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August 15, 1994

Part VIII

Department of the Interior

Bureau of Indian Affairs

25 CFR Part 115

Individual Indian Money Accounts; Proposed Rule

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 115

RIN 1076–AC65

Individual Indian Money Accounts

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Proposed rule.

SUMMARY: The Bureau of Indian Affairs (BIA) is proposing to revise and replace the existing regulations contained in 25 CFR Part 115 governing the establishment, management, control, closure and deletion of Individual Indian Money (IIM) accounts, by the Secretary of the Interior. The growth in the number of IIM accounts maintained by the BIA makes it necessary and desirable for the Secretary of the Interior to promulgate revised regulations that will secure the integrity of the system and ensure that the IIM accounts will be maintained in an efficient and accountable manner.

The proposed regulations clarify and expand upon current regulations, and to the extent practicable, incorporate and standardize BIA practices for maintaining and administering IIM accounts.

DATES: Comments must be received on before October 14, 1994.

ADDRESSES: Written comments should be directed to the Bureau of Indian Affairs, Office of Trust Funds Management, 505 Marquette N.W., Suite 700, Albuquerque, New Mexico 87102.

FOR FURTHER INFORMATION CONTACT: Mr. Jim Parris, Bureau of Indian Affairs, Office of Trust Funds Management, 505 Marquette NW, Suite 700, Albuquerque, New Mexico 87102, telephone number 505–766–3233.

SUPPLEMENTARY INFORMATION: This proposed rulemaking action will revise Part 115 to Chapter 1 of Title 25 of the Code of Federal Regulations, which contains general regulations governing Individual Indian Money (IIM) accounts, to set forth authorities, policy, and procedures to be followed governing the establishment, management, control, closure, and deletion of Individual Indian Money (IIM) accounts, by the Secretary of the Interior, with certain exceptions which are set forth in 25 CFR Parts 16 and 116 (Five Civilized Tribes), 25 CFR Parts 17 and 117 (Osage).

Section 115.1 This section sets forth the purpose and scope of these regulations. The Secretary of the Interior is obligated by statute to establish, manage, and control individual Indian money accounts, and has been granted the authority to promulgate regulations to implement such responsibilities.

Section 115.2 This section revises former § 115.1 and expands upon the definitions for the purpose of clarification, standardization, and to avoid ambiguities in the implementation of Part 115.

Section 115.3 This section is new and sets forth the authority and procedures for establishing IIM accounts.

Section 115.3(a) This paragraph formalizes the authority of the Secretary to establish IIM accounts. To avoid potential duplication of IIM accounts and resulting inconsistencies in the management of an individual's trust funds, this paragraph authorizes only one IIM account per account holder.

Section 115.3(b) This paragraph specifies the Bureau of Indian Affairs agency is responsible for establishing and maintaining an IIM account.

Section 115.3(c) This paragraph requires that the social security number for the account holder be furnished to the Secretary thereby enabling the Secretary to meet the requirement to comply with the reporting and filing requirements set forth by the Internal Revenue Code, including the Tax Equity and Fiscal Responsibility Act of 1982, and those of the various states. See § 115.10.

Section 115.4 This is a new section which formally recognizes the authority of the Secretary to close and delete certain IIM accounts. It is noted that the closure or deletion of an IIM account does not preclude the Secretary from reopening or re-establishing such account.

Section 115.4(a) This paragraph establishes the circumstances under which the Secretary will close an IIM account.

Section 115.4(b) This paragraph provides for deletion of an IIM account from the system after one year from the date of closure, thus allowing for the Secretary to meet tax reporting and filing requirements.

Section 115.5 This section revises former § 115.6. Conditions do arise requiring the Secretary to accept and place monies which are not derived from trust resources, tribal judgment awards, or other Federal Agencies in IIM accounts to meet critical situations as defined in § 115(8)(c).

Section 115.6 This section is new and recognizes the statutory authority of the Secretary to invest funds for the benefit of account holders.

Section 115.7 This section is new and provides direction and standardization of the disbursement policy and procedures for IIM funds.

Section 115.7(a) This paragraph requires that funds will be automatically disbursed unless otherwise provided by this part.

Section 115.7(b) This paragraph formally recognizes the general statutory prohibition of payment of judgments and/or levies, or placement of liens against funds from IIM accounts, unless such levies and/or liens are specifically permitted by statute or Title 25 of the Code of Federal Regulations. This paragraph also recognizes the authority of the Secretary to apply an account holder's funds against delinquent debts due the United States and/or the account holder's tribe, subject to certain limitations and conditions.

Section 115.7(c) This paragraph recognizes the Secretary's authority to supervise certain categories of IIM accounts and to place conditions on disbursements pursuant to § 115.8.

Section 115.7(d) This paragraph recognizes the Secretary's authority to correct posting and recording errors which are clerical in nature, provided corrections are made prior to disbursement of funds. Where the posting error has resulted in a wrongful disbursement, the Secretary may place restrictions on the accounts affected by the disbursement until such time that the wrongful disbursement is rectified. In these cases, the regulation affords opportunity for notice and hearing to the affected account holder pursuant to § 115.12.

Section 115.7(e) This paragraph recognizes the authority of the Secretary to place restrictions on an IIM account to which distributions of estate proceeds have been made pursuant to the probate order of the administrative law judge, and subsequent modifications to the order require reallocation of the initial distribution. The account holder so affected is given an opportunity to dispute the equity of the restrictions.

Section 115.7(f) This paragraph provides for prompt payment to be made to rightful owner(s) within an specified time when an erroneous disbursement has occurred.

Section 115.8 This section revises former § 115.4 and recognizes the authority of Federal agencies to deposit monies into the IIM account for the benefit of minors or adults, non compos mentis or under other legal disability, for whom no legal guardian or fiduciary has been appointed. This section provides for the supervision of IIM accounts for six categories of account holders.

Section 115.8(a) This paragraph denotes "Minors" as supervised account holders.

Section 115.8(a)(1) This subparagraph revises former § 115.4(a) and provides for the supervision of funds of a minor, except for those funds derived from per capita shares of tribal judgment awards.

Section 115.8(a)(2) This subparagraph revises former § 115.4(b) and provides for the supervision of funds of a minor which have been derived from per capita shares of tribal judgment awards. The limitation on the amount of funds disbursed and reference to withdrawals upon reaching the age of majority have been removed so as to avoid potential conflict with any congressional plan associated with the judgment award.

Section 115.8(b) This paragraph revises former § 115.5 and denotes "Adults, non compos mentis or under other legal disability" as supervised account holders. This paragraph provides for conditions of disbursement similar to those of minor account holders.

Section 115.8(c) This paragraph is new and denotes "Account holders requesting and requiring assistance" as supervised account holders. This paragraph references § 115.3(d) which clarifies the right of those account holders, whose IIM accounts are not otherwise restricted under this part, to place conditions of disbursement upon their IIM accounts. Under this new paragraph, such conditions of disbursement shall not take effect unless approved by the Secretary.

Section 115.8(d) This paragraph is new and denotes "Account holders—Whereabouts unknown" as supervised account holders.

Section 115.8(e) This paragraph replaces § 115.11 and revises the language to read "Deceased account holders other than those of the Five Civilized Tribes and the Osage Tribe" as supervised account holders. Part 15 of this chapter was modified to add "the Osage Tribe" and this paragraph will revise the language to include the addition of the Osage Tribe also. This paragraph references 25 CFR Part 15 which in turn references 43 CFR Part 4, Subpart D. When the provisions governing the administration of these IIM accounts were incorporated into 43 CFR part 4, Subpart D, in 1971, the language appearing in § 115.11 was not modified accordingly. This paragraph will correct that oversight.

Section 115.8(f) This paragraph denotes "Deceased account holders of the Five Civilized Tribes" as supervised account holders and revises former § 115.12. The substance of this regulation has not been significantly changed.

Section 115.8(g) This paragraph is new and provides restoration of unclaimed IIM monies to tribal ownership or deposit to the general fund of the U.S. Treasury after six (6) years.

Section 115.8(h) This paragraph is new and provides guidance in handling proceeds of sale of capital assets in compliance with proposed use plans approved by the Secretary or authorized representative prior to sale.

Section 115.8(i) This paragraphs is new and provides direction in dealing with creditor claims against an account holder.

Section 115.9 This paragraph is new and sets forth authority for providing statements to IIM account holders.

Section 115.9(a) This paragraph formalizes the authority of the Secretary to provide periodic statements of IIM accounts to account holders.

Section 115.9(b) This paragraph formalizes the authority of the Secretary to provide account statements to minors and adults, non compos mentis or under other legal disability.

Section 115.9(c) This paragraph recognizes the statutory obligation of the Secretary to provide explanation of payments of oil and gas royalties to respective account holders, as required by 30 U.S.C. 1701.

Section 115.10 This section is new and recognizes the reporting requirements imposed upon the Secretary by the Internal Revenue Code and regulations promulgated thereunder. This section also authorizes the Secretary to meet the filing requirements of the Internal Revenue Service, and the various states, for and on behalf of supervised account holders.

Section 115.11 This is a new section which incorporates, by cross reference, 25 CFR Part 103, § 103.33 Assignment of Income, into this part.

Section 115.12 This section revises former § 115.10 and clarifies and elaborates upon the application of the notice and hearing requirements of the Administrative Procedure Act, for the purposes of this part.

Section 115.13 This section revises former § 115.13 and brings the regulation into compliance with 25 U.S.C. 954(e).

Section 115.14 This section revises former § 115.14 and updates the reference to § 115.12.

The policy of the Department of the Interior is, whenever, practical, to afford the public an opportunity to participate in the rulemaking process. Accordingly, interested persons may submit written comments regarding the proposed rule to the locations identified in the Addresses section of this preamble.

The Department of the Interior has determined that this rule is not a significant regulatory action under Executive Order 12866, and therefore will not be reviewed by the Office of Management and Budget. This rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

The Department of the Interior has determined that this proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969.

The Department of the Interior has certified to the Office of Management and Budget that this proposed regulation meets the applicable standards provided in Sections 2(a) and 2(b)(2) of Executive Order 12778.

The Department of the Interior has determined that this proposed rule does not have significant takings implications.

The Department of the Interior has determined that this proposed rule does not have significant federalism effects.

This rule does not contain information collection requirements which require approval of the Office of Management and Budget under 44 U.S.C. 3501 et seq.

The primary author of this proposed rule is William F. Benjamin, Jr., Chief, Branch of Payments, Bureau of Indian Affairs, Division of Accounting Management, Office of Management and Administration. However, personnel from other offices of the Bureau of Indian Affairs, the Department of the Interior, Office of the Solicitor—Indian Affairs and tribal representatives participated in the developing of the regulations both on matters of substance and style.

List of Subjects in 25 CFR Part 115

Indians—business and finance; Administrative practices and procedures.

For the reasons set out in the preamble, 25 CFR part 115 is proposed to be revised to read as follows.

PART 115—INDIVIDUAL INDIAN MONEY ACCOUNTS

Table of Contents

Authority: 5 U.S.C. 301; 25 U.S.C. 2, 9; 25 U.S.C. 954(e); 43 U.S.C. 1457.

§ 115.1 Purpose, scope and information collection.

(a) These regulations set forth the authorities, policy, and procedures governing the establishment, management, control, closure, and deletion of Individual Indian Money (IIM) accounts, by the Secretary of the Interior. Certain exceptions to these rules are set forth in 25 CFR Parts 16 and 116 (Five Civilized Tribes) and 25 CFR Parts 17 and 117 (Osage).

(b) These regulations do not contain information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501 et seq.

(c) Disclosure of any account information from IIM Ledgers and Cards and IIM Case Files systems is controlled by the Privacy Act of 1974, as amended, 5 U.S.C. 522a.

§ 115.2 Definitions.

Account holder means a beneficiary of an IIM account.

Adult means an account holder who has reached the age of 18.

Agency means an Indian agency or other field unit of the Bureau of Indian Affairs having trust or restricted Indian land under its immediate jurisdiction.

Closure means placing an IIM account in a status whereby such account is no longer accessible for accounting activity.

Deletion means elimination of an account from the IIM accounting system.

Funds means monies deposited and/or held in an IIM account whether derived from trust and restricted resources, Federal entities, tribal judgment awards or voluntary deposits.

Inactive means there has been no posting into or out of an IIM account for 13 months.

Individual Indian Money (IIM) account means a U.S. Treasury account established and controlled by the Secretary of the Interior for the purpose of depositing, maintaining and disbursing funds for the benefit of an individual recognized by the Secretary as an Indian or Alaskan Native to whom the United States owes a trust and/or fiduciary responsibility.

