the pressure testing requirement went into effect for new pipelines. Consequently, many older pipelines subject to part 195 are not operated with a minimum 25 percent proven margin of safety. It was not common industry practice to test to at least 125 percent of MOP or to test to that pressure level for a sufficient duration.

Notice of Proposed Rulemaking

Older pipelines that do not have a minimum 25 percent proven margin of safety are more susceptible to failures from defect growth in service than pipelines that meet the part 195 pressure testing requirements. They are also more susceptible to failure from defect growth during instances of overpressure permitted by § 195.406(b). This increased potential for failure is prevalent in pipelines made of pre-1970 electric resistance welded (ERW) pipe.

RSPA's pipeline accident statistics show the benefits of requiring older pipelines to have a minimum 25 percent proven margin of safety. September 15, 1985, was the date by which onshore interstate pipelines constructed before January 8, 1971, that transport HVL had to have a minimum 25 percent proven margin of safety. By that date these pipelines had to have been pressure tested hydrostatically to part 195 requirements or operated at 80 percent or less of a qualified prior test or operating pressure. To learn the effect of the 25-percent-safety-margin requirement, RSPA compared the period for which accident data were available before the requirement was adopted with the period from September 15, 1985, through December 31, 1989. Onshore HVL interstate pipelines had a 68 percent lower rate of failure from material defects and corrosion during the latter period. RSPA attributed this dramatic drop in failure rate to the 25-percent-safety-margin requirement imposed on the older onshore HVL interstate pipelines. In addition, RSPA concluded that operators could achieve a comparable reduction in failure rate on all other older pipelines subject to part 195 that lack an adequate proven margin of safety.

To bring about this reduction in failure rate, RSPA published a Notice of Proposed Rulemaking (NPRM) (Docket PS–121; 56 FR 23538, May 22, 1991) on testing older pipelines. The notice proposed to extend the part 195 requirement for a proven margin of safety to all pipelines that are covered by part 195 but excepted from the testing standards in subpart E of part 195. These pipelines are (1) hazardous liquid steel interstate pipelines constructed before January 8, 1971, other than onshore HVL pipelines; (2) hazardous liquid steel interstate offshore gathering lines constructed before August 1, 1977; (3) hazardous liquid steel intrastate pipelines constructed before October 21, 1985, other than onshore HVL pipelines; and (4) carbon dioxide steel pipelines constructed before July 12, 1991.

In the NPRM, RSPA also discussed the unique safety problems with longitudinal seams on ERW pipe manufactured before 1970. RSPA proposed that operators give pipelines with a predominance of pre-1970 ERW pipe priority in scheduling tests. Under this proposal, testing of pipelines known to have more than 50 percent (by mileage) of pre-1970 ERW pipe would have to be completed within 4.5 years after a final rule is published.

Thirteen persons submitted written comments on the NPRM: 11 pipeline operators, the American Petroleum Institute (API), and the U.S. Department of the Interior (DOI). A discussion of the significant comments and their disposition in development of the final rules follows.

General Comments

Most commenters discussed specific problems they anticipated in carrying out the rulemaking proposals, without objecting to them outright. DOI favored adoption of the proposals, especially for offshore pipelines. One commenter, a major operator of hazardous liquid pipelines, clearly supported the proposed rules. A few other operators hedged their apparent agreement with the proposals by suggesting RSPA allow smart pigs as a substitute for pressure testing or MOP reduction, an issue discussed separately below. Another operator asserted that RSPA should require pressure testing or MOP reduction only where risk is heightened by factors such as adverse leak or corrosion history, environmental sensitivity, or high population. Only two operators strongly objected to the proposals. But, they aimed their remarks at carbon dioxide pipelines, and as discussed below, the final rule addresses their concerns. By and large, RSPA believes the commenters supported the objective of the notice concerning older untested or inadequately tested hazardous liquid pipelines.

Limiting the application of the proposed rules to older pipelines that have an increased risk of failure or that are near environmentally sensitive areas or a large number of people does not sufficiently address safety concerns. The problem of the growth of defects is common among all pipelines regulated by part 195. It is not limited to pipelines that are in a worrisome condition or a high risk location. For such problems, RSPA believes that all pipelines should

provide a basic level of protection. The proposals in the NPRM were consistent with this view. They would assure that older pipelines provide at least the same basic level of protection against the growth of defects as newer pipelines must provide. Also, limiting the proposed rules to pipelines that involve some added element of risk would leave many miles of older pipelines without adequate protection against failures caused by the growth of defects. RSPA strongly believes these potential failures and preventable damages should not go unchecked.

Pump Stations and Tank Farms

API and two operators argued that the proposed rules should not apply to pump stations, tank farms, or tank farm delivery facilities. They said compliance would be an extremely time-consuming task because of the many fittings, valves, tanks, and instrumentation. API also suggested the benefits would be questionable since most accidents, as described in the NPRM, occur on pipeline rights-of-way.

Part 195 has limited application at tank farms. In general, it applies to only receiving and reinjection lines, to tanks used as breakout tanks, and to facilities associated with breakout tanks.

Although the job of testing pump station and breakout tank facilities may be time-consuming, it is crucial to ensure public safety and protect the environment. Population has encroached on the older pump stations and tank farms since their construction, increasing their threat to public safety. Also, slow leaks at tank farms have polluted ground water and endangered neighborhoods.

In considering the issue of pump stations and tank farms, RSPA examined the existing rule in § 195.302 regarding the testing of older onshore HVL pipelines. Except for tank farm facilities to which the rule does not apply, § 195.302 does not exclude any of the facilities the commenters suggested RSPA exclude from the present rulemaking. RSPA believes non-HVL facilities should not be treated differently. Leaks at non-HVL hazardous liquid facilities can have fire and pollution consequences. Also, even minor accidents at breakout tanks in tank farms have the potential to become uncontrollable emergencies because of proximity to other large volume hazardous liquid storage tanks. Therefore, RSPA has adopted the final rule as proposed concerning pump stations and breakout tanks. The demands of testing these facilities should be mitigated, however, by the compliance deadlines, which are discussed next.

Compliance Deadlines

RSPA proposed a deadline of 1 year after publication of the final rule for operators to plan and schedule testing or to reduce MOPs. RSPA also proposed a deadline of 4.5 years after publication of the final rule for testing all pipelines with more than 50 percent pre-1970 ERW pipe, and for testing at least 50 percent of all other pipelines. Finally, RSPA proposed that operators complete all testing within 7.5 years after publication of the final rule.

One operator argued that RSPA should allow operators to use the entire test period to plan testing or to reduce MOPs. This commenter said that planning for testing or reduction in MOP would involve complicated analyses that would take longer than 1 year. The commenter also said any plan may need to be changed because of unforeseen operational problems that may arise during the test period.

RSPA proposed a 1-year deadline to assure that operators start their testing program early in the test period. Early planning is necessary to minimize unexpected delays and assure that operators complete testing within the time allowed. Also, RSPA assumed that when operators plan to reduce MOP, the reduction could be done without lengthy preparations. Further, RSPA strongly believes any MOP reduction should be done early in the program to lessen the continuing risk to the public. If unforeseen testing or operational problems arise during the test period, an operator could modify its initial testing plan and schedule as needed to resolve those problems. Of course, any modified plan or schedule would still have to provide for completion of testing before the applicable deadline.

