

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 55**

[OAR–2004–0091; FRL–8731–5]

**Outer Continental Shelf Air Regulations Consistency Update for California****AGENCY:** Environmental Protection Agency (“EPA”).**ACTION:** Final rule; consistency update.

**SUMMARY:** EPA is finalizing the updates of the Outer Continental Shelf (“OCS”) Air Regulations proposed in the **Federal Register** on August 13 and 20, 2008. Requirements applying to OCS sources located within 25 miles of states’ seaward boundaries must be updated periodically to remain consistent with the requirements of the corresponding onshore area (“COA”), as mandated by section 328(a)(1) of the Clean Air Act Amendments of 1990 (“the Act”). The portions of the OCS air regulations that are being updated pertain to the requirements for OCS sources for which the Santa Barbara County Air Pollution Control District (Santa Barbara County APCD) and Ventura County Air Pollution Control District (Ventura County APCD) are the designated COA. The intended effect of approving the requirements contained in “Santa Barbara County Air Pollution Control District Requirements Applicable to OCS Sources” (August, 2008) and “Ventura County Air Pollution Control District Requirements Applicable to OCS Sources” (July, 2008) is to regulate emissions from OCS sources in accordance with the requirements onshore.

**DATES:** *Effective Date:* This rule is effective on November 21, 2008.

The incorporation by reference of certain publications listed in this rule is approved by the Director of the Federal Register as of November 21, 2008.

**ADDRESSES:** EPA has established docket number OAR–2004–0091 for this action. The index to the docket is available electronically at [www.regulations.gov](http://www.regulations.gov) and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

**FOR FURTHER INFORMATION CONTACT:**

Cynthia G. Allen, Air Division, U.S. EPA Region IX, (415) 947–4120, [allen.cynthia@epa.gov](mailto:allen.cynthia@epa.gov).

**SUPPLEMENTARY INFORMATION:**

Throughout this document, the terms “we,” “us,” or “our” refer to U.S. EPA. Organization of this document: The following outline is provided to aid in locating information in this preamble.

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**I. Background**

On August 13, 2008 (73 FR 47114) and August 20, 2008 (73 FR 49136), EPA proposed to approve requirements into the OCS Air Regulations pertaining to Santa Barbara County APCD and Ventura County APCD. These requirements are being promulgated in response to the submittal of rules from these California air pollution control agencies. EPA has evaluated the proposed requirements to ensure that they are rationally related to the attainment or maintenance of federal or state ambient air quality standards or Part C of title I of the Act, that they are not designed expressly to prevent exploration and development of the OCS and that they are applicable to OCS sources. 40 CFR 55.1. EPA has also evaluated the rules to ensure that they are not arbitrary or capricious. 40 CFR 55.12(e). In addition, EPA has excluded administrative or procedural rules.

Section 328(a) of the Act requires that EPA establish requirements to control air pollution from OCS sources located within 25 miles of states’ seaward boundaries that are the same as onshore requirements. To comply with this statutory mandate, EPA must incorporate applicable onshore rules into part 55 as they exist onshore. This limits EPA’s flexibility in deciding which requirements will be incorporated into part 55 and prevents EPA from making substantive changes to the requirements it incorporates. As a result, EPA may be incorporating rules into part 55 that do not conform to all of EPA’s state implementation plan (SIP) guidance or certain requirements of the Act. Consistency updates may result in the inclusion of state or local rules or regulations into part 55, even though the same rules may ultimately be disapproved for inclusion as part of the SIP. Inclusion in the OCS rule does not imply that a rule meets the requirements of the Act for SIP approval, nor does it imply that the rule will be approved by EPA for inclusion in the SIP.

**II. Public Comment**

EPA’s proposed actions provided a 30-day public comment period. During this period, we received no comments on the proposed actions.