Interest means the earnings derived from the investment of IIM funds during the time they are in the custody of the Secretary.

ISSDA means Indian Service Special Disbursing Agent.

Minor means an account holder who has not reached the age of 18.

Secretary means the Secretary of the Interior or authorized representative, and, for purposes of § 115.13, means the officer in charge of the Palm Springs Office, Bureau of Indian Affairs.

Supervised IIM account means an IIM account administered by the Secretary for a minor, an account holder declared non compos mentis or under other legal disability, an account holder requesting or requiring assistance with the management of his/her funds, an account holder whose whereabouts are unknown, or a deceased account holder.

Voluntary deposit means acceptance of a deposit of money by the Secretary or authorized representative from an account holder, or any person or entity, into an IIM account. Monies deposited by a Federal entity pursuant to 25 U.S.C. 14 or by a tribe are authorized deposits and shall not be considered voluntary deposits.

§ 115.3 Establishing IIM accounts.

(a) The Secretary is authorized to establish one IIM account per account holder except as otherwise provided by statute.

(b) The Secretary shall establish an IIM account at the agency as indicated by the respective account holder's identification number. The responsible agency is normally the agency that serves the tribe in which the account holder is enrolled.

(c) Prior to the establishment of an IIM account, the account holder's social security number shall be provided to the Secretary.

§ 115.4 Closure and deletion of accounts.

(a) The Secretary may close an IIM account under the following circumstances:

(1) Upon determination that an account is inactive for one or more of the following reasons:

(i) Readily available evidence indicates that no further trust income is forthcoming;

(ii) The account holder does not own any trust assets; or

(iii) The account has a balance of less than $15 that has not been disbursed during the year due to administrative policy. In this case, the funds shall be disbursed at year end closing regardless of amount and the account closed provided the conditions of (i) and/or (ii) above apply. The provisions of § 115.8 (d) and (g) shall apply for an account holder whose whereabouts are unknown.

(2) Upon fulfillment of the orders of the Administrative Law Judge, Office of Hearings and Appeals, the restoration to tribal ownership as provided § 115.8(g) or like authority as provided by statute;

(b) After an IIM account has been closed for a period of one year, the Secretary will delete the account from the IIM accounting system within the following six month period.

§ 115.5 Voluntary deposits.

Voluntary deposits for the sole purpose of investment will not be accepted by the Secretary. Voluntary deposits shall be excepted under the following conditions:

(a) Monies received from Federal agencies pursuant to 25 U.S.C. 14 for the benefit of a minor or adult, non compos mentis or under other legal disability, for whom no legal guardian or fiduciary has been appointed may be deposited into the account holder's IIM account; or

(b) Monies from any source may be deposited into an account when the account holder has been determined to be in need of assistance by the Secretary in accordance with the provisions of § 115.8(c), or to avoid a substantial hardship explained in a recorded written justification approved by the Secretary and maintained in the records of the account holder.

§ 115.6 Investment of IIM funds.

The Secretary is authorized, in his/her discretion, to invest IIM funds in accordance with 25 U.S.C. 162a during the time they are in the custody of the Bureau of Indian Affairs.

§ 115.7 Disbursement policy and procedures.

(a) Except as otherwise provided in this part, the Secretary shall automatically disburse to the account holder funds and accrued interest funds held in an unrestricted, unsupervised IIM account. All disbursements shall be made at times and places the Secretary may designate.

(b) Funds shall not be disbursed for the payment of judgments, levies, and/or liens, absent specific authorization by statute and/or Title 25 of the Code of Federal Regulations except as provided in paragraph (c) of this section.

(c) Funds of an account holder may be applied by the Secretary against delinquent debts to the United States or to the tribe of which the account holder is a member, unless such payments are prohibited by acts of Congress; and against money judgments rendered by Courts of Indian Offenses or any ordinances or codes of the tribe not prohibited by Federal laws.

(1) A temporary restriction shall be placed on the affected IIM account on receipt of an order of execution of a Court of Indian Offenses money judgment pending final determination of collection action by the Secretary.

(2) Notice of the proposed collection action shall be provided to the account holder pursuant to § 115.12 at the time the temporary restriction is placed.

(d) Funds of an account holder that have been placed under supervision pursuant to the authorities set forth in § 115.8 (a), (b), (c), (d), (e) or (f) shall be disbursed in strict accordance with the provisions of the applicable authority. Although a restriction may be placed on an adult's IIM account at the time supervision is approved by the Secretary under authority of § 115.8 (b), (c) or (d), notice must be provided to the account holder as required in § 115.12.

(e) Posting and/or recording errors may be corrected at the Secretary's discretion, provided disbursement has not been made. If an erroneous disbursement is made, corrective action will be taken pursuant to § 115.7(f).

(f) If an IIM account(s) is credited pursuant to a probate order of an administrative law judge and that order is subsequently modified to effect a different distribution of the estate, a temporary restriction will be placed on the affected IIM account(s) immediately upon receipt of the modification. The restriction shall remain effective until the Secretary determines the final collection action to be taken. The Secretary shall notify the affected account holder(s), pursuant to § 115.12, at the time the temporary restriction is placed.

(g) In no instance shall an erroneous disbursement delay prompt payment to the rightful owner.

(1) Within five working days after discovery that an erroneous disbursement has been made from an IIM account, the deputy ISSDA shall transmit a complete report of the incident to the ISSDA, and the Agency Superintendent shall place a restriction on the IIM account of the beneficiary of the error.

(2) The report shall indicate: the cause of the error; recommended corrective action; impact on account holder; and when collection of any overpayment might be expected and its source.

(3) The ISSDA shall, within ten working days of receipt of the report: authorize payment to the rightful owner from available appropriated funds subject to the Secretary's delegated authority, place a restriction on the IIM account of the erroneous beneficiary and/or direct any other remedial action as he/she determines required or appropriate.

(4) Upon receipt of instruction from the ISSDA, the Agency Superintendent shall immediately issue the notice of the proposed collection action to the erroneous beneficiary in accordance with § 115.12.

§ 115.8 Supervised IIM accounts.

(a) *Minors.* (1) Funds of a minor, except as otherwise provided in paragraph (a)(2) of this section, shall be disbursed, in amounts deemed by the Secretary to be necessary in the best interest of the minor for the minor's support, health, education, and/or welfare. Disbursements shall be made upon such conditions as the Secretary may prescribe to parents, legal guardians, fiduciaries, or persons having the control and custody of the minor, or to the minor directly, under a written plan approved by the Secretary. The Secretary may modify an approved plan whenever he/she deems modification to be in the best interest of the minor.

(2) A minor's per capita share of a tribal judgment award, including accrued interest, shall be disbursed in accordance with the congressionally approved distribution plan and 25 CFR § 87.10.

(b) *Adults under legal disability.* The funds of an adult who is non compos mentis or under other legal disability shall be disbursed in amounts deemed by the Secretary to be in the best interest of the adult. Disbursements shall be made for the adult's support, health, education, and/or welfare. Funds shall be disbursed upon such conditions as the Secretary may prescribe to legal guardians, fiduciaries, or persons having the control and custody of the adult; or to the adult directly, under a written plan approved by the Secretary. The Secretary may modify the approved plan whenever he/she deems modification to be in the best interest of the adult.

(c) *Accounts in need of assistance.* The funds of adults who are not non compos mentis or under other legal disability, whom the Secretary finds to be in need of assistance in the management of their affairs, may be disbursed on the basis of an approved written plan containing terms and conditions requested by the adult or prescribed by the Secretary.

(1) Disbursement plans are authorized to protect the interests of the elderly, handicapped, addicted, imprisoned, children, and spouses affected by divorce or separation or those who suffer other social or physical problems and impairments.

(2) When this action is taken at the written request of the account holder, he/she shall authorize the Secretary to waive all terms and conditions in emergencies where the account holder may become unable to nullify them because of illness or incapacity.

(3) The Secretary or authorized representative may modify an approved plan wherever it is deemed in the best interest of the adult, but shall record all such changes.

(4) All disbursement plans shall be supported by a social services summary and recommendation, approved by the Secretary, justifying the determination of need. The recommendation will be maintained in the account holder's social services case file.

(d) *Whereabouts unknown.* The IIM account of an account holder whose whereabouts are unknown shall be supervised until closed pursuant to § 115.4. Agency supervision of the account shall include continuing and diligent search for the account holder and shall be done with oversight and assistance from the Office of Trust Funds Management.

(e) *Deceased other than Five Civilized Tribes and the Osage Tribe.* The account of a deceased Indian other than those of the Five Civilized Tribes and the Osage Tribe shall be supervised under 25 CFR 15. Funds from the account may be disbursed for:

(1) Payment of obligations previously authorized, including authorized expenses for last illness;

(2) Authorized funeral expenses;

(3) Support of dependent members of the family of the decedent in amounts deemed necessary to avoid hardship and consistent with the value of the estate and the interests of probable heirs;

(4) Necessary expenses to conserve the estate pending the completion of probate proceedings; and

(5) Probate fees and claims allowed pursuant to part 15 of this chapter.

(f) *Deceased—Five Civilized Tribes.* Funds of a deceased account holder who was a member of one of the Five Civilized Tribes may be disbursed for: payment of ad valorem and personal property taxes; obligations approved by the Secretary prior to the death of the account holder; expenses of last illness and burial; claims found to be just and reasonable that are not barred by the statute of limitations; the cost of determining heirs to restricted property or funds by the State courts; and claims allowed pursuant to 25 CFR 16.

(g) *Restorations and deposits to general fund.* The following types of funds and accrued interest shall be restored to tribal ownership or deposited to the general fund of the Treasury in accordance with 25 USC 164, 165:

(1) Unclaimed per capita shares or other distributions; and

(2) Individualization, segregation, or proration of Indian tribal or group funds redeposited to an individual's IIM account and held in trust by the United States for a period of six years from the date of the administrative directive to make the payment.

(h) *Sale of capital assets.* Funds of an adult that are derived from the sale of capital assets shall be expended only for those specific purposes agreed to and approved by the Secretary prior to sale. The proposed use plan will normally be presented in conjunction with an application for sale of trust property submitted for approval.

(i) *Creditor claims.* In accordance with § 115.11, funds may not be disbursed to satisfy creditor claims against an account holder for purposes not approved in advance by the Secretary, except as provided in § 115.7(b).

§ 115.9 Statement of IIM account.

(a) Statements of IIM accounts shall be provided to account holders, at least quarterly. An account holder may request current account status reports at any time at his/her Agency office.

(b) Statements of IIM accounts for minors and non compos mentis or otherwise legally disabled adults, shall be furnished to parents, legal guardians, fiduciaries or persons having control and/or custody of the account holder, or to the account holder directly, under a plan approved by the Secretary.

(c) A separate explanation shall be provided to an account holder at the time of disbursement of oil and gas royalties from the account. An account holder may request further explanation and assistance on oil and gas disbursements at any time at the Agency office.

§ 115.10 Tax requirements.

(a) The Secretary shall comply with all applicable reporting requirements of the Internal Revenue Service and the various States.

(b) The Secretary is authorized to meet all filing requirements of the Internal Revenue Service and the various States for and on behalf of supervised account holders.

§ 115.11 Assignment of income.

(a) Any assignment of future trust income shall require a contractual agreement to be executed between a non-Federal/tribal creditor and an account holder. The assignment agreement shall be made at the time a loan arrangement is consummated. The agreement shall be approved by the Secretary in advance of the receipt of the income into the account.

(b) Future income obligated under an approved agreement shall be disbursed only in accordance with the terms of the agreement, subject to any deductions specifically authorized or directed by acts of Congress or modifications thereof. An approved agreement can be withdrawn or modified prior to fulfillment only with the approval of the Secretary. Assignments of income shall be administered in accordance with the provisions of § 103.33.

§ 115.12 Notice and hearing.

(a) If, under § 115.7(b), (d) (e) or (f) or § 115.8(b), (c), or (d), the disbursement of funds to an account holder is restricted, or it is proposed that these funds be used to pay creditors, the account holder must be notified in writing as follows:

(1) Notice must be given at the commencement of the restrictions or at least 40 calendar days prior to the proposed disbursement of funds from the IIM account.

(2) The notice must state the reasons for the restrictions or proposed disbursement.

(3) The notice shall inform the account holder of the right to a hearing and that a written request for a hearing must be received by the Secretary within 30 calendar days of the account holder's receiving the notice of the proposed action.

(4) The notice of proposed action shall be delivered to the account holder in person, by Certified Mail-Return Receipt Requested, or if this is not possible, it shall be published in a newspaper of general circulation likely to be accessible to the account holder. The date indicating delivery of the notice, which shall commence the 40 or 30 day periods, shall be confirmed by one of the following:

(i) Signed receipt;

(ii) Affidavit of delivery; or

(iii) Publication in a newspaper of general circulation if personal delivery cannot be made.