The proposed 1-year deadline for MOP reduction or planning and scheduling testing was the same amount of time that § 195.302 allowed for similar activities on the older onshore HVL pipelines. However, the process will involve more mileage than it did for onshore HVL pipelines. Also, RSPA expects operators will need further planning to maintain the product-supply requirements of their customers. Therefore, RSPA has extended the proposed planning and scheduling deadline to 1.5 years in the final rule.

Another operator thought the proposed test period for pre-1970 ERW pipelines was unfair to operators who have many of these pipelines. These operators would not be able to spread costs and impacts on operations over as much time as other operators. This commenter suggested that an equitable approach would be to require that operators give pre-1970 ERW pipelines priority in testing over the full test period.

RSPA proposed a shorter test period for the pre-1970 ERW pipelines because these pipelines have unique safety problems. The unique problems cause pre-1970 ERW pipelines to have a greater potential for failure than other older pipelines. Since pre-1970 ERW pipelines pose a greater risk, requiring operators to test them sooner than other older pipelines is critical to safety.

API declared that the proposed testing periods would create an undue hardship on consumers and the pipeline industry. It suggested RSPA lengthen the period to 10 years for all older pipelines, with testing priorities based on risk. Operators and shippers need the additional time, API said, so the nation's pipeline network can adapt to the impact of the testing program on the market. The operators and shippers would use the time to arrange alternative transportation and to prevent regional supply disruptions.

Using similar reasoning, two operators also urged us to allow more time for testing. One operator thought a reasonable period would be 7 years for pre-1970 ERW pipelines, and 10 years for the others. The other operator thought the periods should be 5 and 10 years, respectively.

RSPA, too, is concerned about the potential adverse impact on the nation's fuel supplies that could result from testing thousands of miles of pipelines. Aside from the substantial planning that must be done before testing, many operators will need time to obtain waste water disposal permits from various jurisdictions. Operators will need time to prepare pipeline systems for testing and to arrange for personnel and equipment to conduct the tests.

System changes and actual testing must be coordinated with product-supply operations to minimize the impact on refineries, distributors, and users of the transported products. Also, operators need time to assure that testing is done safely, with the least environmental risk, and in accordance with applicable Federal and State regulations. However, RSPA weighed these time demands in deciding upon the compliance deadlines proposed in the NPRM. None of the commenters who addressed the compliance-time issue substantiated their opinions that more time should be allowed. Although it is admittedly difficult to predict how much time is appropriate, the comments do not convince us that there are too many pre-1970 ERW pipelines to test in

4.5 years or that a decade is needed to complete testing of all other pipelines. Therefore, the final rule adopts the testing deadlines as proposed.

RSPA has not adopted API's suggestion to allow 10 years for all older pipelines, with priorities based on risk, because the unique problems of pre-1970 ERW pipelines demand correction sooner. Also, considering the mileage involved, the potential savings from reusing test water, and the need to minimize market impacts, API's suggestion would further complicate the development of test schedules. Still, the final rule does provide operators flexibility in planning and scheduling tests. When feasible, operators could use this flexibility to select pipelines for testing according to leak history or other risk factors. RSPA encourages such testing priorities provided all required testing is completed within the periods allowed.

Charts or Logs

Two operators commenting on proposed § 195.406(a)(5) asked us not to limit allowable documentation of prior tests or operating pressures to recording charts or logs. They said the industry has never had to keep these charts and logs for older pipelines, and many have been lost. They suggested that the final rule allow alternative documentation, such as construction specifications, pipeline completion reports, and affidavits from responsible people.

Considering the importance of a minimum 25 percent proven margin of safety to the integrity of pipelines, public safety cannot tolerate doubts about whether a pipeline has been adequately tested. Only recording charts or logs made at the time of prior testing or operations show with certainty that the minimum margin exists for the pipeline concerned. Alternative documentation, including specifications, reports, or affidavits, is less probative. Such evidence leaves some room for doubt because it does not result directly from pipeline testing or operation. Although recording charts and logs may no longer be available for some older pipelines, RSPA does not believe a lack of proper records justifies allowing a lesser level of proof for a matter so serious as pipeline integrity. Therefore, the final rule allows only recording charts or logs to document a prior test or operating pressure.

Another operator was concerned that the documentation available for use under the proposed revision of § 195.406(a)(5) may not meet existing § 195.310. For example, the operator said calibration data may not be available. Section 195.310 specifies the records operators must keep for each pressure test required by subpart E of part 195. Section 195.310 does not affect the documentation required by existing § 195.406(a)(5), and would not affect documentation under the proposed revision of § 195.406(a)(5). Thus, operators need not have documentation under final § 195.406(a)(5) in the same detail as § 195.310 requires.

Permits for Disposal of Test Water

When existing petroleum pipelines are pressure tested hydrostatically, the testing process introduces hydrocarbons into the test water. If test water picks up unacceptable quantities of hydrocarbons, the National Pollutant Discharge Elimination System (NPDES) governs its discharge into the environment. (See 40 CFR parts 122–124.) The NPDES is a regulatory program administered by the U.S. Environmental Protection Agency (EPA) in cooperation with qualified State agencies under the Federal Water Pollution Control Act, as amended by the Clean Water Act (33 U.S.C. 1251 *et seq.*).

Several commenters were concerned that the procedure of obtaining NPDES permits from State agencies and EPA for treatment and disposal of test water could significantly delay testing. This potential for delay probably would be limited to areas where operators do not transport test water to refineries for treatment and discharge, or do not store it for use in subsequent tests. Although none of the commenters estimated the time that would be needed to secure the NPDES permits, RSPA has considered this potential for delay in setting deadlines for compliance.

Two operators and API suggested that RSPA somehow help the industry in obtaining from EPA a general NPDES permit for the disposal of treated test water. They also requested our assistance in obtaining a general waiver of the EPA requirement to measure the toxicity of test water. API said these actions would provide flexibility for efficient scheduling and implementation of testing.

EPA has procedures for issuing permits and waivers under its NPDES program. EPA's decisions on applications for permits and waivers depend on facts known to the industry. Under these circumstances, RSPA believes an operator is the appropriate party to apply for permits or waivers.

To hasten the process, RSPA will notify EPA of this final rule. RSPA will urge that agency to give prompt attention to requests for NPDES permits involving disposal of test water used to comply with the final rule. RSPA will also ask EPA to request its cooperating State agencies to give prompt attention to requests for permits and waivers.

Smart Pig Alternative

Several operators and API recommended that the final rule allow the use of smart pigs (internal inspection devices) as an alternative to pressure testing for all pipelines, except the pre-1970 ERW pipelines. Two of these operators said pigging is superior to pressure testing because it shows where potential problems lie. Two operators thought pigging is better at finding corrosion problems, particularly deep isolated pits that may survive a pressure test. One operator and API argued that smart pigs could alleviate potential disruptions of service and many environmental and scheduling problems.

Despite the capabilities of smart pigs, RSPA knows of no evidence that they can provide satisfactory long-term protection against the growth of defects. Only a minimum 25 percent proven margin of safety between MOP and a previous test or operating pressure is generally recognized as able to provide this protection.