**III. EPA Action**

In this document, EPA takes final action to incorporate the proposed changes into 40 CFR part 55. No changes were made to the proposed actions. EPA is approving the proposed actions under section 328(a)(1) of the Act, 42 U.S.C. 7627. Section 328(a) of the Act requires that EPA establish requirements to control air pollution from OCS sources located within 25 miles of states’ seaward boundaries that are the same as onshore requirements. To comply with this statutory mandate, EPA must incorporate applicable onshore rules into Part 55 as they exist onshore.

**IV. Statutory and Executive Order Reviews**

Under the Clean Air Act, the Administrator is required to establish requirements to control air pollution from OCS sources located within 25 miles of States’ seaward boundaries that are the same as onshore air control requirements. To comply with this statutory mandate, EPA must incorporate applicable onshore rules into part 55 as they exist onshore. 42 U.S.C. 7627(a)(1); 40 CFR 55.12. Thus, in promulgating OCS consistency updates, EPA’s role is to maintain consistency between OCS regulations and the regulations of onshore areas, provided that they meet the criteria of the Clean Air Act. Accordingly, this action simply updates the existing OCS requirements to make them consistent with requirements onshore, without the exercise of any policy discretion by EPA. For that reason, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or

safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and

- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, nor does it impose substantial direct compliance costs on tribal governments, nor preempt tribal law.

Under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, OMB has approved the information collection requirements contained in 40 CFR part 55 and, by extension, this update to the rules, and has assigned OMB control number 2060-0249. Notice of OMB's approval of EPA Information Collection Request ("ICR") No. 1601.06 was published in the **Federal Register** on March 1, 2006 (71 FR 10499-10500). The approval expires January 31, 2009. As EPA previously indicated (70 FR 65897-65898 (November 1, 2005)), the annual public reporting and recordkeeping burden for collection of information under 40 CFR part 55 is estimated to average 549 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of

information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9 and are identified on the form and/or instrument, if applicable. In addition, the table in 40 CFR part 9 of currently approved OMB control numbers for various regulations lists the regulatory citations for the information requirements contained in 40 CFR part 55.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 22, 2008. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

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

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

Dated: September 24, 2008.

**Wayne Nastri,**

*Regional Administrator, Region IX.*

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

**PART 55—[AMENDED]**

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

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

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

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

\* \* \* \* \*

- (e) \* \* \*
- (3) \* \* \*
- (ii) \* \* \*

(F) *Santa Barbara County Air Pollution Control District Requirements Applicable to OCS Sources*, August 2008.

\* \* \* \* \*

(H) *Ventura County Air Pollution Control District Requirements Applicable to OCS Sources*, July 2008.

\* \* \* \* \*

■ 3. Appendix A to CFR Part 55 is amended by revising paragraphs (b)(6) and (8) under the heading "California" to read as follows:

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

\* \* \* \* \*

California

\* \* \* \* \*

- (b) \* \* \*

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

- Rule 102 Definitions (Adopted 06/19/08)
- Rule 103 Severability (Adopted 10/23/78)
- Rule 106 Notice to Comply for Minor Violations (Repealed 01/01/2001)
- Rule 107 Emergencies (Adopted 04/19/01)
- Rule 201 Permits Required (Adopted 06/19/08)
- Rule 202 Exemptions to Rule 201 (Adopted 06/19/08)
- Rule 203 Transfer (Adopted 04/17/97)
- Rule 204 Applications (Adopted 04/17/97)
- Rule 205 Standards for Granting Permits (Adopted 04/17/97)
- Rule 206 Conditional Approval of Authority to Construct or Permit to Operate (Adopted 10/15/91)
- Rule 207 Denial of Application (Adopted 10/23/78)
- Rule 210 Fees (Adopted 03/17/05)
- Rule 212 Emission Statements (Adopted 10/20/92)