(5) The notice shall include a statement of the rights listed in paragraph (c) of this section.

(6) The notice shall advise that, if the account holder wishes to have the delinquent debt or money judgment paid without delay and without a hearing, he/she can sign a form furnished with the notice.

(7) If the amount of funds in account holder's IIM account exceeds the amount to be disbursed in accordance with the notice, the excess shall be disbursed to the account holder without delay.

(b) If the account holder fails to request a hearing within 30 days, he/she is deemed to consent to the restrictions on the disbursement of funds from the IIM account and to the disbursement, if any, in accordance with the notice.

(c) The Secretary shall conduct a hearing, if requested as specified above, to determine whether to continue the restrictions on disbursement, and/or allow disbursements in accordance with the notice. The following are requirements for a fair and equitable hearing in accordance with 25 USC 164, 165:

(1) The hearing shall be held within ten (10) working days of the Secretary's receipt of the account holder's request for a hearing.

(2) The account holder shall be given the opportunity to be heard orally and/or in writing.

(3) The account holder shall be allowed: to hear the case for the proposed action; to present testimony, arguments, and evidence; to present witnesses, and to question and rebut opposing witnesses.

(4) The account holder may be heard on why the restrictions on disbursement, and/or disbursement in accordance with the notice, should not be made. The account holder may not re-litigate the facts and circumstances giving rise to the restrictions on his/her IIM account.

(5) The account holder may retain an attorney or other representative at his/her expense.

(6) The decision to uphold or overturn the proposed action shall be made by the Secretary and must be based upon information presented or referred to at the hearing.

(7) The Secretary shall make provisions for recording the hearing and shall preserve the record for the duration of any applicable appeal process. Tape recording the hearing is sufficient.

(8) The decision of the Secretary shall be provided in writing to all parties concerned within ten working days following the hearing.

(d) No funds, except as provided in subsection (b) of this section, shall be paid or disbursed from an IIM account or applied against a debt, or a judgment of a tribal court or court of Indian offenses, until the decision has become final in accordance with the appeal procedures provided for in § 115.14.

§ 115.13 Assets of members of the Agua Caliente Band of Cahuilla Indians.

(a) The Secretary is authorized, in his/her discretion, to invest funds of members of the Agua Caliente Band of Cahuilla Indians in accordance with 25 U.S.C. 954(e).

(b) The provisions of this section apply to money or other personal property held by the United States in trust for members of the Agua Caliente Band of Cahuilla Indians, which, with the consent of its members, may be used, advanced, expended, exchanged, deposited, disposed of, invested, and reinvested by the officer in charge of the Palm Springs office, Bureau of Indian Affairs, in accordance with 25 U.S.C. 954(e). Consent shall not be required if the Secretary determines a member to be incompetent by reason of minority or otherwise, or where the estate of a deceased member remains unprobated.

(c) An adult member of the Agua Caliente Band shall be presumed competent unless and until proven incompetent in accordance with the procedures in this section.

(1) When the Secretary believes, based upon relevant and reliable evidence, that an adult member of the Agua Caliente Band is incompetent to participate in the management of funds, the Secretary shall request the Director, Office of Hearings and Appeals, to appoint an Administrative Law Judge to conduct a hearing for the purpose of determining the competency of the member.

(2) At the same time the hearing request is made to the Office of Hearings and Appeals, the Secretary shall provide notice to the member that a hearing is being requested. The notice shall be in writing and shall be served on the member, personally or by certified mail. The Secretary shall assist the member in preparing for the hearing, and shall assist him/her to retain an attorney, at the member's expense, if he/she wishes to be represented by counsel.

(3) The Administrative Law Judge shall conduct a hearing in the State of California within sixty days of the date of notice, unless the member requests and/or consents to a reasonable alternative place and/or date. The hearing shall be conducted in accordance with the requirements of the Administrative Procedure Act, 5 U.S.C. 554. The burden of proving incompetency of the member shall be on the Secretary.

(4) Within 30 days after the hearing, the Administrative Law Judge shall submit a recommended decision as to the member's incompetency and shall transmit it, together with the record of the proceedings, including the hearing transcript, to the Board of Indian Appeals. Within 90 days of receipt of the recommended decision and record, the Board of Indian Appeals shall render a decision on the member's competency, based upon federal law, which shall be final for the Department of the Interior.

(5) Following a final Departmental determination that a member is incompetent, the member's consent shall not be a condition to the Secretary's use, advance, expenditure, exchange, deposit, disposal, investment, or reinvestment of the member's funds.

(d) Investments made by the Secretary shall be limited to those investments of principal and interest that are guaranteed by the United States as provided in 25 U.S.C. 162a.

(e) The investment of funds in a deceased member's estate account shall be limited to periods of one year or less.

§ 115.14 Appeals.

Appeals from an action taken by an official of the Bureau of Indian Affairs may be taken pursuant to 25 CFR Part 2, subject to the terms of § 115.12 where applicable.

Ada E. Deer,

Assistant Secretary—Indian Affairs.

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Part IX

Department of Energy

10 CFR Part 766

Uranium Enrichment Decontamination and Decommissioning Fund; Procedures for Special Assessment of Domestic Utilities; Final Rule

DEPARTMENT OF ENERGY

10 CFR Part 766

RIN 1901–AA52

Uranium Enrichment Decontamination and Decommissioning Fund; Procedures for Special Assessment of Domestic Utilities

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Final rule.

SUMMARY: This final rule revises the procedures and methods that the Department of Energy (DOE or the Department), Office of Environmental Management, will use to invoice and collect a Special Assessment from domestic utilities. The assessments will be deposited into the Uranium Enrichment Decontamination and Decommissioning Fund (Fund), established under Chapter 28 of the Atomic Energy Act of 1954 (Act), as amended by Title XI of the Energy Policy Act of 1992 (EPACT). The Fund will be used to pay for the costs of decontamination and decommissioning (D&D) and remedial action activities at DOE's uranium enrichment facilities, and for reimbursement of certain costs of D&D, reclamation, and other remedial actions incurred by licensees at active uranium or thorium processing sites, as specified in Title X of the EPACT.

EFFECTIVE DATE: September 14, 1994.

FOR FURTHER INFORMATION CONTACT: Ross Bradley, U.S. Department of Energy, Uranium Enrichment Decontamination and Decommissioning Fund Manager, Mail Stop EM–42, 1000 Independence Ave., SW, Washington, DC, 20585, (301) 903–7646; or Edward Le Duc, U.S. Department of Energy, Office of General Counsel, Mail Stop GC–51, 1000 Independence Ave., SW., Washington, DC, 20585, (202) 586–6947.

SUPPLEMENTARY INFORMATION:

I. Background

Sections 1801, 1802 and 1803 were added to the Act by Title XI of the EPACT (Pub. L. 102–486). Section 1801 establishes the Fund in the Treasury of the United States (42 U.S.C. § 2297g). Amounts on deposit in the Fund are available to the Secretary of Energy, subject to appropriations, for D&D and remedial action activities at DOE's uranium enrichment facilities and for reimbursement of uranium and thorium licensees for certain costs of D&D, reclamation, and other remedial actions incurred by licensees at active uranium or thorium processing sites, as specified in Title X of the EPACT (42 U.S.C. § 2296a *et seq.*). The Act provides that amounts in the Fund be invested by the Secretary of the Treasury in obligations of the United States. The Act also requires the Secretary of the Treasury, after consultation with the Secretary of Energy, to report to Congress annually on the financial condition and operations of the Fund.

Section 1802 of the Act provides that the Fund shall consist of annual deposits of $480 million per fiscal year, to be annually adjusted for inflation using the Department of Labor's Consumer Price Index for all-urban consumers (CPI–U)(42 U.S.C. § 2297g–1(a)). Deposits to the Fund are required to include a Special Assessment on domestic utilities not to exceed $150 million per fiscal year (adjusted for inflation using the CPI–U). Section 1802 also authorizes appropriations to be deposited into the Fund in the amount necessary to ensure that the total annual amount of $480 million (adjusted for inflation using the CPI–U) is deposited (42 U.S.C. § 2297g–1(b)). The amount collected from each domestic utility for the Special Assessment shall be in the same ratio to the total amount to be deposited in the Fund, for each fiscal year, as the total amount of separative work units (SWUs) the utility has purchased from DOE for the purpose of commercial electricity generation, prior to the date of enactment of the EPACT (October 24, 1992), bears to the total amount of SWUs purchased from DOE for all purposes, including units purchased or produced for defense purposes, prior to October 24, 1992 (42 U.S.C. § 2297g–1(c)).

Collection of the Special Assessment is authorized as of the date of enactment of the EPACT (October 24, 1992), and shall continue for a period of the earlier of 15 years or until $2.25 billion (adjusted for inflation using the CPI–U) has been collected (42 U.S.C. § 2297g–1(e)). A Special Assessment levied on domestic utilities is deemed by the Act to be a necessary and reasonable current cost of fuel, fully recoverable in a utility's rates in the same manner as other fuel costs (42 U.S.C. § 2297 g–1(g)).

Section 1803 provides that the National Academy of Sciences shall conduct a study and provide recommendations for reducing the costs associated with D&D of the Department's uranium enrichment facilities, and report its finding to Congress within 3 years after the date of the enactment of EPACT (42 U.S.C. § 2297g–2(a)). This section specifies that the costs of D&D activities are to be paid from the Fund until such time as the

Secretary of Energy certifies, and the Congress concurs, that the activities are complete (42 U.S.C. § 2297g–2(b)). This section also specifies that the annual costs of remedial action at DOE's uranium enrichment facilities shall be paid from the Fund to the extent the amount available in the Fund is sufficient (42 U.S.C. § 2297g–2(c)).

II. The Interim Final Rule and the Proposed Rule

On August 2, 1993, DOE published an interim final rule (58 FR 41160) and a proposed rule (58 FR 41164) which set forth the procedures for calculation and collection of the Special Assessment from domestic utilities for deposit into the Fund.

The interim final rule became effective on September 1, 1993. This rule revises part 766 by including amendments from the proposed rule and adding a new section on prepayments.

The interim final rule set forth those procedures, which the EPACT does not leave to DOE discretion, for calculation of the Special Assessment from domestic utilities for deposit into the Fund. DOE issued the rule as an interim final rule to allow for public comment while facilitating timely administrative action to comply with the obligation to collect the Fiscal Year 1993 Special Assessment from utilities by no later than September 30, 1993. The proposed rule expanded the interim final rule by adding new sections that address substantive matters left by the EPACT to DOE discretion, such as the required method of payment, late payment fees, and administrative appeals.

On August 30, 1993, a public hearing was conducted by DOE on the proposed rule. No attendees asked to make oral presentations. A transcript of this hearing is available in the Freedom of Information Public Reading Room, 1000 Independence Avenue, Washington, DC 20885.

During the public comment period, written comments on the interim final rule were received from a total of nine organizations representing domestic utilities, electric power industry groups, and Congress. Written comments were received on the proposed rule from seven organizations with the same affiliations.

DOE has considered and evaluated the comments received during the public comment period. In addition, DOE has addressed comments from two utilities it received outside the public comment period. The following discussion describes the comments received, provides DOE's response to the comments, and describes any changes incorporated into the rule.

III. Response to Public Comment

A. Detailed Listing of Activities To Be Paid From the Fund

Several commenters requested that DOE provide a detailed listing of the activities at the gaseous diffusion plants that are to be paid from the Fund. Activities that are to be paid from the Fund are those that are authorized by the EPACT and subsequently approved by Congress in appropriation bills. A listing of these activities and other pertinent information is annually released to the public by the DOE in the Office of Environmental Management's annual budget documentation. Because this information is prepared and modified annually, and is made available to the public, the final rule does not include a detailed listing of all activities that are to be paid from the Fund. However, the following are examples of the types of activities at the gaseous diffusion plants that DOE believes would appropriately be paid for from the Fund: demolition of buildings, Resource Conservation and Recovery Act closures and surveillance and maintenance activities.

B. Definition of Commercial Electricity Generation

Several commenters requested that DOE provide a definition of "commercial electricity generation." This term was not defined in the EPACT. Given that the amount collected from a utility is based upon its purchases of SWUs for the purpose of commercial electricity generation, DOE has added a definition to the final rule.

Commercial electricity generation means the production of electricity for sale to consumers. Power produced under the power demonstration program operated by the Atomic Energy Commission (AEC) falls within the definition of commercial electricity generation. However, SWU deliveries to reactors wholly owned by the AEC under the power demonstration program, even though they fall within the definition of commercial electricity generation, are considered deliveries of SWUs to the government and not to domestic utilities, since domestic utilities did not purchase these SWUs from DOE or its predecessor agency the AEC. Therefore, they will not be included in the calculation for domestic utilities, but will be included in the calculation for total SWUs produced.