Various manufacturers have significantly improved the data collection and recording capabilities of smart pigs. The ability of trained personnel to interpret recorded pig data has also improved. Yet smart pigs still cannot detect as many pipeline defects that could grow to failure during operation as can an adequate pressure test. Longitudinal defects, like cracks in a longitudinal weld seam, are particularly resistant to detection by smart pigs. More important, an adequate pressure test provides a basis for safe operation, with a proven margin of safety against the growth of defects that survive the test. Smart pigs cannot provide such a margin of safety. Thus, they are not an adequate substitute for pressure testing in achieving the objectives of this rulemaking proceeding.

Carbon Dioxide Pipelines

Two operators argued that RSPA should not adopt the proposed rules for older carbon dioxide pipelines, particularly production field distribution lines. They offered various reasons to exempt carbon dioxide pipelines:

- Carbon dioxide is non-polluting.
- The pipelines are relatively new, having been constructed in the 1980s.
- The pipelines have been pressure tested hydrostatically, but perhaps not to part 195 standards.

• The failure data used as a basis for the proposed rules did not include carbon dioxide pipelines.

• After hydrostatic pressure testing, carbon dioxide pipelines must be dehydrated, an expensive process that is not applicable to hazardous liquid pipelines.

• Pneumatic testing with carbon dioxide or inert gas poses a greater risk than hydrostatic testing because of the high pressures at which supercritical carbon dioxide pipelines operate.

• The alternative of MOP reduction would dramatically reduce enhanced oil recovery rates.

As for carbon dioxide distribution lines, the two operators said these pipelines generally are smaller than transmission lines, and only affect isolated areas in oil production fields. The commenters said pressure testing of carbon dioxide distribution systems would seriously disrupt oil field operations. One of these operators said that over 50 separate tests may be needed to minimize disruption, depending on the layout of the distribution system.

In view of these comments, RSPA has reviewed both the need to apply the proposed rules to carbon dioxide pipelines and the burden of compliance. Carbon dioxide pipelines have not been subject to part 195 long enough for us to develop an accident history for them. Still, because of their similarity to hazardous liquid pipelines, untested or inadequately tested carbon dioxide pipelines can fail in service from the growth of physical defects, whatever the pipeline's age. Although carbon dioxide is non-polluting and nonflammable, any failure that releases large quantities of carbon dioxide would expose nearby persons to the risk of suffocation.

This risk is less, however, for production field distribution lines that transport carbon dioxide than for transmission lines that transport carbon dioxide. Compared to transmission lines, which move large volumes of carbon dioxide over long distances, individual pipelines in a production field distribution system carry smaller volumes over localized areas. Normally these areas are rural. In addition, the burden of compliance would be greater for field distribution systems than for transmission lines. Testing field distribution systems could disrupt oil production and require a multiplicity of tests to minimize that disruption. RSPA believes this combination of decreased risk and increased burden of compliance justifies excluding from the final rule production field distribution lines that are in a rural area. As defined in § 195.2, the term "rural area" means "outside the limits of any incorporated or unincorporated city, town, village, or any other designated residential or commercial area such as a subdivision, a business or shopping center, or community development."

In the final rules, § 195.302(b)(2)(ii) reflects our decision to exclude older carbon dioxide field distribution lines in rural areas from the 25-percent-safety-margin requirement. Consistent with the present pressure testing requirement, any portion of these older lines that is replaced, relocated, or otherwise changed on or after July 12, 1991, or any older line converted to carbon dioxide service under § 195.5 would have to be pressure tested to at least 1.25 times its MOP.

Test Pressure

In the NPRM, RSPA proposed to redesignate existing § 195.302(c), concerning the level and duration of test pressure, as new § 195.303. RSPA received no comments on this proposal, and has adopted it as final. However, the term "hydrostatic test" is replaced by "pressure test" because under existing requirements, carbon dioxide pipelines may be pressure tested either pneumatically or hydrostatically.

Test Medium

In most cases, operators must use water as the hydrostatic test medium for hazardous liquid pipelines (§ 195.306(a)). However, under specified conditions, onshore pipelines may be tested with petroleum that does not vaporize rapidly (§ 195.306(b)).

This exception allowing operators to use petroleum as the test medium was established when only newly constructed pipelines were subject to hydrostatic testing under part 195. Newly constructed pipelines are less likely to rupture during a hydrostatic test than pipelines that have been in operation for a number of years and never tested or inadequately tested. Therefore, RSPA is concerned that if existing pipelines subject to testing under the final rule were tested with petroleum, operators would not be able to contain all the petroleum that would spill from ruptures. To preclude this outcome, RSPA has revised § 195.306(b) to prohibit the use of petroleum as a test medium in pressure testing pipelines to meet the final rule.

Although RSPA's NPRM did not propose to limit the use of petroleum, the NPRM asked operators to estimate the pipeline mileage they would test with petroleum to learn the extent to which operators might use petroleum instead of water as the test medium. Only four operators responded, and the answers ranged from none to practically none. Based on this information and RSPA's experience in administering the hydrostatic testing rules of part 195, disallowing the use of petroleum as a test medium under the final rule should not significantly affect the burden of compliance with the rule.

Although RSPA believes this action is within the scope of the NPRM, because we did not specifically propose it, § 195.306(b) will be effective August 8, 1994, unless by July 7, 1994, RSPA receives comments that illustrate that this final rule is not in the public interest. Upon receipt of such comments, RSPA will withdraw § 195.306(b) before the effective date by simultaneously publishing two subsequent documents. One document will withdraw this section of the final rule. The other will announce a proposal to disallow the use of petroleum as a test medium for pressure testing required by this rulemaking and establish a new comment period. If RSPA does not receive comments that illustrate that § 195.306(b) is not in the public interest, RSPA will publish a notice advising that § 195.306(b) will be effective on August 8, 1994.

Advisory Committee Review

RSPA presented a draft of the NPRM to the Technical Hazardous Liquid Pipeline Safety Standards Committee (THLPSSC) for its consideration at a meeting in Washington, DC on September 14, 1988. THLPSSC is RSPA's statutory advisory committee for hazardous liquid pipeline safety. It is comprised of 15 members, representing industry, government, and the public, who are technically qualified to evaluate liquid pipeline safety.

THLPSSC's discussion of the draft centered on cost of compliance; problems of compliance, such as waste water disposal; and the smart-pig alternative. THLPSSC voted not to support the draft NPRM primarily because RSPA had not yet demonstrated that the proposed rules were cost beneficial.

At a meeting on September 14, 1989, RSPA updated THLPSSC on the status of the draft NPRM. Committee members discussed many issues, including product supply to customers, disposal of test water, and the time needed for compliance. Although no vote was taken, THLPSSC members representing industry indicated agreement with the need to test the older untested or inadequately tested pipelines.

RSPA has decided to adopt final rules in this proceeding despite THLPSSC's negative vote in 1988. RSPA did so because THLPSSC's primary concern

was that the rules be cost beneficial, and the final regulatory evaluation supports that conclusion. Also, RSPA has addressed THLPSSC's other concerns elsewhere in this preamble in response to similar concerns raised by commenters. The THLPSSC's reports of the 1988 and 1989 meetings are available in the docket of this proceeding.

Wording of Final Rules

The final rules are worded differently from the proposed rules. However, other than the substantive changes discussed above, the changes in wording are for editorial or clarification purposes. In several existing rules, the word "hydrostatic" or "hydrostatically" is replaced by "pressure," because under subpart E carbon dioxide pipelines may be pressure tested either hydrostatically or pneumatically. Also, the title of subpart E is changed from "Hydrostatic Testing" to "Pressure Testing." In §§ 195.304(b) (1) and (2), the word "hydrostatically" is not changed to "pressure," because these rules concern factory testing of components, not post-construction pipeline testing.