- Rule 219 Equipment Not Requiring a Written Permit Pursuant to Regulation II (Adopted 06/1/07)
- Rule 301 Circumvention (Adopted 10/23/78)
- Rule 302 Visible Emissions (Adopted 10/23/78)
- Rule 304 Particulate Matter—Northern Zone (Adopted 10/23/78)
- Rule 305 Particulate Matter Concentration—Southern Zone (Adopted 10/23/78)
- Rule 306 Dust and Fumes—Northern Zone (Adopted 10/23/78)
- Rule 307 Particulate Matter Emission Weight Rate—Southern Zone (Adopted 10/23/78)
- Rule 308 Incinerator Burning (Adopted 10/23/78)
- Rule 309 Specific Contaminants (Adopted 10/23/78)
- Rule 310 Odorous Organic Sulfides (Adopted 10/23/78)
- Rule 311 Sulfur Content of Fuels (Adopted 10/23/78)
- Rule 312 Open Fires (Adopted 10/02/90)
- Rule 316 Storage and Transfer of Gasoline (Adopted 04/17/97)
- Rule 317 Organic Solvents (Adopted 10/23/78)
- Rule 318 Vacuum Producing Devices or Systems—Southern Zone (Adopted 10/23/78)
- Rule 321 Solvent Cleaning Operations (Adopted 09/18/97)
- Rule 322 Metal Surface Coating Thinner and Reducer (Adopted 10/23/78)
- Rule 323 Architectural Coatings (Adopted 11/15/01)
- Rule 324 Disposal and Evaporation of Solvents (Adopted 10/23/78)
- Rule 325 Crude Oil Production and Separation (Adopted 07/19/01)
- Rule 326 Storage of Reactive Organic Compound Liquids (Adopted 01/18/01)
- Rule 327 Organic Liquid Cargo Tank Vessel Loading (Adopted 12/16/85)
- Rule 328 Continuous Emission Monitoring (Adopted 10/23/78)
- Rule 330 Surface Coating of Metal Parts and Products (Adopted 01/20/00)
- Rule 331 Fugitive Emissions Inspection and Maintenance (Adopted 12/10/91)
- Rule 332 Petroleum Refinery Vacuum Producing Systems, Wastewater Separators and Process Turnarounds (Adopted 06/11/79)
- Rule 333 Control of Emissions from Reciprocating Internal Combustion Engines (Adopted 06/19/08)
- Rule 342 Control of Oxides of Nitrogen (NO<sub>x</sub>) From Boilers, Steam Generators and Process Heaters (Adopted 04/17/97)
- Rule 343 Petroleum Storage Tank Degassing (Adopted 12/14/93)
- Rule 344 Petroleum Sumps, Pits, and Well Cellars (Adopted 11/10/94)
- Rule 346 Loading of Organic Liquid Cargo Vessels (Adopted 01/18/01)
- Rule 352 Natural Gas-Fired Fan-Type Central Furnaces and Residential Water Heaters (Adopted 09/16/99)
- Rule 353 Adhesives and Sealants (Adopted 08/19/99)
- Rule 359 Flares and Thermal Oxidizers (Adopted 06/28/94)
- Rule 360 Emissions of Oxides of Nitrogen from Large Water Heaters and Small Boilers (Adopted 10/17/02)
- Rule 361 Small Boilers, Steam Generators, and Process Heaters (Adopted 01/17/08)
- Rule 370 Potential to Emit—Limitations for Part 70 Sources (Adopted 06/15/95)
- Rule 505 Breakdown Conditions Sections A., B.1., and D. only (Adopted 10/23/78)
- Rule 603 Emergency Episode Plans (Adopted 06/15/81)
- Rule 702 General Conformity (Adopted 10/20/94)
- Rule 801 New Source Review (Adopted 04/17/97)
- Rule 802 Nonattainment Review (Adopted 04/17/97)
- Rule 803 Prevention of Significant Deterioration (Adopted 04/17/97)
- Rule 804 Emission Offsets (Adopted 04/17/97)
- Rule 805 Air Quality Impact Analysis and Modeling (Adopted 04/17/97)
- Rule 808 New Source Review for Major Sources of Hazardous Air Pollutants (Adopted 05/20/99)
- Rule 1301 Part 70 Operating Permits—General Information (Adopted 06/19/03)
- Rule 1302 Part 70 Operating Permits—Permit Application (Adopted 11/09/93)
- Rule 1303 Part 70 Operating Permits—Permits (Adopted 11/09/93)
- Rule 1304 Part 70 Operating Permits—Issuance, Renewal, Modification and Reopening (Adopted 11/09/93)
- Rule 1305 Part 70 Operating Permits—Enforcement (Adopted 11/09/93)