C. Treatment of SWUs in Leased Material in Calculating the Special Assessment

One commenter requested clarification concerning the treatment of SWUs in leased material in the calculation of the Special Assessment. The commenter suggested that the use of leased SWU material in calculating the Special Assessment would overstate its Special Assessment and would be inappropriate because unused portions of leased material were returned to the Government.

Leased material is appropriately included as part of the Special Assessment to the extent that the material was for the purpose of commercial electricity generation. Utilities paid "use and burnup charges" for the portion of leased material that they consumed. These charges were based on the number of SWUs consumed. Therefore, leased material is being treated as purchased material and is subject to the Special Assessment. A utility's Special Assessment will be adjusted for those portions of SWUs in leased material that it did not consume and that were returned to the Government. In addition, DOE has added a definition of "use and burnup charges" to the final rule.

Domestic utilities converted lease contracts to "in-situ" ownership contracts when the Atomic Energy Act was amended to allow private ownership of special nuclear materials. The original Special Assessment invoices included SWUs delivered under lease contracts and under "in-situ" contracts. Several commenters noted that the SWUs in these assessments were double counted as a result of SWUs being counted as lease deliveries and in-situ deliveries. DOE agrees with these comments. The Fiscal Year 1994 Special Assessment invoices will be adjusted to correct for this double counting.

D. Calculation of Future Assessments

Several commenters observed that the EPACT states that the Special Assessment should be "annually adjusted for inflation" and that the final rule should reflect this requirement and indicate when the inflation adjustments will commence. The final rule specifies that the annual Special Assessment shall be adjusted for inflation each fiscal year following the first Special Assessment using the most recently published monthly Consumer Price Index for all urban consumers (CPI–U) published by the Department of Labor and the CPI–U for October, 1992. (See section 766.102(d)). DOE believes that this provision, which establishes an adjustment for inflation on each annual assessment following the first Special Assessment, appropriately implements the inflation adjustment requirement of EPACT. DOE waived the inflation adjustment to the first Special Assessment because domestic utilities had no control over the date of the issuance of the interim final rule, which established the date of the first Special Assessment.

E. Treatment of DOE Produced SWUs Re-Entering the U.S. Domestic Market in Calculation of the Special Assessment

One commenter requested clarification as to how DOE plans to treat any DOE produced SWUs that were sold to foreign utilities and that re-enter the domestic market. This commenter questioned how this would affect the reconciliation of SWU records for recalculating the Special Assessment.

During the reconciliation process, DOE will identify these SWUs from information provided by utilities and from other sources to which DOE has access, such as the Nuclear Materials Management and Safeguards System (NMMSS), a joint DOE-Nuclear Regulatory Commission (NRC) database. DOE-produced SWUs that were sold to foreign utilities and later re-entered the domestic commercial market would have the effect of increasing the number of DOE-produced SWUs purchased by domestic utilities for the purpose of commercial electricity generation in relation to the total number of DOE-produced SWUs purchased from DOE for all purposes, as stated in the EPACT. The Special Assessment invoices will contain information on the total number of DOE-produced SWUs purchased by domestic utilities, including those purchased from foreign utilities. When the reconciliation process is complete, DOE will provide utilities with a summary of all adjustments made during the process.

F. Treatment of Fabrication Losses in Calculation of the Special Assessment

Several commenters requested clarification as to how DOE will treat fabrication losses in calculating the Special Assessment. The commenters stated that fuel fabrication losses were not used in commercial electricity generation and therefore should not be included in the calculation of the Special Assessments.

In determining a utility's Special Assessment, the EPACT does not require a SWU to have actually been used in commercial electricity generation, but only to have been purchased for that purpose. Therefore, DOE will not adjust Special Assessments to exclude fabrication losses.

G. Treatment of SWUs Sold to Domestic Utilities That Shut Down Their Nuclear Power Plants Prior to Enactment of the EPACT

Several commenters questioned the applicability of the Special Assessment to reactors that have ceased operations or are scheduled for shut down during the 15-year assessment period. The commenters asserted that the intent of EPACT is to levy Special Assessments only upon operating domestic utilities. Relying on EPACT's statement that a utility may recover the cost of its Special Assessment as a "current cost of fuel * * * recoverable * * * in the same manner as the utility's other fuel cost," 42 U.S.C. § 2297g–1(g), one commenter argued that Congress intended to exempt non-operating facilities. This language, according to the commenter, suggests a Congressional intent to subject a utility to the Special Assessment only if it has at least one operating facility, by which it incurs "other fuel cost."

DOE believes that the EPACT is unambiguous in regard to the statutory applicability of the Special Assessment to domestic utilities. The statutory provision governing application of the Special Assessment is 42 U.S.C. § 2297g–1(c). This section states that: "The Secretary shall collect a special assessment from domestic utilities," and that the amount collected from each utility shall be proportional to the "total amount of separative work units such utility has purchased from the Department of Energy for the purpose of commercial electricity generation, before October 24, 1992." If prior to October 24, 1992, a utility purchased SWUs from DOE for the purpose of commercial electricity generation, EPACT's plain terms subject such a utility to the Special Assessment. EPACT provides no exceptions for utilities that satisfy this condition of applicability.

One commenter points to a separate provision on rate recoverability as the basis for implying an exemption from the Special Assessment. DOE does not believe that the provision in EPACT authorizing a utility's rate recovery of its Special Assessments, 42 U.S.C. § 2297g–1(g), was intended by Congress to be a limitation on the statutory applicability of the Special Assessments. The terms of this provision, entitled "Treatment of Assessment," do not purport to create an exemption or to address the scope of applicability of the Special Assessment. The terms and separate placement of the rate recovery provision reflect its separate purpose, namely, to allow utilities to pass through the costs of their Special Assessments.

We note that the statutory structure contemplates that current ratepayers will bear costs related to fuels that benefitted ratepayers years earlier. Congress apparently recognized this as a potential ratemaking issue, and thus directed that the present ratepayers of the utilities that benefitted from the fuel use would pay the Special Assessments.

Accordingly, because the EPACT contains no exemption from the Special Assessment for non-operating reactors, DOE has not exempted non-operating reactors in this final rule.

H. Treatment of SWUs Sold to Another Domestic Utility at a Different Tails Assay in Calculation of the Special Assessment

One commenter requested that DOE address how it would treat enrichment services that were purchased from DOE and subsequently sold to another utility at a different transaction tails assay that resulted in a net difference in SWUs.

If a utility purchased DOE-produced SWUs from another utility, the purchasing utility's assessment will be based on the SWUs specified in contracts or other probative documents generated at the time of the secondary market purchase. The selling utility's assessment will be reduced by an amount that will be determined by the SWUs sold to the purchasing utility. For instance, in the event that the SWUs purchased in the secondary market transactions were less than the SWUs originally purchased from DOE, the selling utility will be assessed for the difference. If a transaction resulted in a net increase in SWUs, the purchasing utility will be assessed only for the amount of SWUs originally purchased from DOE; the selling utility's assessment will be reduced by the same amount. In general, where a secondary market sale resulted in a net difference in SWUs, there will be no increase or decrease, for Special Assessment purposes, in the total number of SWUs purchased from DOE. The Department bases this principle on its interpretation of EPACT, which requires Special Assessments to be determined on the basis of the total SWUs purchased from DOE by domestic utilities for the purpose of commercial electricity generation. To implement this requirement, DOE believes that secondary market transactions cannot be allowed to effect a net increase or decrease, for Special Assessment purposes, in the total number of SWUs that were purchased from DOE for all purposes. The following examples illustrate this principle:

1. Utility A purchases 100 SWUs from DOE. Utility A's assessment would be based upon 100 SWUs.
2. Utility A purchases 100 SWUs from DOE. Utility A sells this material to Utility B in a transaction based on the same calculated number of SWUs. Utility B's assessment would be based upon 100 SWUs. Utility A's assessment would be based upon 0 SWUs.
3. Utility A purchases 100 SWUs from DOE. In a subsequent sale, Utility A changes the calculated SWUs and sells the 100 SWUs to Utility B in a transaction for only 80 SWUs. Utility B's assessment is based upon 80 SWUs. Utility A's assessment is based upon the remaining 20 SWUs unaccounted for in the secondary market transaction.
4. Utility A purchases 100 SWUs from DOE. In a subsequent sale, Utility A changes the calculated SWUs and sells the 100 SWUs to Utility B in a transaction for 120 SWUs. Utility B's assessment is based upon 100 SWUs, and Utility A's assessment is based upon 0 SWUs.

Requests for assessment adjustments reflecting secondary market SWU transactions may be made pursuant to the requirements of section 766.104. The liability for payment of the Special Assessment rests with the utility that originally purchased the SWUs from DOE, until such time that DOE makes a written determination granting or denying a requested adjustment pursuant to section 766.104(c). Such a determination must be based upon reliable and adequately probative information documenting the sale of the SWUs in question. DOE will use this information to reconcile its records of SWU purchases with both sellers and purchasers.

I. Treatment of SWUs Traded or Loaned in Calculation of the Special Assessment

One commenter requested that definitions for the terms "purchased" and "sold" be incorporated into the final rule, and that these terms be clearly defined to include enriched uranium trades and loans as purchases and sales.

DOE has not included a definition of purchased and sold in the final rule because EPACT sufficiently describes these terms. The EPACT specifies that a utility is considered to have purchased a separative work unit from DOE if such separative work unit was produced by DOE, but purchased from another source; and a utility shall not be considered to have purchased a separative work unit from DOE if such separative work unit was purchased by the utility, but sold to another source.

On a case by case basis, uranium enrichment trades and loans of SWUs will be considered for treatment as purchases for assessment purposes when probative and reliable documentation is provided under the reconciliation provisions set forth at section 766.104, and DOE determines that a particular trade or loan transaction constitutes a purchase pursuant to the requirements of the EPACT.

J. Invoicing of the Special Assessment in Proportion to U.S. Congressional Appropriations to the Fund

The EPACT specifies that the annual Special Assessment of domestic utilities "shall not exceed" $150 million of the total $480 million in annual deposits to the Fund. One commenter stated that the ratio (.4545) of the maximum amount of Special Assessments ($150 million) to the total amount of government deposits ($330 million) represents the maximum percentage of total deposits the utilities can be assessed in a given fiscal year. This percentage should be applied against the Federal Government contributions to the Fund to determine the ceiling for each annual Special Assessment of domestic utilities. For example, if the Federal Government contributes $100 million in a given fiscal year, the utility contribution should be $45.45 million ($100 million x .4545). The commenter contended that use of this capping method would make the domestic utility contributions to the Fund proportional to those made by the Federal Government and would eliminate the possibility of utility over-subscription to the Fund.

EPACT authorizes the Department to collect a Special Assessment from domestic utilities up to $150 million per fiscal year without any requirement for proportionality between the Federal Government and utility contributions that are actually made to the Fund. Therefore, DOE will not impose an annually adjusted ceiling on the Fund or a requirement for actual proportionality between the two Fund sources.

K. Payment Schedule for Future Assessments

Several commenters expressed concern over the condensed payment schedule for payment of the Special Assessment in Fiscal Years 1993, 1994, and 1995. These commenters contended that this payment schedule presents an unfair burden on domestic utilities, and may make it difficult for utilities to obtain full rate recovery of the Special Assessment.

DOE accommodated this concern in the proposed rule in stating that "Fiscal Year 1994 invoicing will be postponed two quarters to accommodate the reconciliation of records." This delay also allows for more time between the Fiscal Year 1993 and Fiscal Year 1994 Special Assessments. In addition, the EPACT affords utilities full rate recovery protection without regard to the timing of payments (42 U.S.C. § 2297g–1(g)).

L. Fixed Annual Date for Invoicing

Several commenters expressed the need for a fixed date for invoicing of the Special Assessment to allow domestic utilities to plan for payment of the Special Assessment. DOE has modified the final rule to accommodate this concern. The final rule provides for annual invoicing of the Special Assessment on or about October 1 of each fiscal year with payment due 30 calendar days from the date of invoice, beginning with the Fiscal Year 1995 Special Assessment.

M. Payment of the Special Assessment for Utilities Transferring All of Their SWUs to Another Domestic Utility

One commenter recommended an exemption from payment of the Special Assessment for utilities that transferred, or plan to transfer, their entire portfolio of SWUs to other domestic utilities.