Paperwork Reduction Act

This final rule incrementally increases the current information collection burden under § 195.310. Section 195.310 requires operators to keep certain records of each test required by subpart E of part 195 for as long as the tested facility is in use. The Office of Management and Budget (OMB) has approved this increased burden under the Paperwork Reduction Act of 1980, as amended (44 U.S.C. chap. 35). The OMB approval number is 2137–0047.

Rulemaking Analyses

Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule is a significant regulatory action under Executive Order 12866. Therefore, it was reviewed by the Office of Management and Budget. In addition, the final rule is significant under DOT's regulatory policies and procedures (44 FR 11034; February 26, 1979) because it involves a substantial change in regulations affecting certain existing pipelines.

Several operators and API suggested revisions to the draft "Economic Evaluation" RSPA prepared in support of the NPRM. Also, some of these commenters and others responded to our specific requests in the NPRM for information to aid us in assessing the impact of the final rule. How RSPA dealt with these comments is discussed in the final regulatory evaluation, a copy of which is in the docket. The final regulatory evaluation shows net benefits resulting from the final rule.

Regulatory Flexibility Act

Based on the facts available about the anticipated impact of this rulemaking action, I certify pursuant to section 605 of the Regulatory Flexibility Act (5 U.S.C. 605) that the action will not have a significant economic impact on a substantial number of small entities because few, if any, small entities operate pipelines subject to part 195.

Executive Order 12612

This rulemaking action will not have substantial direct effects on states, on the relationship between the Federal Government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with E.O. 12612 (52 FR 41685), RSPA has determined that this final rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

National Environmental Policy Act

RSPA has analyzed this action for purposes of the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and has determined that this action would not significantly affect the quality of the human environment. An Environmental Assessment and a Finding of No Significant Impact are in the docket.

List of Subjects in 49 CFR Part 195

Anhydrous ammonia, Carbon dioxide, Petroleum, Pipeline safety, Reporting and recordkeeping requirements.

In consideration of the foregoing, RSPA amends part 195 of title 49 of the Code of Federal Regulations as follows:

PART 195—[AMENDED]

1. The authority citation for part 195 continues to read as follows:

Authority: 49 App. U.S.C. 2001 *et seq.*, and 49 CFR 1.53.

Subpart E—[Amended]

2. The title of subpart E is revised to read as follows: "Subpart E—Pressure Testing".

3. Section 195.300 is revised to read as follows:

§ 195.300 Scope.

This subpart prescribes minimum requirements for the pressure testing of steel pipelines. However, this subpart does not apply to the movement of pipe under § 195.424.

4. Section 195.302 is revised to read as follows:

§ 195.302 General requirements.

(a) Except as otherwise provided in this section and in § 195.304(b), no operator may operate a pipeline unless it has been pressure tested under this subpart without leakage. In addition, no operator may return to service a segment of pipeline that has been replaced, relocated, or otherwise changed until it has been pressure tested under this subpart without leakage.

(b) Except for pipelines converted under § 195.5, the following pipelines may be operated without pressure testing under this subpart:

(1) Any hazardous liquid pipeline whose maximum operating pressure is established under § 195.406(a)(5) that is—

(i) An interstate pipeline constructed before January 8, 1971;

(ii) An interstate offshore gathering line constructed before August 1, 1977, or

(iii) An intrastate pipeline constructed before October 21, 1985.

(2) Any carbon dioxide pipeline constructed before July 12, 1991, that—

(i) Has its maximum operating pressure established under § 195.406(a)(5); or

(ii) Is located in a rural area as part of a production field distribution system.

(c) Except for onshore pipelines that transport HVL, the following compliance deadlines apply to pipelines under paragraphs (b)(1) and (b)(2)(i) of this section that have not been pressure tested under this subpart:

(1) Before December 7, 1995, for each pipeline each operator shall—

(i) Plan and schedule testing according to this paragraph; or

(ii) Establish the pipeline's maximum operating pressure under § 195.406(a)(5).

(2) For pipelines scheduled for testing, each operator shall—

(i) Before December 7, 1998, pressure test—

(A) Each pipeline identified by name, symbol, or otherwise that existing records show contains more than 50 percent by mileage of electric resistance welded pipe manufactured before 1970; and

(B) At least 50 percent of the mileage of all other pipelines; and

(ii) Before December 7, 2001, pressure test the remainder of the pipeline mileage.

5. Section 195.303 is added to read as follows:

§ 195.303 Test pressure.

The test pressure for each pressure test conducted under this subpart must be maintained throughout the part of the

system being tested for at least 4 continuous hours at a pressure equal to 125 percent, or more, of the maximum operating pressure and, in the case of a pipeline that is not visually inspected for leakage during the test, for at least an additional 4 continuous hours at a pressure equal to 110 percent, or more, of the maximum operating pressure.

§ 195.304 [Amended]

6. In § 195.304, in paragraph (a), the word "hydrostatic" is removed and the word "pressure" is added in its place; and in the introductory text of paragraph (b), the word "hydrostatically" is removed and the word "pressure" is added in its place.

7. The introductory text of § 195.306(b) is revised to read as follows:

§ 195.306 Test medium.

* * * * *

(b) Except for offshore pipelines and pipelines to be tested under § 195.302(c), liquid petroleum that does not vaporize rapidly may be used as the test medium if—

* * * * *

§ 195.308 [Amended]

8. In § 195.308, the word "hydrostatically" is removed and the word "pressure" is added in its place.

§ 195.310 [Amended]

9. In § 195.310(a), the word "hydrostatic" is removed and the word "pressure" is added in its place.

10. In § 195.406, in paragraph (a)(3), the word "hydrostatically" is removed and the word "pressure" is added in its place; and paragraph (a)(5) is revised to read as follows:

§ 195.406 Maximum operating pressure.

(a) * * *

(5) For pipelines under §§ 195.302(b)(1) and (b)(2)(i) that have not been pressure tested under subpart E of this part, 80 percent of the test pressure or highest operating pressure to which the pipeline was subjected for 4 or more continuous hours that can be demonstrated by recording charts or logs made at the time the test or operations were conducted.

* * * * *

Issued in Washington, DC, on May 27, 1994.

Ana Sol Gutiérrez,

Acting Administrator, RSPA.

[FR Doc. 94-13806 Filed 6-6-94, 8:45 am]

BILLING CODE 4910-60-P

Proposed Rules

Federal Register
Vol. 59, No. 108
Tuesday, June 7, 1994

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF JUSTICE

8 CFR Parts 1, 3, 103, 208, and 242

[AG Order No. 1878–94]

Executive Office for Immigration Review; Motions and Appeals in Immigration Proceedings

AGENCY: Department of Justice.

ACTION: Proposed rule.

SUMMARY: This proposed rule amends Executive Office for Immigration Review regulations concerning motion and appeal practice in immigration proceedings. The rule is being promulgated to implement the directives of section 545 of the Immigration Act of 1990 ("IMMACT"). Both time and number limitations on motions to reopen proceedings or to reconsider decisions have been proposed in accordance with section 545(d) of IMMACT, and will reflect the intent of Congress to streamline the deportation proceedings of aliens in the United States.

DATES: Written comments must be received on or before August 8, 1994.