- \* \* \* \* \*
- (8) The following requirements are contained in *Ventura County Air Pollution Control District Requirements Applicable to OCS Sources*:
- Rule 2 Definitions (Adopted 04/13/04)
- Rule 5 Effective Date (Adopted 04/13/04)
- Rule 6 Severability (Adopted 11/21/78)
- Rule 7 Zone Boundaries (Adopted 06/14/77)
- Rule 10 Permits Required (Adopted 04/13/04)
- Rule 11 Definition for Regulation II (Adopted 03/14/06)
- Rule 12 Applications for Permits (Adopted 06/13/95)
- Rule 13 Action on Applications for an Authority to Construct (Adopted 06/13/95)
- Rule 14 Action on Applications for a Permit to Operate (Adopted 06/13/95)
- Rule 15.1 Sampling and Testing Facilities (Adopted 10/12/93)
- Rule 16 BACT Certification (Adopted 06/13/95)
- Rule 19 Posting of Permits (Adopted 05/23/72)
- Rule 20 Transfer of Permit (Adopted 05/23/72)
- Rule 23 Exemptions from Permits (Adopted 04/08/08)
- Rule 24 Source Recordkeeping, Reporting, and Emission Statements (Adopted 09/15/92)
- Rule 26 New Source Review—General (Adopted 03/14/06)
- Rule 26.1 New Source Review—Definitions (Adopted 11/14/06)
- Rule 26.2 New Source Review—Requirements (Adopted 05/14/02)
- Rule 26.3 New Source Review—Exemptions (Adopted 03/14/06)
- Rule 26.6 New Source Review—Calculations (Adopted 03/14/06)
- Rule 26.8 New Source Review—Permit To Operate (Adopted 10/22/91)
- Rule 26.10 New Source Review—PSD (Adopted 01/13/98)
- Rule 26.11 New Source Review—ERC Evaluation At Time of Use (Adopted 05/14/02)
- Rule 26.12 Federal Major Modifications (Adopted 06/27/06)
- Rule 28 Revocation of Permits (Adopted 07/18/72)
- Rule 29 Conditions on Permits (Adopted 03/14/06)
- Rule 30 Permit Renewal (Adopted 04/13/04)
- Rule 32 Breakdown Conditions: Emergency Variances, A., B.1., and D. only. (Adopted 02/20/79)
- Rule 33 Part 70 Permits—General (Adopted 09/12/06)
- Rule 33.1 Part 70 Permits—Definitions (Adopted 09/12/06)
- Rule 33.2 Part 70 Permits—Application Contents (Adopted 04/10/01)
- Rule 33.3 Part 70 Permits—Permit Content (Adopted 09/12/06)
- Rule 33.4 Part 70 Permits—Operational Flexibility (Adopted 04/10/01)
- Rule 33.5 Part 70 Permits—Time Frames for Applications, Review and Issuance (Adopted 10/12/93)
- Rule 33.6 Part 70 Permits—Permit Term and Permit Reissuance (Adopted 10/12/93)
- Rule 33.7 Part 70 Permits—Notification (Adopted 04/10/01)
- Rule 33.8 Part 70 Permits—Reopening of Permits (Adopted 10/12/93)
- Rule 33.9 Part 70 Permits—Compliance Provisions (Adopted 04/10/01)
- Rule 33.10 Part 70 Permits—General Part 70 Permits (Adopted 10/12/93)
- Rule 34 Acid Deposition Control (Adopted 03/14/95)
- Rule 35 Elective Emission Limits (Adopted 11/12/96)
- Rule 36 New Source Review—Hazardous Air Pollutants (Adopted 10/06/98)
- Rule 42 Permit Fees (Adopted 04/08/08)
- Rule 44 Exemption Evaluation Fee (Adopted 04/08/08)
- Rule 45 Plan Fees (Adopted 06/19/90)
- Rule 45.2 Asbestos Removal Fees (Adopted 08/04/92)
- Rule 47 Source Test, Emission Monitor, and Call-Back Fees (Adopted 06/22/99)
- Rule 50 Opacity (Adopted 04/13/04)
- Rule 52 Particulate Matter—Concentration (Grain Loading) (Adopted 04/13/04)
- Rule 53 Particulate Matter—Process Weight (Adopted 04/13/04)
- Rule 54 Sulfur Compounds (Adopted 06/14/94)
- Rule 56 Open Burning (Adopted 11/11/03)
- Rule 57 Incinerators (Adopted 01/11/05)
- Rule 57.1 Particulate Matter Emissions from Fuel Burning Equipment (Adopted 01/11/05)
- Rule 62.7 Asbestos—Demolition and Renovation (Adopted 09/01/92)
- Rule 63 Separation and Combination of Emissions (Adopted 11/21/78)
- Rule 64 Sulfur Content of Fuels (Adopted 04/13/99)