EPACT requires the Special Assessment to be calculated on the basis of SWUs purchased from DOE prior to the date of enactment of the legislation. Therefore, domestic utilities shall be liable for the Special Assessment based upon SWUs purchased prior to the date of enactment without regard to potential or actual transfers of SWU portfolios, except that transfers that were a result of sales made prior to the date of enactment will be treated as adjustments to a utility's assessment during reconciliation, in accordance with the requirements set forth in section 766.104. See Section R.

N. Submittal of Special Assessment Payment After Approval From Public Utility Commissions

One commenter requested that utilities be allowed to submit their payments of the Special Assessment after regulatory approval is obtained from their public utility commission for rate recovery of these costs. There is no basis for such a contingency in the

EPACT. The EPACT requires DOE to assess and collect an annual Special Assessment and provides for separate utility rate recovery of the assessments as a current cost of fuel. Making payment contingent upon a public utility commission's approval of Special Assessment costs could lead to undue delay in the collection of the Special Assessments and lost interest income for the Department. This delay could also cause DOE to risk violating EPACT by collecting more in a given fiscal year than the $150 million that is authorized, since DOE would lose control over the timing of collections. Therefore, DOE will not permit a delay in payment pending public utility commission cost recovery authorization.

O. Establishment of a D&D Trust Fund Managed by the Domestic Utilities

Several commenters requested that the annual Special Assessments, once collected, be placed into a Trust Fund to be managed by the domestic utilities. These commenters stated that such an arrangement would demonstrate prudence to rate regulators, and enable utilities to provide greater cost-control assurance to their customers.

The EPACT requires that the Fund be established in the Treasury of the United States, and that amounts contained in the Fund be invested by the Secretary of the Treasury in obligations of the United States. (42 U.S.C. § 2297g). Since the EPACT does not leave management of the Fund to DOE discretion, the Department cannot establish a utility managed trust fund.

P. Payment of Interest on Credits to Future Special Assessments

Several commenters expressed concern about the inability of domestic utilities to recover interest on any credits to future Special Assessments as a result of changes to utility Special Assessments from the reconciliation process. In the absence of specific authority, DOE cannot pay interest. The EPACT provides no authority for the payment of interest on credits or refunds made to utilities. However, DOE expects the majority of credits to Special Assessments to be completed in Fiscal Year 1994 as a result of the reconciliation process.

Q. Method of Payment

One commenter requested that DOE modify the final rule, which requires payment to be made by wire transfer, to allow domestic utilities to make payment of the Special Assessment by other electronic funds transfer methods.

The final rule continues to specify wire transfer as the method of payment because this is the only electronic method accepted by the Department of Treasury. This method is consistent with payment methods already in use and familiar to domestic utilities. DOE is currently investigating the use of the Automated Clearing House method of payment with the Department of Treasury. Should this collection procedure become available, DOE may propose modification to this rule to reflect the change.

R. Reconciliation Adjustments and Appeals

Several commenters remarked that thirty days from the date of a Special Assessment invoice was insufficient time to file a notice requesting an invoice adjustment. One of the commenters recommended that DOE clarify the phrase in section 766.104(a) "* * * filing of the notice is complete only upon receipt by DOE." The commenter was concerned that this language could be construed to mean that filing of a notice is only complete when DOE deems the documentation supplied with such notice to be acceptable. DOE believes that thirty days is sufficient time to file a notice requesting adjustment. The final rule clarifies that domestic utilities are considered to have met the 30-day filing deadline upon receipt by DOE of the notice requesting an adjustment, and not contingent upon acceptance of supporting documentation by DOE. If more time is needed to gather probative information, DOE will consider utility requests for additional time, up to 90 days, to gather the necessary information based on a showing of need.

One commenter requested that DOE provide guidelines for verification of transactions involving non-utilities and foreign utilities, and for the recalculation of utility assessments and the notification of changes in assessments. DOE does not believe that guidelines would be helpful for these purposes because the use of reliable and probative documentation, provided by selling and purchasing utilities and other sources, would be adequate and would provide flexibility in accomplishing the purpose of the reconciliation process.

One domestic utility requested that DOE amend the Section-by-Section Analysis in the interim final rule to clarify that DOE is giving equal weight to the seller's and purchaser's documentation submitted in the reconciliation process. DOE has amended section 766.104 and the Section-by-Section Analysis to reflect this request.

DOE has also amended the final rule to allow the Department to acquire probative documentation that may not reside with the Department or with a domestic utility, if the Department believes that such information would be useful for reconciliation of SWU records. During the reconciliation process, DOE will provide to the affected utilities the substance of any data obtained from other sources, but may withhold the source of the information consistent with applicable confidentiality requirements.

One commenter was concerned that DOE had not provided for refunds of over-payments of Special Assessments. The final rule provides for refunds of Special Assessment payments in cases where it is determined that an over-payment has been made, with the exception of FY 1993 invoices. For FY 1993, DOE has already issued credits or refunds as appropriate.

S. Prepayment of Special Assessments

Subsequent to the comment period, one domestic utility requested to prepay future year Special Assessments. For convenience and expediency, DOE agrees to accommodate this request and has added to the final rule a new section 766.107 permitting prepayments. However, DOE will apply only the pro-rata share of any prepayment to a given fiscal year to ensure that the total Special Assessment for any fiscal year does not exceed $150 million (adjusted for inflation).

T. Miscellaneous Comments

One commenter requested that section 766.1 be revised to read as follows: "The provisions of this part establish policies applicable to administration of the Fund established by sections 1801, 1802, and 1803 of the Act as amended." DOE has revised the final rule to reflect this request.

Another commenter requested that a definition for the term "delivery" be included in the final rule, asserting that unused SWU credits held by a utility should not be considered deliveries for purposes of determining the utility's SWU purchases. DOE does not believe a definition of delivery is necessary because it is relying upon the Toll Enrichment Services System (TESS), which is defined in the final rule. The TESS does not define the term delivery but includes data on SWU deliveries to domestic utilities. DOE intends to use TESS data in determining SWU deliveries for purposes of determining SWU purchases from DOE. As appropriate, DOE will modify the application of TESS data for any discrepancies or further transactions raised during the reconciliation process.

One commenter requested DOE to insert the word "commercial" immediately before "electricity generation" in the definition of Domestic Utility. This comment is consistent with the EPACT, and DOE has revised the final rule to incorporate the change.

Two commenters requested that the number of significant digits used in calculating the Special Assessment be specified in the final rule. The final rule has been modified to specify that five significant digits will be used in the calculation of the Special Assessment.

In addition to the changes made in response to comments, DOE has also made a number of clarifying editorial changes in the final rule.

U. Review Under Executive Order 12866

Several commenters addressed DOE's decision not to consider the final rule as a major rule under Executive Order 12291 (recently replaced by Executive Order 12866). The commenters believe that the annual Special Assessment of $150 million appears to satisfy the criteria for a major rule, or in the case of Executive Order 12866 a significant regulatory action, having an effect of over $100 million on the economy. While the assessments to be paid by members of the electric utility industry will exceed $100 million annually, and may even be considered a major cost to the industry, these costs are not the result of any exercise of DOE's discretion in this final rule, but rather are specifically imposed by EPACT. After consultation with the Office of Management and Budget, DOE has determined the final rule is not a significant regulatory action.

V. Review Under the Paperwork Reduction Act

Many commenters stated that the final rule imposes an additional paperwork burden on the public, and that hundreds of hours have already been spent in additional paperwork in response to this rule. In consultation with the Office of Management and Budget (OMB), DOE has determined, under the Paperwork Reduction Act (44 U.S.C. § 3501 *et seq.*), that the final rule imposes relatively minimal additional paperwork burden on the public. Therefore, DOE will not amend the rule's information collection requirements.

IV. Section by Section Analysis

A. Subpart A—General

1. Sections 766.1 and 766.2 Purpose and Applicability

Section 766.1 specifies that the purpose of this rule is to establish procedures for the Special Assessment of domestic utilities for the Fund pursuant to sections 1801, 1802 and 1803 of the Act. Section 766.2 describes the applicability of the rule, stating that it applies to all domestic utilities in the United States that purchased SWUs from the Department between 1945 and October 23, 1992.

2. Section 766.3 Definitions

Section 766.3 sets forth pertinent definitions applicable to Part 766. DOE has added definitions for "commercial electricity generation" and "use and burnup charges."

B. Subpart B—Procedures for the Special Assessment for the Uranium Enrichment Decontamination and Decommissioning Fund

1. Section 766.101 Data Utilization

Section 766.101 identifies the records upon which the determination of the SWUs purchased for domestic, foreign, and defense purposes shall be based. An audit was completed on records in DOE's possession on July 19, 1993, by an independent accounting firm prior to initial billing. These records reflect all SWUs produced and delivered by DOE (or DOE's predecessor agencies) from 1945 to October 23, 1992. These records reflect initial production and delivery of SWUs, and do not reflect subsequent transactions involving DOE SWUs by domestic utilities. Accordingly, DOE may also use privately held, reliable, and probative records of SWU transactions. Access to DOE records is subject to generally applicable laws and regulations governing classified and sensitive unclassified information and materials. Requests for confidential treatment of business records submitted to DOE are subject to 10 CFR Part 1004.

2. Section 766.102 Calculation Methodology

Section 766.102 describes the method for calculating Special Assessments. It is based on the formula described in the text of the Act. The rule has been modified so that all calculations will be carried to five significant digits.

3. Section 766.103 Special Assessment Invoices

Section 766.103 addresses the billing of the Special Assessments. DOE issued Fiscal Year 1993 invoices in September 1993, along with a summary of supporting information as described in paragraph (b) of section 766.103. Under paragraph (c), DOE will issue similar invoices in future fiscal years and update supporting information as appropriate.

4. Section 766.104 Reconciliation, Adjustments, and Appeals

Section 766.104 outlines procedures that must be followed by domestic utilities when seeking adjustments of invoices. DOE anticipates that this procedure will be used most often with respect to the Fiscal Year 1993 Special Assessment as domestic utilities present records of secondary market SWU transactions for reconciliation of the allocation of SWUs. Following reconciliation of records, DOE will provide, in appropriate cases, refunds or additional assessments. Determinations under section 766.104 will serve as precedents, and may be the basis for summary determinations for repetitious claims filed in the years following Fiscal Year 1993.

During the administrative reconciliation process, each domestic utility will have the opportunity to question the allocation of SWUs that was the basis of the Special Assessment, and DOE will have the opportunity to adjust the allocation of SWUs based on probative information it obtains from other sources. In most instances, documentary evidence of SWU transactions, in the nature of resales or purchases of DOE SWUs from other sources, is in the possession of domestic utilities or other parties involved in the secondary market. Domestic utilities will be responsible for raising the issue of resales and purchases and should be prepared to respond to any questions regarding their records of resales and purchases; however, DOE may rely on information from other sources, if it is reliable and adequately probative of the transactions documented, to validate the content of utility records. DOE shall attempt to verify all claims with corroborating documentation provided by both the seller and purchaser. In order to obtain corroborating evidence, DOE may rely on its subpoena authority pursuant to section 161(c) of the Act. DOE may also seek relevant data from the Nuclear Regulatory Commission's NMMSS. DOE may give greater weight to documents that were prepared contemporaneously with the purchase or sale of SWUs, although other documentation will be considered. As appropriate, DOE will modify its application of TESS data for discrepancies and additional transactions raised during the reconciliation process.

DOE considered the possibility of delaying the requirement to make payments until reconciliation of records is complete, but rejected such a procedure because the time required to reconcile records would have unduly delayed the program. This would have frustrated Congress's intention to establish the Fund expeditiously, and caused domestic utilities to encounter delays in obtaining appropriate rate relief.

Section 766.104 also provides an administrative appeal procedure for domestic utilities to challenge an adverse determination by DOE on a Special Assessment. Appeals may be filed with the Office of Hearings and Appeals (OHA), a quasi-judicial body that reports to the Secretary of Energy. The OHA is responsible for conducting many of the informal adjudicative proceedings of DOE involving separation of functions. DOE chose OHA to conduct the appeals process because of its expertise in developing administrative records regarding economic issues. In connection with these duties, OHA holds hearings, receives evidence, develops a record, and issues a final determination, which is subject to review in federal courts. The procedures of OHA applicable to this rule are set forth in 10 CFR Part 205, Subpart H. DOE has revised the rule to clarify that it will rely upon decisions from the OHA and any ruling from courts with appropriate jurisdiction in revising records of SWU transactions.

5. Section 766.105 Payment Procedures

Section 766.105 provides that DOE shall specify the procedures that shall be followed by domestic utilities in payment of their apportioned share of the Special Assessment. Wire transfer is identified as the method of payment.