ADDRESSES: Please submit written comments to Gerald S. Hurwitz, Counsel to the Director, Executive Office for Immigration Review, suite 2400, 5107 Leesburg Pike, Falls Church, Virginia 22041.

FOR FURTHER INFORMATION CONTACT: Gerald S. Hurwitz, Counsel to the Director, Executive Office for Immigration Review, Suite 2400, 5107 Leesburg Pike, Falls Church, Virginia 22041, telephone (703) 305–0470.

SUPPLEMENTARY INFORMATION: Section 545 of the Immigration Act of 1990, Public Law 101–649 (8 U.S.C. 1252b), modifies both substantive and procedural aspects of motion and appeal practice in immigration proceedings. Under the proposed rule, a party may file only one motion to reopen proceedings, and one motion to reconsider a decision of an Immigration Judge, the Board of Immigration Appeals ("Board"), or a Service Officer. A motion to reopen proceedings must be filed within 20 days of the final administrative decision or within 20 days of the effective date of the final rule, whichever is later. A motion to reconsider a decision must also be filed within 20 days of the decision or within 20 days of the effective date of the final rule, whichever is later. Under the proposed rule, provisions concerning motions to reopen or reconsider have been condensed into one section under 8 CFR 3.2. A new § 3.8 will concern fees.

The Board has previously addressed issues relating to the effect of an alien's loss of lawful permanent resident status on a motion to reopen proceedings to apply for or to further pursue an application for relief under section 212(c) of the Act. See *e.g., Matter of Cerna*, Interim Decision 3161 (BIA 1991) and *Matter of Lok*, 18 I&N Dec. 101 (BIA 1981), *aff'd on other grounds, Lok* v. *INS*, 681 F.2d 107 (2d Cir. 1982). These decisions have recently been the subject of litigation and conflicting court rulings. Subject to all of the other requirements pertaining to motions to reopen, the proposed rule will permit reopening of proceedings to consider or further consider an application for relief under section 212(c) of the Act if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation or exclusion.

There are several exceptions to these general rules, as required by section 242B(c)(3) of the Act, 8 U.S.C. 1252b(c)(3). An alien who is ordered deported *in absentia* who can demonstrate that his or her failure to appear was due to exceptional circumstances may file a motion to reopen the proceedings within 180 days of the final order. An alien who is ordered deported *in absentia* without receiving notice of the proceedings, if notice was required, or who was in federal or state custody at the time of the proceedings and could not appear, may file a motion to reopen without regard to the above time limitations. The filing of a motion to reopen proceedings or a motion to reconsider a decision will not serve to stay the execution of any decision, unless the motion is filed by an alien who was ordered deported *in absentia*, pursuant to 8 CFR 3.23(b)(5). As in the past, an alien who files an asylum claim that arises after the initiation of deportation proceedings against the alien where the claim is based upon an alleged change in circumstances in the country of the alien's nationality may move to reopen the proceedings at any time.

When a party appeals a decision, the notice of appeal must meaningfully identify the reasons for the appeal in order to avoid summary dismissal. The notice must indicate whether the party will be filing a brief and whether the party desires oral argument before the Board. An appellant will be provided 30 days in which to file a brief unless the alien concerned is detained, in which case the appellant will be given 14 days to file a brief. The Immigration Judge or Service Officer may specify a shorter time in which to file a brief, but only the Board may extend the time for filing, and then only up to a total of 90 days for good cause shown. An appeal may be withdrawn by either party. In the event the alien concerned leaves the United States after taking an appeal but prior to a decision, the appeal will be deemed withdrawn. An appeal will not be permitted when an order of deportation or exclusion has been entered *in absentia*.

The rule more clearly outlines when the notice of appeal should be filed with the Immigration and Naturalization Service and when the notice of appeal should be filed with the Office of the Immigration Judge. The proposed rule also replaces the reference to discontinued Form I–290A with reference to the currently used Form EOIR–26 for filing an appeal from a decision of an Immigration Judge and Form EOIR–29 for filing an appeal from a decision of a district director. The proposed change will eliminate the requirement that the notice of appeal be filed in triplicate. Parties will still be required to file the original notice of appeal with the office having administrative control over the record of proceeding and serve a copy of the notice of appeal on the opposing party. The proposed rule will clarify that a notice of appeal will not be considered filed until the notice is actually received in the office having administrative control over the record of proceeding.

The rule clarifies that the period for filing a Notice of Appeal to the Board of Immigration Appeals of Decision of Immigration Judge (Form EOIR–26) is extended from 10 to 13 days where the

decision of the Immigration Judge is served by mail. The proposed change will clearly define the event that commences the running of the period for filing an appeal and will reiterate which form should be used to file an appeal and where to file the form. These proposed changes will help unify practice and procedure throughout the country and will restrict the ability of parties to reopen or continue proceedings indefinitely. These goals are consistent with the directives of section 545 of IMMACT (8 U.S.C. 1252b).

This rule is promulgated as a proposed regulation to allow for comments prior to implementation.

In accordance with 5 U.S.C. 605(b), the Attorney General certifies that this rule will not have a significant adverse economic impact on a substantial number of small entities. This rule was not reviewed by the Office of Management and Budget pursuant to Executive Order No. 12866. In addition, this rule does not have Federalism implications warranting the preparation of a Federalism Assessment in accordance with Executive Order No. 12612.

List of Subjects

8 CFR Part 1

Administrative practice and procedure, Aliens.

8 CFR Part 3

Administrative practice and procedure, Immigration, Organization and functions (Government agencies).

8 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of information, Privacy, Reporting and recordkeeping requirements, Surety bonds.

8 CFR Part 208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 242

Administrative practice and procedure, Aliens.

Accordingly, title 8, chapter I of the Code of Federal Regulations is proposed to be amended as follows:

PART 1—DEFINITIONS

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

Authority: 66 Stat. 173; 8 U.S.C. 1101; 28 U.S.C. 509, 510; 5 U.S.C. 301.

2. Section 1.1 is amended by adding a new paragraph (p) to read as follows:

§ 1.1 Definitions.

* * * * *

(p) The term *lawfully admitted for permanent residence* means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed. Such status terminates upon entry of a final administrative order of exclusion or deportation.

PART 3—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

3. The authority citation for part 3 is revised to read as follows:

Authority: 5 U.S.C. 301; 8 U.S.C. 1103, 1252 note, 1252b, 1362; 28 U.S.C. 509, 510, 1746; Sec. 2, Reorg. Plan No. 2 of 1950, 3 CFR, 1949–1953 Comp., p. 1002.

4. Section 3.1 is amended by revising paragraphs (b)(1), (b)(2), and (c) to read as follows:

§ 3.1 General Authorities.

* * * * *

(b) * * *

(1) Decisions of Immigration Judges in exclusion cases, as provided in part 236 of this chapter, except that no appeal shall lie from an order of exclusion entered *in absentia*.

(2) Decisions of Immigration Judges in deportation cases, as provided in part 242 of this chapter, except that no appeal shall lie from an order of deportation entered *in absentia*, nor shall an appeal lie from an order of an Immigration Judge under § 244.1 of this chapter granting voluntary departure within a period of at least 30 days, if the sole ground of appeal is that a greater period of departure time should have been fixed.