6. Section 766.106 Late Payment Fees

Section 766.106 addresses procedures for assessment of late payment fees in case of a late payment by a domestic utility of its special assessment.

7. Section 766.107 Prepayment of Special Assessments

Section 766.107 has been added to the rule to allow prepayment of future year Special Assessments.

V. Review Under Executive Order 12866

DOE has reviewed this final rule and, after consultation with the Office of Information and Regulatory Affairs within the OMB, determined that the final rule is not a "significant regulatory action" under Executive Order 12866, "Regulatory Planning and Review," (58 FR 51735, October 4, 1993). Accordingly, today's action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs.

Under one criterion of the Executive Order, a regulatory action is deemed significant if it is expected to have an annual effect on the economy of $100 million or more. It was determined that this criterion did not apply to today's action for the following reasons. While the money to be paid by members of the electric utility industry under the Special Assessment will exceed $100 million annually, these costs are not the result of any exercise of DOE's discretion in the rule. Rather, these costs are specifically imposed by the EPACT and reflect for domestic utilities their statutory *pro rata* share of costs related to the remediation and D&D of DOE's uranium enrichment facilities.

VI. Review Under the Regulatory Flexibility Act

In accordance with section 605 (b) of the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*, DOE finds that sections 603 and 604 of that Act do not apply to this rule because it will not have a significant economic impact on a substantial number of small entities. This finding is based on a determination that the domestic utilities who will be assessed are not small entities.

VII. Review Under the Paperwork Reduction Act

The information collection requirements in this rule have been approved by the OMB under the Paperwork Reduction Act and have been assigned OMB control number 1910–1400.

VIII. Review Under the National Environmental Policy Act

This rule establishes procedures for the Special Assessment of domestic utilities for amounts that are to be deposited in the Fund. The Fund will be used to pay for the cost of D&D and remedial action activities at DOE's uranium enrichment facilities, and for the reimbursement of certain costs of D&D, reclamation, and other remedial actions incurred by licensees at active uranium or thorium processing sites, as specified in Title X of the EPACT. Implementation of this rule will not affect the legally required cleanup of the sites or result in any other environmental impacts. The Department has therefore determined that this rule is covered under the Categorical Exclusion found at paragraph A.6 of Appendix A to Subpart D, 10 CFR Part 1021, which applies to the establishment of procedural rulemakings. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

IX. Review Under Executive Order 12612

This final rule does not have a substantial direct effect on the states, the relationship between the states and the Federal Government, or the distribution of power and responsibilities among various levels of Government. No Federalism assessment under Executive Order 12612 is required.

X. Review Under Executive Order 12778

Section 2 of Executive Order 12778 instructs each agency to adhere to certain requirements in promulgating new regulations and reviewing existing regulations. These requirements, set forth in sections 2 (a) and (b), include eliminating drafting errors and needless ambiguity, drafting the regulations to minimize litigation, providing clear and certain legal standards for affected conduct, and promoting simplification and burden reduction. Agencies are also instructed to make every reasonable effort to ensure that the regulation clearly specifies any preemptive effect, effect on existing Federal law or regulation, and retroactive effect, describes any administrative proceedings to be available prior to judicial review and any provisions for the exhaustion of such administrative proceedings; and defines key terms. DOE certifies that today's final rule meets the requirements of sections 2 (a) and (b) of Executive Order 12778.

List of Subjects in 10 CFR Part 766

Confidential Business Information, Electric Power Rates, Electric Utilities, Nuclear Materials, Radioactive Materials, Reclamation, Reporting & Recordkeeping Requirements, Uranium, Waste Treatment & Disposal.

Issued in Washington, D.C., on this 8th day of August, 1994

Thomas P. Grumbly,

Assistant Secretary for Environmental Management.

For the reasons set forth in the Preamble, Part 766 of Title 10 of the Code of Federal Regulations is revised to read as set forth below:

PART 766—URANIUM ENRICHMENT DECONTAMINATION AND DECOMMISSIONING FUND; PROCEDURES FOR SPECIAL ASSESSMENT OF DOMESTIC UTILITIES

Authority: 42 U.S.C. §§ 2201, 2297g, 2297g–1, 2297g–2, 7254.

Subpart A—General

§ 766.1 Purpose.

The provisions of this part establish procedures for the Special Assessment of domestic utilities for the Uranium Enrichment Decontamination and Decommissioning Fund pursuant to sections 1801, 1802 and 1803 of the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2011 *et seq.*).

§ 766.2 Applicability.

This part applies to all domestic utilities in the United States that purchased separative work units from the DOE between 1945 and October 23, 1992.

§ 766.3 Definitions.

For the purposes of this part, the following terms shall be defined as follows:

CPI–U means the Consumer Price Index for all-urban consumers published by the Department of Labor.

Commercial electricity generation means the production of electricity for sale to consumers.

DOE means the United States Department of Energy and its predecessor agencies.

Domestic utility means any utility in the United States that has purchased SWUs produced by DOE for the purpose of commercial electrical generation during the period beginning in 1945 to October 23, 1992.

Fund means an account in the U.S. Treasury referred to as the Uranium Enrichment Decontamination and Decommissioning Fund, established by section 1801 of the Atomic Energy Act of 1954, as amended.

Oak Ridge Operations Office means the Oak Ridge Operations Office of the Department of Energy in Oak Ridge, Tennessee.

Special Assessment means the Special Assessment levied on domestic utilities for payments into the Fund.

SWU means a separative work unit, the common measure by which uranium enrichment services are sold.

TESS means the Toll Enrichment Services System, which is the database that tracks uranium enrichment services transactions of the DOE Oak Ridge Operations Office for the purpose of planning, toll transaction processing, customer invoicing and historical tracking of SWU deliveries.

Use and burnup charges mean lease charges for the consumption of SWUs and natural uranium.

Subpart B—Procedures for Special Assessment

§ 766.100 Scope.

This subpart sets forth the procedures for the Special Assessment of domestic utilities for funds to be deposited in the Fund.

§ 766.101 Data utilization.

DOE shall use the records from the Toll Enrichment Services System (TESS) and other records maintained by the Oak Ridge Operations Office in order to determine the total SWUs purchased from DOE for all purposes. DOE shall use records from TESS, relevant records of domestic utilities, and such other information as DOE deems to be reliable and probative in determining the number of SWUs that were purchased by each domestic utility prior to October 24, 1992. A domestic utility shall be considered to have purchased a SWU from DOE if the SWU was produced by DOE but purchased by the domestic utility from another source. DOE shall consider a purchase to have occurred upon the delivery of a SWU to the domestic utility purchasing the SWU. A domestic utility shall not be considered to have purchased a SWU from DOE if the SWU was purchased by the domestic utility but subsequently sold to another source.

§ 766.102 Calculation methodology.

(a) *Calculation of Domestic Utilities' Annual Assessment Ratio to the Fund.* Domestic utilities shall be assessed annually for their share of the Fund. The amount of the assessment shall be determined by the ratio of SWUs produced by DOE and purchased by domestic utilities prior to October 24, 1992, to the total number of SWUs produced by DOE for all purposes (including SWUs produced for defense purposes). All calculations will be carried out to the fifth significant digit. This ratio is expressed by the following hypothetical example:

SWUs purchased by all domestic utilities		Total SWUs produced—all purposes		Special assessment ratio
12345	÷	45678	=	.27026

(b) *Calculation of the Baseline Total Annual Special Assessment for Domestic Utilities.* The Annual Special Assessment ratio calculated in paragraph (a) of this section shall be multiplied by $480 million, yielding the total amount of the Baseline Total Annual Special Assessment as of October 1992. In the event that this amount is in excess of $150 million, the Baseline Total Annual Special Assessment shall be capped at $150 million. All calculations will be carried out to the fifth significant digit. The Baseline Total Annual Special Assessment is determined as shown in the following hypothetical example:

Total fund		Annual assessment ratio		Baseline total annual special assessment
$480,000,000	×	0.27026	=	$129,724,800

(c) *Calculation of Baseline Total Annual Special Assessment per Utility.* The ratio of the total number of SWUs purchased by an individual domestic utility for commercial electricity generation, to the total number of SWUs purchased by all domestic utilities for commercial electricity generation, multiplied by the Baseline Total Annual Special Assessment calculated in paragraph (b) of this section, determines an individual utility's share of the Baseline Total Annual Special Assessment. All calculations will be carried out to the fifth significant digit. A hypothetical example of such a calculation follows:

Single utility SWUs		All utility SWUs		Utility ratio		Baseline total annual special assessment		Individual utility special Assessment
300	+	12345	=	.02430	×	$129,724,800		$3,152,312.64

(d) *Calculation of Inflation Adjustment.* The Baseline Total Annual Special Assessment billed to domestic utilities shall be adjusted for inflation using the most recently published monthly CPI–U and the CPI–U for October 1992. All calculations will be carried out to the fifth significant digit. A hypothetical example of such a calculation follows:

CPI–U (Mar 93)		CPI–U (Oct 92)		Adjustment multiplier
150	+	141.6	=	1.05783

Utility special Assessment		Adjustment multiplier		Adjusted utility assessment
$3,152,312.64	×	1.05783	=	$3,334,610.88

§ 766.103 Special Assessment invoices.

(a) DOE shall issue annually a Special Assessment invoice to each domestic utility. This invoice will specify itemized quantities of enrichment services by reactor. In each Special Assessment invoice, DOE shall require payment, on or before 30 days from the date of each invoice, of that utility's prorated share of the Baseline Total Annual Special Assessment, as adjusted for inflation using the most recently published monthly CPI–U data.

(b) DOE shall enclose with the Fiscal Year 1993 Special Assessment invoice a sealed, business confidential, summary SWU transaction statement including:

(1) TESS information which documents, by reactor, the basis of the utility's assessment;

(2) A list of domestic utilities subject to the Special Assessment;

(3) The total number of SWUs purchased from DOE by all domestic utilities for all purposes prior to October 24, 1992.

(4) The total number of SWUs purchased from DOE for all purposes prior to October 24, 1992, including SWUs purchased or produced for defense purposes; and

(5) Such other information as may be appropriate.

(c) With regard to any fiscal year after Fiscal Year 1993, DOE shall enclose a summary SWU transaction statement with Special Assessment invoices that will include updated information regarding adjustments to Special Assessments resulting from the reconciliation and appeals process under Section 766.104.

(d) The date of each Annual Special Assessment invoicing will be set on or about October 1 with payment due 30 calendar days from the date of invoice starting with the Fiscal Year 1995 Special Assessment.

§ 766.104 Reconciliation, adjustments and appeals.

(a) A domestic utility requesting an adjustment shall, within 30 days from the date of a Special Assessment invoice, file a notice requesting an adjustment. Such notice shall include an explanation of the basis for the adjustment and any supporting documents, and may include a request for a meeting with DOE to discuss its invoice. If more time is needed to gather probative information, DOE will consider utility requests for up to 90 days additional time, providing that the initial notice requesting an adjustment was timely filed. The notice shall be filed at the address set forth in the Special Assessment invoice, and filing of this notice is complete only upon receipt by DOE. Domestic utilities are considered to have met the filing requirements upon DOE's receipt of the notice requesting an adjustment without regard to DOE's acceptance of supporting documentation. The filing of a notice for an adjustment shall not stay the obligation to pay.

(b) DOE may request additional information from domestic utilities and may acquire data from other sources.

(c) After reviewing a notice submitted under paragraph (a) of this section and other relevant information, and after making any necessary adjustment to its records in light of reliable and adequately probative records submitted in connection with the request for adjustment or otherwise obtained by DOE, DOE shall make a written determination granting or denying the requested adjustment. As appropriate, DOE shall modify the application of TESS data for any discrepancies or further transactions raised during the reconciliation process.

(d) Any domestic utility that wishes to dispute a written determination under paragraph (c) of this section shall have the right to file an appeal with the Office of Hearings and Appeals, U.S. Department of Energy, 1000 Independence Avenue S.W., Washington, DC 20585. Except for the Fiscal Year 1993 Special Assessment, any appeal must be filed on or before 30 days from the date of the written determination and should contain information of the type described in 10 CFR Part 205, Subpart H. With regard to a written determination under paragraph (c) of this section concerning a Fiscal Year 1993 Special Assessment, a domestic utility must file an appeal on or before 30 days from the effective date of this paragraph or from the date of such written determination, whichever is later. The decision of the Office of Hearings and Appeals shall be the final decision of DOE. Upon completion of the reconciliation process, all records of SWU transactions shall be finalized and shall become the basis of subsequent Special Assessment invoices. These records shall be revised to reflect any decisions from the Office of Hearings and Appeals and any applicable court rulings.

(e) Refunds of Special Assessments shall be provided in cases where DOE has determined, as a result of reconciliation, that an overpayment has been made by a domestic utility, and that the domestic utility has no further current obligation to DOE.

§ 766.105 Payment procedures.

DOE shall specify payment details and instructions in all Special Assessment invoices. Each domestic utility shall make payments to the Fund by wire transfer to the Department of Treasury.

§ 766.106 Late payment fees.

In the case of a late payment by a domestic utility of its Special Assessment, the domestic utility shall pay interest at the per annum rate (365-day basis) established by DOE for general application to monies due DOE and not received by DOE on or before a designated due date. Interest shall accrue beginning the date of the designated payment except that, whenever the due date falls on a Saturday, Sunday, or a United States legal holiday, interest shall commence on the next day immediately following which is not a Saturday, Sunday, or United States legal holiday. Late payment provisions for the Special Assessment to the Fund shall be based on the Treasury Current Value of Funds Rate (which is published annually by the Treasury and used in assessing interest charges for outstanding debts on claims owed to the United States Government), plus six (6) percent pro rata on a daily basis. The additional six (6) percent charge shall not go into effect until five (5) business days after payment was originally due. Late payment fees shall be invoiced within two days of receipt of utility payment of the special assessment when delinquency is less than 30 days. For longer periods of delinquency, DOE will submit additional invoices, as appropriate. Late payment fees will be due 30 days from the date of invoice.

§ 766.107 Prepayment of future Special Assessments

DOE shall accept prepayment of future Special Assessments upon request by a domestic utility. A domestic utility's liability for the future assessments shall be satisfied to the extent of the prepayments. DOE shall use the pro rata share of prepayments attributable to a given fiscal year plus the Special Assessments collected from utilities who did not prepay for that fiscal year, in order to determine that the total amount of Special Assessments collected from domestic utilities in a given fiscal year does not exceed $150 million, annually adjusted for inflation.

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Monday
August 15, 1994

Part X

Environmental Protection Agency

40 CFR Part 82
Protection of Stratospheric Ozone; Refrigerant Recycling; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 82

[FRL–5040–5]

Protection of Stratospheric Ozone; Refrigerant Recycling

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is amending the rules on refrigerant recycling promulgated under section 608 of the Clean Air Act to clarify the conditions under which technician certification programs would be grandfathered, allowing technicians who had participated in voluntary technician training and certification programs prior to the publication of the rule to receive formal certification. EPA is also proposing to amend the rule to clarify the scope of the technician certification requirement.

DATES: Written comments on the proposed rule must be received by September 14, 1994, unless a hearing is requested by August 25, 1994. If a hearing is requested, written comments must be received by October 3, 1994. If requested, a public hearing will be held on September 1, 1994 at 9 a.m. Individuals wishing to request a hearing must contact the Stratospheric Ozone Hotline at 1–800–296–1996 by August 25, 1994. To find out whether a hearing will take place, contact the Stratospheric Ozone Hotline between August 26, 1994 and September 1, 1994.

ADDRESSES: Comments should be submitted in duplicate to the attention of Air Docket No. A–92–01 VIII.A at: Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460. The public hearing will be held at Washington Information Center (WIC), room 3 North, USEPA, 401 M Street SW., Washington, DC. The Air and Radiation Docket and Information Center is located in room M–1500, Waterside Mall (Ground Floor) Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460. Dockets may be inspected from 8:00 a.m. to 4:00 p.m., Monday through Friday. A reasonable fee may be charged for copying docket materials.

FOR FURTHER INFORMATION CONTACT: Debbie Ottinger, Program Implementation Branch, Stratospheric Protection Division, Office of Atmospheric Programs, Office of Air and Radiation (6205–J), 401 M Street, S.W., Washington, D.C. 20460. The Stratospheric Ozone Information Hotline at 1–800–296–1996 can also be contacted for further information.

SUPPLEMENTARY INFORMATION:

I. Background

Final regulations published on May 14, 1993 (58 FR 28660) establish a recycling program for ozone-depleting refrigerants recovered during the servicing and disposal of air-conditioning and refrigeration equipment. The regulations require technicians to observe practices that serve to minimize release of refrigerant to the environment. To ensure that technicians become knowledgeable of these requirements, § 82.161 of the final rule mandates that technicians be certified by passing a test. For Type II, Type III, and Universal technicians, the test must be a closed-book, proctored examination drawn from a bank of test questions kept by the Environmental Protection Agency (EPA) and administered in a secure environment by an EPA-approved certifying program. For Type I technicians, a mail-in program is permitted. Testing and training organizations can apply to EPA to become EPA-approved technician certifiers under § 82.161(c) by demonstrating that they can ensure test security, provide an adequate number of proctors during the examination, select questions randomly from the test bank, and provide proof of certification to technicians who pass the exams. (The specific requirements of the program are presented in § 82.161 and appendix D of the final rule.) To date, EPA has authorized 66 organizations as technician certifying organizations.

A. Grandfathering

Under § 82.161(g), organizations that seek approval as certifying organizations can also apply to grandfather technicians who received training and testing under programs established prior to promulgation of the final rule (which established the approval process for certification programs). Specifically, § 82.161(g) states:

"Persons seeking approval of a technician certification program may also seek approval for technician certifications granted previously under the program. Interested persons may submit to the Administrator at the address in § 82.160(a) verification that the program met all of the standards of § 82.161(c) and appendix D, * * * except for some elements of the test subject material, in which case the person must submit verification that supplementary information on that material will be provided pursuant to appendix D, section (j)"

When EPA initially drafted the language requiring programs to meet "all of the standards of § 82.161(c) and appendix D," these standards were considerably more general than those that were ultimately incorporated into the rule. The proposal had discussed possible requirements in broad terms. For instance, although the proposal anticipated that tests would be proctored, it did not suggest a specific ratio of proctors to examinees, such as the 1:50 ratio that ultimately appeared in the final rule. Similarly, the proposal did not specify whether tests would be open- or closed-book. Instead, the proposal included general requirements that tests be proctored, that test security measures be in place, and that tests be graded objectively. EPA believed that many voluntary programs would meet these general requirements.

In response to comments, the requirements for certifying organizations grew more specific. EPA believed that increasing the specificity of the standards strengthened the technician certification program overall. However, EPA did not thoroughly reevaluate and revise its grandfathering provision to reflect the new, detailed requirements. Instead, the provision inappropriately continued to require voluntary programs to have met *all* the requirements of § 82.161(c) and appendix D.

This error has now come to EPA's attention. The Agency recognizes that if voluntary programs were held to each of the detailed standards, no voluntary technician certification program could be grandfathered. Appendix D contains the specific requirements of the technician certification program. Voluntary programs prior to the promulgation of the final rule could not have complied with these requirements, as they were not yet in existence. Section (a) (Test Preparation) of appendix D requires that "each certifying program must assemble tests by choosing a prescribed subset from the EPA test bank." However, the test bank did not become available until September 30, 1993. In addition, EPA requires programs to certify technicians with Type I, Type II, or Type III certifications, depending on the level of the test passed by the technician. EPA developed these categories after the close of the public comment period to the proposed rule. However, other logical categorization systems are possible, and until EPA promulgated the final rule, many technician certification organizations categorized technician types differently. Furthermore, section (a) requires a closed-book test, yet most testing organizations prior to the final rule offered only open-book tests. Finally, appendix D defines the ratio of technicians to proctors, and requires recordkeeping and reporting requirements, all requirements that organizations certainly could not have complied with prior to the promulgation of the final rule.

Nevertheless, many voluntary programs met most of the standards of appendix D, for instance proctoring tests (at least the equivalent of Type II, Type III, and Universal tests), ensuring test security, and objectively grading tests. Several programs also covered most of the required subject matter in the core and at least some technical sections, even when they did not establish the same categories in their testing as were established in the final rule (Type I, II, etc.). Where the content of their voluntary testing fell short of that required by the final rule, programs expressed their willingness to provide additional testing and training as needed, and the final rule provided for this remedy.

EPA has always intended to grandfather these reasonably stringent programs. By training and testing technicians in recycling refrigerants before the rule was promulgated (on May 14, 1993), reasonably stringent voluntary programs prepared technicians to comply with the prohibition on venting that became effective on July 1, 1992, and probably significantly reduced refrigerant emissions. These programs also served as an impetus for developing a mandatory program, providing a model for that program. Indeed, EPA worked with several voluntary programs to develop the requirements of the mandatory program. In addition, many voluntary organizations provided questions for the test bank, determining the scope of the training and the current exam. In proposing and adopting the grandfathering provision, EPA recognized that these benefits outweighed any costs that might be associated with the programs' unavoidable failure to have followed every requirement that new programs must follow under the final rule. Moreover, EPA did not want to discourage future participation in voluntary environmental training. Requiring repeat testing for technicians who voluntarily took adequate testing and training could discourage people from participating in future voluntary programs. For these reasons, EPA is modifying the requirements for grandfathering to ensure that these programs are not disqualified outright due to a drafting error by the Agency.

Specifically, the EPA today is proposing to amend the grandfathering provision of § 82.161(g). This paragraph currently states that "[i]nterested parties may submit to the Administrator at the address in § 82.160(a) verification that the program met all of the standards of § 82.161(c) and appendix D, or verification that the program met all of the standards of § 82.161(c) and appendix D, except for some elements of the test subject material, in which case the person must submit verification that supplementary information will be provided pursuant to appendix D, section (j)." EPA is proposing to amend § 82.161(g) to read "Interested persons may submit to the Administrator at the address in § 82.160(a) verification that the program substantially complied with most of the standards of § 82.161(c) and appendix D. If the program did not test or train participants on some elements of the test subject material, the person must submit verification that supplementary information on the omitted material will be provided pursuant to appendix D, section (j)."

In reviewing requests to grandfather technicians, EPA will assess the extent to which a program substantially complied with most of the requirements in each paragraph of § 82.161(c) and appendix D (paragraph (a) of appendix D being test preparation, (b), proctoring, (c), test security, etc.) and most of the paragraphs of § 82.161(c) and appendix D, considering the information that was available to the program at the time of its development. EPA believes that this is reasonable given the limited information available to these programs before the final rule was published. For example, the proposed rule published on December 10, 1992, discussed the need for organizations to provide proctored tests under conditions that ensured test security, but did not specify that one proctor be provided for every 50 individuals taking the test. Under the approach proposed in this document, voluntary programs that provided proctors, but did not necessarily provide exactly one proctor for every 50 individuals taking the test, would not be disqualified on that basis alone. EPA believes that the modification of the final rule to replace "met all" with "substantially complied with most" allows EPA to review these programs taking such circumstances into account.

EPA recognizes that the current rule requires that all technicians be certified by November 14, 1994. However, EPA did not anticipate the delay caused by this amendment, and EPA does not wish to force technicians who completed a voluntary program to take additional testing simply because they do not know whether or not their voluntary program will be grandfathered. Thus, the Agency proposes to extend the deadline until six months after promulgation of this amendment for those technicians who successfully completed voluntary programs. During the six-month period of the extension, those technicians who successfully completed a voluntary program could continue to service, maintain, repair, and dispose of appliances and could buy refrigerant using the certificates or cards issued by the voluntary program. This additional time would allow EPA to consider applications for grandfathering and would enable grandfathered voluntary programs to provide supplementary information or testing, if necessary, and proof of certification to grandfathered technicians. To make their past participants eligible for this extension, programs would have to apply (or have already applied) within 30 days of publication of the final amendment: (1) To be approved as a "new" program, and (2) to grandfather technicians. This extension would not apply to technicians who had not participated in voluntary programs that apply within the set period. These technicians would still have to be certified by November 14, 1994.

In addition to the changes outlined above, EPA is clarifying how it would determine whether programs and individual technicians would be grandfathered for a given Type. Whether a voluntary certification program was grandfathered for a Type would depend upon the coverage by the program of the material in that Type. Whether an individual technician was grandfathered for a given Type would depend upon: (1) Whether the technician successfully completed a voluntary program that was grandfathered for that Type; (2) whether the technician successfully completed the portions of the voluntary certification program that correspond to that Type; and (3) whether the technician completes any additional testing and training required by the Administrator pursuant to § 82.161(g)(i). For clarity, EPA is also adding two definitions, defining "to be grandfathered," and "voluntary certification program."

B. Clarification of the Scope of the Technician Certification Requirement

EPA is proposing several changes to clarify the scope of the technician certification requirement. The current regulation contains three provisions addressing the scope of this requirement. These provisions are somewhat inconsistent. The first provision is the definition of technician at § 82.152(x):

Technician means any person who performs maintenance, service, or repair that could reasonably be expected to release class I or class II substances from appliances into the atmosphere, including but not limited to installers, contractor employees, in-house service personnel, and in some cases, owners. Technician also means any person disposing of appliances except for small appliances.