* * * * *

(c) *Jurisdiction by certification.* The Commissioner, or any other duly authorized officer of the Service, any Immigration Judge, or the Board may in any case arising under paragraph (b) of this section require certification of such case to the Board. The Board in its discretion may review any such case by certification without regard to the provisions of § 3.7 of this chapter if it determines that the parties have already been given a fair opportunity to make representations before the Board regarding the case, including the opportunity to request oral regiment and to submit a brief.

* * * * *

5. Section 3.2 is revised to read as follows:

§ 3.2 Reopening or reconsideration.

(a) *General.* The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Commissioner or any other duly authorized officer of the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief.

(b) *Motion to reconsider.* A motion to reconsider a decision must be filed within 20 days after the mailing of the decision or the stating of the oral decision for which reconsideration is being sought, or within 20 days of the effective date of the final rule, whichever is later. When service of the decision is made by mail, 3 days shall be added to the period prescribed for filing of the motion. A party may file only one motion to reconsider any given decision and may not seek reconsideration of a decision denying a previous motion to reconsider. A motion to reconsider shall state the reasons for the motion and shall be supported by pertinent authority. A motion to reconsider a decision rendered by an Immigration Judge or Service Officer that is pending when an appeal is filed with the Board, or that is filed subsequent to the filing with the Board of an appeal from the decision sought to be reconsidered, shall be deemed a motion to remand the decision for further proceedings before the Immigration Judge or the Service Officer from whose decision the appeal was taken. Such motion, which shall be consolidated with and considered by the Board in connection with any appeal to the Board, is subject to the time and numerical limitations of this paragraph.

(c) *Motion to reopen.* (1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was

not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefor was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

(2) Except as provided in paragraph (c)(3), a party may file only one motion to reopen proceedings and that motion must be filed not later than 20 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or within 20 days of the effective date of the final rule, whichever is later.

(3) The time and numerical limitations set forth in paragraph (c)(2) shall not apply to a motion to reopen proceedings:

(i) Filed pursuant to the provisions of § 3.23(b)(5) of this part.

(ii) To apply or reapply for asylum, or withholding of deportation, based on changed circumstances arising subsequent to the commencement of proceedings in the country of nationality or in the country to which deportation has been ordered, or

(iii) Agreed upon by all parties and jointly filed.

(4) A motion to reopen a decision rendered by an Immigration Judge or Service Officer that is pending when an appeal is filed, or that is filed subsequent to the filing of an appeal to the Board from the proceedings sought to be reopened, shall be deemed a motion to remand for further proceedings before the Immigration Judge or the Service Officer from whose decision the appeal was taken. Such motion, which shall be consolidated with, and considered by the Board in connection with, the appeal to the Board, is subject to the requirements set forth in paragraph (c)(1) and the time and numerical limitations set forth in paragraph (c)(2).

(d) *Departure or deportation.* A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of deportation or exclusion proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation of a person who is the subject of deportation or exclusion proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

(e) *Judicial proceedings.* Motions to reopen or reconsider shall state whether the validity of the deportation order has been or is the subject of any judicial proceeding and, if so, the nature and date thereof, the court in which such proceeding took place or is pending, and its result or status. In any case in which a deportation order is in effect, any motion to reopen or reconsider such order shall include a statement by or on behalf of the moving party declaring whether the subject of the deportation order is also the subject of any pending criminal proceeding under section 242(e) of the Act, and, if so, the current status of that proceeding. If a motion to reopen or reconsider seeks discretionary relief, the motion shall include a statement by or on behalf of the moving party declaring whether the alien for whose relief the motion is being filed is subject to any pending criminal prosecution and, if so, the nature and current status of that prosecution.

(f) *Stay of deportation.* Except where a motion is filed pursuant to the provisions of § 3.23(b)(5) of this part, the filing of a motion to reopen or a motion to reconsider shall not stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board, the Immigration Judge, or an authorized officer of the Service.

(g) *Distribution of motion papers.* A motion to reopen to a motion to reconsider a decision of the Board pertaining to proceedings before an Immigration Judge shall be filed with the Office of the Immigration Judge having administrative control over the record of proceeding. A motion to reopen or a motion to reconsider a decision of the Board pertaining to a matter initially adjudicated by an officer of the Service shall be filed with the officer of the Service having administrative control over the record of proceeding; provided, however, that when a motion to reopen or a motion to reconsider is made by the Commissioner or any other duly authorized officer of the Service in proceedings in which the Service has administrative control over the record of proceedings, the record of proceedings in the case and the motion shall be filed directly with the Board. In all cases, the motion shall include proof of service on the opposing party and all attachments. The moving party may only file a brief if it is included with the motion. The opposing party shall have ten days from the date of service of the motion to submit a brief in opposition to the motion, which shall be filed with the Office where the motion was filed, along with proof of service of a copy of the brief on the opposing party. The Board, in its discretion, may extend the time within which such brief is to be submitted. A motion shall be deemed unopposed unless a timely response is made.

(h) *Oral argument.* A request for oral argument, if desired, shall be incorporated in the motion to reopen or reconsider. The Board in its discretion may grant or deny requests for oral argument.

(i) *Ruling on motion.* Rulings upon motions to reopen or motions to reconsider shall be by written order. If the order directs a reopening and further proceedings are necessary, the record shall be returned to the Office of the Immigration Judge or the officer of the Service having administrative control over the place where the reopened proceedings are to be conducted. If the motion to reconsider is granted, the decision upon such reconsideration shall affirm, modify, or reverse the original decision made in the case.

6. Section 3.3 is revised to read as follows:

§ 3.3 Notice of appeal.

(a) A party affected by a decision who is entitled under this chapter to appeal to the Board shall be given notice of his or her right to appeal. An appeal of a decision of an Immigration Judge shall be taken by filing a Notice of Appeal to the Board of Immigration Appeals of Decision of Immigration Judge (Form EOIR–26) with the Office of the Immigration Judge having administrative control over the record of proceeding, within the time specified in the governing sections of this chapter. An appeal of a decision of a Service Officer shall be taken by filing a Notice of Appeal to the Board of Immigration Appeals of Decision of District Director (Form EOIR–29) with the office of the Service having administrative control over the record of proceeding, within the time specified in the governing sections of this chapter. A notice of appeal of a decision of an Immigration Judge is not considered to be filed until the Form EOIR–26 is actually received in the appropriate Office of the Immigration Judge and the fee provisions of § 3.8 of this part are satisfied. A notice of appeal of a

decision of a district director is not considered to be filed until the Form EOIR–29 is actually received in the appropriate office of the Service and the fee provisions of § 3.8 of this part are satisfied. The certification of a case as provided in this part shall not relieve the party affected from compliance with the provisions of this section in the event that he or she is entitled, and desires, to appeal from an initial decision, nor shall it serve to extend the time specified in the applicable parts of this chapter for the taking of an appeal. Departure from the United States of a person in deportation proceedings prior to the taking of an appeal from a decision in his or her case shall constitute a waiver of his or her right to appeal.

(b) *Items to be included in the Notice of Appeal.* The party taking the appeal must meaningfully identify the reasons for the appeal in the notice of appeal in order to avoid summary dismissal pursuant to § 3.1(d)(1–a)(i) of this part. The statement on the notice of appeal must specifically identify the findings of fact, the conclusions of law, or both, that are being challenged. If a question of law is presented, supporting authority must be cited. If the dispute is over the findings of fact, the specific facts contested must be identified. Where the appeal concerns discretionary relief, the appellant must state whether the alleged error relates to statutory grounds of eligibility or to the exercise of discretion and must identify the specific factual and legal finding or findings that are being challenged. In addition, the statement of the reasons for appeal must be set forth with sufficient clarity and specificity that the Board may address the appeal without first reviewing the record and constructing the arguments. The appellant must also indicate in the notice of appeal whether he or she desires oral argument before the Board and whether he or she will be filing a separate written brief or statement in support of the appeal.

(c) *Briefs.* Briefs in support of or in opposition to an appeal shall be filed with the Office of the Immigration Judge or, where the appeal is from a decision of a Service Officer, with the officer of the Service having administrative control over the case. If the alien concerned is not detained, the appellant shall be provided 30 days in which to file a brief unless a shorter period is specified by the Immigration Judge or by the Service Officer from whose decision the appeal is taken. If the alien concerned is detained, the appellant shall be provided 14 days in which to file a brief, unless a shorter period is specified by the Immigration Judge or by the Service Officer from whose decision the appeal is taken. The appellee shall have the same period of time in which to file a reply brief that was initially granted to the appellant to file his or her brief. The time to file a reply brief commences from the date upon which the appellant's brief was due, as originally set or extended by the Board, or the date upon which such brief was filed, whichever is earlier. The Board, upon motion, may extend the period for filing a brief or a reply brief for up to 90 days for good cause shown and may authorize the filing of briefs directly with it. If, in its discretion, the Board determines that the interests of justice would be served thereby, it may consider a brief filed out of time in its adjudication of an appeal. All briefs and motions regarding the filing of briefs shall include proof of service of the brief or motion on the opposing party.

7. Section 3.4 is revised to read as follows:

§ 3.4 Withdrawal of appeal.

In any case in which an appeal has been taken, the party taking the appeal may file a written withdrawal thereof with the office at which the notice of appeal was filed. If the record in the case has not been forwarded to the Board on appeal in accordance with § 3.5 of this part, the decision made in the case shall be final to the same extent as if no appeal had been taken. If the record has been forwarded on appeal, the withdrawal of the appeal shall be forwarded to the Board and, if no decision in the case has been made on the appeal, the record shall be returned and the initial decision shall be final to the same extent as if no appeal had been taken. If a decision on the appeal shall have been made by the Board in the case, further action shall be taken in accordance therewith. Departure from the United States of a person who is the subject of deportation proceedings subsequent to the taking of an appeal but prior to a decision thereon shall constitute a withdrawal of the appeal and the initial decision in the case shall be final to the same extent as though no appeal had been taken.

8. Section 3.5 is revised to read as follows:

§ 3.5 Forwarding of record on appeal.

If an appeal is taken from a decision, as provided in this chapter, the entire record of proceeding shall be forwarded to the Board by the office having administrative jurisdiction over the case upon timely receipt of the briefs of the parties, or upon expiration of the time allowed for the submission of such briefs. After an appeal to the Board has been filed, a district director or regional service center director need not forward such appeal to the Board, but may reopen and reconsider any decision made by the director, if the director's new decision will grant the benefit that has been requested in the appeal, provided that the director's new decision must be served on the appealing party within 45 days of receipt of any briefs or upon expiration of the time allowed for the submission of any briefs. If the director's new decision is not served within these time limits or the appealing party does not agree that the new decision disposes of the matter, the record of proceeding shall be immediately forwarded to the Board.

9. Section 3.6 is revised to read as follows:

§ 3.6 Stay of execution of decision.

(a) Except as provided under § 242.2(d) of this chapter and paragraph (b) of this section, the decision in any proceeding under this chapter from which an appeal to the Board may be taken shall not be executed during the time allowed for the filing of an appeal unless a waiver of the right to appeal is filed, nor shall such decision be executed while an appeal is pending or while a case is before the Board by way of certification.

(b) The provisions of paragraph (a) of this section shall not apply to an order of an Immigration Judge under § 3.23 or § 242.22 of this chapter denying a motion to reopen or reconsider or to stay deportation, except where such order expressly grants a stay or where the motion was filed pursuant to the provisions of § 3.23(b)(5). The Board may, in its discretion, stay deportation while an appeal is pending from any such order if no stay has been granted by the Immigration Judge or a Service officer.

10. Section 3.7 is revised to read as follows:

§ 3.7 Notice of certification.

Whenever, in accordance with the provisions of § 3.1(c) of this part, a case is required to be certified to the Board, the alien or other party affected shall be given notice of certification. An Immigration Judge or Service Officer may certify a case only after an initial decision has been made and before an appeal has been taken. If it is known at the time the initial decision is rendered that the case will be certified, the notice of certification shall be included in such decision and no further notice of certification shall be required. If it is not known until after the initial decision is

rendered that the case will be certified, the office of the Service or Office of the Immigration Judge having administrative control over the record of proceeding shall cause a Notice of Certification to be served upon the parties. In either case, the notice shall inform the parties that the case is required to be certified to the Board and that they have the right to make representations before the Board, including the making of a request for oral argument and the submission of a brief. If either party desires to submit a brief, it shall be submitted to the office of the Service or Office of the Immigration Judge having administrative control over the record of proceeding for transmittal to the Board within the time prescribed in § 3.3(c) of this part. The case shall be certified and forwarded to the Board by the office of the Service or Office of the Immigration Judge having administrative jurisdiction over the case upon receipt of the brief, or upon the expiration of the time within which the brief may be submitted, or upon receipt of a written waiver of the right to submit a brief. The Board in its discretion may elect to accept for review or not accept for review any such certified case. If the Board declines to accept a certified case for review, the underlying decision shall become final on the date of the Board's declination.

11. Section 3.8 is revised to read as follows:

§ 3.8 Fees.

Except as otherwise provided in this section, a notice of appeal or motion filed under this subpart by any person other than an officer of the Service relating to a proceeding held before an Immigration Judge shall be accompanied by evidence that the specified fee has been remitted in accordance with the applicable provisions of §§ 3.38(c) and 103.7 of this chapter. Except as otherwise provided in this section, a notice of appeal or motion filed under this subpart by any person other than an officer of the Service relating to a matter involving an adjudication by an officer of the Service shall be accompanied by the specified fee and remitted in accordance with the applicable provisions of § 103.7 of this chapter. In any case in which an alien or other party affected is unable to pay the fee fixed for an appeal or a motion, he or she shall file with the notice of appeal or the motion his or her affidavit or unsworn declaration, made pursuant to 28 U.S.C. 1746, stating the nature of the motion or appeal and his or her belief that he or she is entitled to redress. Such document shall also establish his or her inability to pay the required fee, and shall request permission to prosecute the appeal or motion without payment of such fee. When such a document is filed with the officer of the Service or the Immigration Judge from whose decision the appeal is taken or with respect to whose decision the motion is addressed, such Service Officer or Immigration Judge shall, if he or she believes that the appeal or motion is not taken or made in good faith, certify in writing his or her reasons for such belief for consideration by the Board. The Board may, in its discretion, authorize the prosecution of any appeal or motion without payment of the required fee.

12. Section 3.23 is amended by revising paragraph (b) to read as follows:

§ 3.23 Motions.