This definition implies that certification requirements are triggered: (1) When persons perform maintenance or repair that has the potential to release refrigerants from appliances into the atmosphere or (2) when persons dispose of appliances.

The second provision requiring clarification is the prohibition at § 82.154(l):

(l) Effective November 14, 1994, no person may open an appliance except for an MVAC and no person may dispose of an appliance except for a small appliance, MVAC, or MVAC-like appliance, unless such person has been certified as a technician for that type of appliance pursuant to § 82.161.

The prohibition explicitly links certification requirements to "opening" of appliances. "Opening" an appliance is defined as "any service, maintenance, or repair on an appliance that could be reasonably expected to release refrigerant from the appliance to the atmosphere unless the refrigerant were previously recovered from the appliance" (§ 82.152(n)). Like the definition of technician, the prohibition also links certification requirements to the disposal of appliances, regardless of the potential for refrigerant release during any given phase of the disposal process.

Although the definition of "opening" contains language very similar to the language in the definition of "technician," specifically, "maintenance, service, or repair that could reasonably be expected to release class I or class II substances from appliances into the atmosphere," EPA intended the definitions to include slightly different types of activities. While EPA intended the definition of "technician" to include any work that could release refrigerant into the environment, EPA intended "opening" to include entry into the refrigeration circuit itself. The definition of "opening" was developed to include exactly the type of work before which refrigerant should be recovered from the appliance (or moved to another, isolated component of the appliance); thus, "opening" an appliance triggers EPA's evacuation requirements. Clearly, there are some types of activities, such as charging appliances, that have the potential to release refrigerant but should not trigger evacuation requirements.

Nonetheless, when EPA developed its evacuation and certification requirements, it believed that for all practical purposes, the same group of people would be included under the definition of "technician" and under the prohibition linked to the definition of "opening." However, EPA has since learned that some individuals charge appliances or do other work that could release refrigerant into the environment without ever "opening" appliances. EPA believes that these individuals should be certified. On the other hand, some individuals open or disassemble appliances only after refrigerant has been removed by someone else. EPA believes that if these individuals service, maintain, repair, or dispose of only empty appliances, they should not need to be certified.

The third provision requiring clarification is the technician certification requirement itself:

Effective November 14, 1994, persons who maintain, service, or repair appliances, except MVACS, and persons who dispose of appliances, except for small appliances, room air conditioners, and MVACs, must be certified by an approved technician certification program * * * (§ 82.161(a)).

This provision implies that all persons who maintain, service, repair or dispose of appliances (except for some types of appliances) must be certified, even those who do work (e.g., electrical work) that does not have the potential to release refrigerant to the atmosphere. While EPA intended this provision to include only the persons who fell under the first two provisions, it did not make this explicit in the regulation.

Therefore, EPA is proposing to amend the rule to clarify the scope of the certification requirement. First, the proposed rule would modify the definition of "opening" in order to distinguish it more clearly from the definition of "technician." "Opening" would be defined as any service, maintenance, or repair on an appliance that would (instead of "could") be reasonably expected to release refrigerant from the appliance to the atmosphere unless the refrigerant were previously recovered from the appliance. Second, the proposed rule would modify the disposal provision of the definition of "technician" to include only those parts of the disposal process (e.g., evacuation of the equipment) that have the potential to release refrigerant. Third, the proposal links this definition to the certification requirement at § 82.161 by replacing the term "person" in that requirement with the term "technician." Fourth, the prohibition linking technician certification requirements to "opening" appliances would be eliminated. EPA requests comment on whether these changes sufficiently clarify the scope of the technician certification requirement.

C. Limited Exemption From Certification Requirements for Apprentices

EPA is also amending the rule to clarify that apprentices who meet certain requirements are exempt from the certification requirement until the end of their field training, as long as that training does not exceed two years. EPA recognizes that some educational programs train apprentices in the field, allowing them to perform maintenance, service, repair, or disposal of appliances under the close supervision of more experienced technicians. A person would be considered an apprentice if he or she: (1) Was currently registered as an apprentice in service, maintenance, repair, or disposal of appliances with the U.S. Department of Labor's Bureau of Apprenticeship and Training (or its delegate), and (2) had less than two years of experience servicing, maintaining, repairing, or disposing of appliances (whether he or she was in a training program at the time or not). An apprentice would not need to be certified as long as he or she was closely and continuously supervised by a certified technician while performing any maintenance, service, repair, or disposal that could reasonably be expected to release refrigerant from appliances into the atmosphere. Uncertified apprentices would not be able to purchase refrigerant after November 14, 1994, however. This provision clearly would not permit uncertified technicians who were not in a training program to perform, under a certified supervisor, service, maintenance, repair, or disposal that could reasonably be expected to release refrigerant from appliances into the atmosphere.

EPA understands that both union and non-union apprentices in air conditioning and refrigeration throughout the U.S. are required to register with the U.S. Department of Labor's Bureau of Apprenticeship and Training. EPA requests comment on whether there are significant exceptions to this requirement and on EPA's proposed use of registration with the Bureau as a qualification for status as an apprentice under this rule. If registration with the Bureau is not an appropriate qualification, EPA requests comment on what other qualifications would permit EPA to distinguish *bona fide* apprentices from other technicians.

IV. Summary of Supporting Analysis

A. Executive Order 12866

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

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

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

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

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

It has been determined by OMB and EPA that this amendment to the final rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review under the Executive Order.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–602, requires that Federal agencies examine the impacts of their regulations on small entities. Under 5 U.S.C. 604(a), whenever an agency is required to publish a general notice of proposed rulemaking, it must prepare and make available for public comment an initial regulatory flexibility analysis (RFA). Such an analysis is not required if the head of an agency certifies that a rule will not have a significant economic impact on a substantial number of small entities, pursuant to 5 U.S.C. 605(b).

EPA believes that any impact that this amendment will have on the regulated community will serve only to provide relief from otherwise applicable regulations, and will therefore limit the negative economic impact associated with the regulations previously promulgated under section 608. An examination of the impacts on small entities was discussed in the final rule (58 FR 28660). That final rule assessed the impact the rule may have on small entities. A separate regulatory impact analysis accompanied the final rule and is contained in Docket A–92–01. I certify that this amendment to the refrigerant recycling rule will not have any additional negative economic impacts on any small entities.

C. Paperwork Reduction Act

Any information collection requirements in a rule must be submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Because no additional informational collection requirements are required by this amendment, EPA has determined that the Paperwork Reduction Act does not apply to this rulemaking and no new Information Collection Request document has been prepared.

V. Judicial Review

Under section 307(b)(1) of the Act, EPA finds that these regulations are of national applicability. Accordingly, judicial review of this action is available only by the filing of a petition for review in the United States Court of Appeals for the District of Columbia Circuit within sixty days of publication of this action in the **Federal Register**. Under section 307(b)(2), the requirements of this rule may not be challenged later in judicial proceedings brought to enforce those requirements.

List of Subjects in 40 CFR Part 82

Administrative practice and procedure, Air pollution control, Chemicals, Chlorofluorocarbons, Hydrochlorofluorocarbons, Recovery and recycle, Reporting and recordkeeping requirements, Stratospheric ozone layer.

Dated: August 4, 1994.

Carol M. Browner,

Administrator.

Title 40, Code of Federal Regulations, part 82, is amended as follows:

PART 82—PROTECTION OF STRATOSPHERIC OZONE

1. The authority citation for part 82 continues to read as follows:

Authority: 42 U.S.C. 7414, 7601, 7671–7671q.

2. Section 82.152 is amended by redesignating paragraphs (f) through (y) as paragraphs (h) through (aa), redesignating paragraphs (b) through (e) as paragraphs (c) through (f), revising newly designated paragraphs (p) and (z), and by adding new paragraphs (b), (g), and (bb) to read as follows:

§ 82.152 Definitions.

* * * * *

(b) *Apprentice* means any person who is currently registered as an apprentice in service, maintenance, repair, or disposal of appliances with the U.S. Department of Labor's Bureau of Apprenticeship and Training (or its delegate). If more than two years have elapsed since the person first began performing maintenance, service, repair or disposal of appliances or registered as an apprentice with the Bureau of Apprenticeship and Training, the person shall not be considered an apprentice.

* * * * *

(g) *To be grandfathered* means:

(1) To receive the approval of the Administrator pursuant to § 82.161(g)(1) to certify technicians who successfully completed a voluntary certification program; or

(2) To become certified as a technician pursuant to § 82.161(g)(2).

* * * * *

(p) *Opening* an appliance means any service, maintenance, or repair on an appliance that would be reasonably expected to release class I or class II refrigerant from the appliance to the atmosphere unless the refrigerant were previously recovered from the appliance.

* * * * *

(z) *Technician* means any person who performs maintenance, service, or repair that could be reasonably expected to release class I or class II refrigerants from appliances, except for MVACs, into the atmosphere, including but not limited to installers, contractor employees, in-house service personnel, and in some cases, owners. Technician also means any person who performs disposal of appliances, except for small appliances, MVACs, and MVAC-like appliances, that could reasonably be expected to release class I or class II refrigerants from the appliances into the atmosphere.

* * * * *

(bb) *Voluntary certification program* means a technician testing program operated by a person before that person obtained approval of a technician certification program pursuant to § 82.161(c).

3. Section 82.154 is amended by removing paragraph (l), by redesignating paragraphs (m) through (o) as (l) through (n) respectively, and by redesignating newly designated paragraphs (m)(2) through (m)(6) as (m)(3) through (m)(7)

respectively, and by adding paragraphs (m)(2) and (m)(8) to read as follows:

§ 82.154 Prohibitions.

* * * * *

(m) * * *

(2) The buyer has successfully completed a voluntary certification program requesting grandfathering under § 82.161(g) by [30 days after publication of the final rule]. This paragraph (m)(2) expires on [six months after publication of the final rule].

* * * * *

(8) The refrigerant is charged into an appliance by a technician who successfully completed a voluntary certification program requesting grandfathering under § 82.161(g) by [30 days after publication of the final rule]. This paragraph (m)(8)expires on [six months after publication of the final rule].

4. Section 82.161 is amended by revising paragraph (a) introductory text; by revising the word "Persons" to read "Technicians" in paragraphs (a)(1) through (a)(5); by revising paragraph (g); and by adding paragraph (a)(6) to read as follows:

§ 82.161 Technician certification.

(a) Effective November 14, 1994, technicians, except technicians who successfully completed voluntary certification programs that apply for grandfathering under § 82.161(g) by [30 days after publication of the final rule], must be certified by an approved technician certification program under the requirements of this paragraph. Effective [six months after publication of the final rule], technicians who successfully completed voluntary certification programs that apply for grandfathering under § 82.161(g) by [30 days after publication of the final rule] but who are not grandfathered for the appropriate type as set forth in this paragraph (a) and in § 82.161(g)(2) must be certified by an approved technician certification program under the requirements of this paragraph (a). Effective [six months after publication of the final rule], technicians who are grandfathered for the appropriate type as set forth in this paragraph and in § 82.161(g)(2) must have completed any additional testing and training specified by the Agency pursuant to § 82.161(g) and appendix D of subpart F, section (j).

* * * * *

(6) Apprentices are exempt from this requirement provided the apprentice is closely and continuously supervised by a certified technician while performing any maintenance, service, repair, or disposal that could reasonably be expected to release refrigerant from appliances into the environment. The supervising certified technician is responsible for ensuring that the apprentice complies with this subpart.

* * * * *

(g)(1) Any person seeking approval of a technician certification program may also seek approval to certify technicians who successfully completed a voluntary certification program operated previously by that person. Interested persons must submit to the Administrator at the address in § 82.160(a) verification that the voluntary certification program substantially complied with most of the standards of § 82.161(c) and appendix D of subpart F. If the program did not test or train participants on some elements of the test subject material, the person must submit verification that supplementary information on the omitted material will be provided pursuant to appendix D of subpart F, section (j). Approval may be granted for Type I, Type II, or Type III certification, or some combination of these, depending upon the coverage in the voluntary certification program of the information in each Type. In order to have their programs considered for grandfathering, persons must submit applications both for approval as a technician certification program and for grandfathering by [30 days after publication of the final rule].

(2) Technicians who successfully completed voluntary certification programs may receive certification in a given Type through that program only if:

(i) The voluntary certification program successfully completed by the technician is grandfathered for that Type pursuant to § 82.161(g)(1);

(ii) The technician successfully completed the portions of the voluntary certification program that correspond to that Type; and

(iii) The technician completes any additional testing and training required by the Administrator pursuant to § 82.161(g)(i).

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