* * * * *

(b) *Reopening/Reconsideration.* (1) The Immigration Judge may upon his or her own motion, or upon motion of the trail attorney or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction in the case is vested in the Board of Immigration Appeals under part 3 of this chapter. Motions to reopen or reconsider a decision of the Immigration Judge must be filed with the Office of the Immigration Judge having administrative control over the record of proceeding. Such motions shall comply with applicable provisions of 8 CFR 208.4, 208.19, and 242.22. The Immigration Judge may set and extend time limits for replies to motions to reopen or reconsider. A motion shall be deemed unopposed unless timely response is made. A motion to reconsider shall state the reasons for the motion and shall be supported by pertinent authority. Any motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application for relief and all supporting documents. A motion to reopen will not be granted unless the Immigration Judge is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing; nor will any motion to reopen for the purpose of providing the alien an opportunity to apply for any form of discretionary relief be granted if the alien's rights to make such application were fully explained to him or her by the Immigration Judge and he or she was afforded an opportunity to do so at the hearing, unless circumstances have arisen thereafter on the basis of which the request is being made. Subject to the other requirements and restrictions of this section, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

(2) A motion to reconsider must be filed within 20 days after the date on which the decision for which reconsideration is being sought was rendered, or within 20 days of the effective date of the final rule, whichever is later. A party may file only one motion to reconsider any given decision and may not seek reconsideration of a decision denying a previous motion to reconsider.

(3) Except as provided in paragraph (b)(4), a party may file only one motion to reopen proceedings and that motion must be filed not later than 20 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or within 20 days of the effective date of the final rule, whichever is later.

(4) The time and numerical limitations set forth in paragraph (b)(3) shall not apply to a motion to reopen filed pursuant to the provisions of paragraph (b)(5), or to a motion to reopen proceedings to apply or reapply for asylum or for withholding of deportation based on changed circumstances, which arise subsequent to the commencement of proceedings, in the country of nationality or in the country to which deportation has been ordered, or to a motion to reopen agreed upon by all parties and jointly filed.

(5) A motion to reopen deportation proceedings to rescind an order of deportation entered *in absentia* must be filed:

(i) Within 180 days after the date of the order of deportation. The motion must demonstrate that the failure to appear was because of exceptional circumstances beyond the control of the alien (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances); or

(ii) At any time if the alien demonstrates that the alien did not receive notice in accordance with subsection 242B(a)(2) of the Act, 8 U.S.C. 1252b(a)(2), and notice was required pursuant to such subsection; or the alien demonstrates that the alien was in Federal or State custody and did not appear through no fault of the alien.

(6) When requested in conjunction with a motion to reopen or a motion to reconsider, the Immigration Judge may stay the execution of a final order of

deportation or exclusion. The filing of a motion to reopen pursuant to the provisions of paragraph (b)(5) shall stay the deportation of the alien pending decision on the motion and the adjudication of any properly filed administrative appeal.

13. Section 3.38 is amended by revising paragraph (b) to read as follows:

§ 3.38 Appeals.

* * * * *

(b) The Notice of Appeals to the Board of Immigration Appeals of Decision of Immigration Judge (Form EOIR–26) shall be filed with the Office of the Immigration Judge having administrative control over the record of proceeding within 10 calendar days after the Immigration Judge has rendered an oral decision on the record or within 10 calendar days after a written decision has been served in person to the parties. Where the decision of the Immigration Judge is served by mail, the Notice of Appeal to the Board of Immigration Appeals of Decision of Immigration Judge (Form EOIR–26) shall be filed with the Office of the Immigration Judge having administrative control over the record of proceeding within 13 calendar days after the date the decision is mailed. If the final date for filing falls on a Saturday, Sunday, or legal holiday, this appeal time shall be extended to the next business day. A notice of appeals may not be filed by any party who has waived appeal.

* * * * *

PART 103—POWERS AND DUTIES OF SERVICE OFFICERS; AVAILABILITY OF SERVICE RECORDS

14. The authority citation for part 103 continues to read as follows:

Authority: 5 U.S.C. 552, 552(a); 8 U.S.C. 1101, 1103, 1201, 1252 note, 1252b, 1304, 1356; 31 U.S.C. 9701; E.O. 12356, 47 FR 14874, 15557, 3 CFR 1982 Comp., p. 166; 8 CFR part 2.

§ 103.5 [Amended]

15. Section 103.5 paragraph (a)(1)(i) is amended by revising the phrase "part 242" to read "parts 3 and 242".

PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF DEPORTATION

16. The authority citation for part 208 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1158, 1226, 1252, 1252 note, 1252b, 1253, and 1283.

17. Section 208.19 paragraph (a) is revised to read as follows:

§ 208.19 Motion to reopen or reconsider.

(a) A proceeding in which asylum or withholding of deportation was denied may be reopened or a decision from such a proceeding reconsidered for proper cause upon motion pursuant to the requirements of 8 CFR 3.2, 3.23, 103.5, and 242.22 where applicable.

* * * * *

PART 242—PROCEEDINGS TO DETERMINE DEPORTABILITY OF ALIENS IN THE UNITED STATES: APPREHENSION, CUSTODY, HEARING, AND APPEAL

18. The authority citation for part 242 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1182, 1186a, 1251, 1252, 1252 note, 1252b, 1254, 1362, 8 CFR part 2.

19. Section 242.21 paragraph (a) is revised to read as follows:

§ 242.21 Appeals.

(a) Pursuant to part 3 of this chapter, an appeal shall lie from a decision of an Immigration Judge to the Board of Immigration Appeals, except that no appeal shall lie from an order of deportation or exclusion entered *in absentia*. The procedures regarding the filing of a Notice of Appeal (Form EOIR–26), fees, and briefs are set forth in §§ 3.3, 3.31, and 3.38 of this chapter. An appeal may be summarily dismissed if it comes within the provisions of § 3.1(d)(1–a) of this chapter.

* * * * *

20. Section 242.22 is amended by revising the first sentence and by adding a sentence at the end, to read as follows:

§ 242.22 Reopening or reconsideration.

Motions to reopen or reconsider are subject to the requirements and limitations set forth in § 3.23 of this chapter. * * * The filing of a motion to reopen pursuant to the provisions of § 3.23(b)(5) of this chapter shall stay the deportation of the alien pending the disposition of the motion and the adjudication of any properly filed administrative appeal.

Dated: May 25, 1994.

Janet Reno,

Attorney General.

[FR Doc. 94–13547 Filed 6–6–94; 8:45 am]

BILLING CODE 1531–26–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 94–NM–26–AD]

Airworthiness Directives; McDonnell Douglas Model DC–10–10, –15, –30, and –40 Series Airplanes, KC–10A (Military) Airplanes, and Model MD–11 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain McDonnell Douglas Model DC–10 and MD–11 series airplanes. This proposal would require the installation of retainers and supports at the lateral control mixer bracket on the center of the wing rear spar of the airplane. This proposal is prompted by an analysis conducted by the manufacturer, which revealed that failure of a lateral control mixer bracket could result in uncommanded deployment of the spoiler. The actions specified by the proposed AD are intended to prevent inadvertent asymmetric deployment of the spoiler, which may lead to reduced controllability of the airplane.

DATES: Comments must be received by August 1, 1994.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 94–NM–26–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from McDonnell Douglas Corporation, P.O. Box 1771, Long Beach, California 90801–1771, Attention: Business Unit Manager, Technical Administrative Support, Department L51, M.C. 2–98. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California.

FOR FURTHER INFORMATION CONTACT: Wahib Mina, Aerospace Engineer, Airframe Branch, ANM–121L, FAA, Transport Airplane Directorate, Los