Rule 67 Vacuum Producing Devices (Adopted 07/05/83)

Rule 68 Carbon Monoxide (Adopted 04/13/04)

Rule 71 Crude Oil and Reactive Organic Compound Liquids (Adopted 12/13/94)

Rule 71.1 Crude Oil Production and Separation (Adopted 06/16/92)

Rule 71.2 Storage of Reactive Organic Compound Liquids (Adopted 09/26/89)

Rule 71.3 Transfer of Reactive Organic Compound Liquids (Adopted 06/16/92)

Rule 71.4 Petroleum Sumps, Pits, Ponds, and Well Cellars (Adopted 06/08/93)

Rule 71.5 Glycol Dehydrators (Adopted 12/13/94)

Rule 72 New Source Performance Standards (NSPS) (Adopted 09/13/05)

Rule 73 National Emission Standards for Hazardous Air Pollutants (NESHAPS) (Adopted 09/13/05)

Rule 74 Specific Source Standards (Adopted 07/06/76)

Rule 74.1 Abrasive Blasting (Adopted 11/12/91)

Rule 74.2 Architectural Coatings (Adopted 11/13/01)

Rule 74.6 Surface Cleaning and Degreasing (Adopted 11/11/03—effective 07/01/04)

Rule 74.6.1 Batch Loaded Vapor Degreasers (Adopted 11/11/03—effective 07/01/04)

Rule 74.7 Fugitive Emissions of Reactive Organic Compounds at Petroleum Refineries and Chemical Plants (Adopted 10/10/95)

Rule 74.8 Refinery Vacuum Producing Systems, Waste-water Separators and Process Turnarounds (Adopted 07/05/83)

Rule 74.9 Stationary Internal Combustion Engines (Adopted 11/08/05)

Rule 74.10 Components at Crude Oil Production Facilities and Natural Gas Production and Processing Facilities (Adopted 03/10/98)

Rule 74.11 Natural Gas-Fired Residential Water Heaters—Control of NO<sub>x</sub> (Adopted 04/09/85)

Rule 74.11.1 Large Water Heaters and Small Boilers (Adopted 09/14/99)

Rule 74.12 Surface Coating of Metal Parts and Products (Adopted 04/08/08)

Rule 74.15 Boilers, Steam Generators and Process Heaters (Adopted 11/08/94)

Rule 74.15.1 Boilers, Steam Generators and Process Heaters (Adopted 06/13/00)

Rule 74.16 Oil Field Drilling Operations (Adopted 01/08/91)

Rule 74.20 Adhesives and Sealants (Adopted 01/11/05)

Rule 74.23 Stationary Gas Turbines (Adopted 1/08/02)

Rule 74.24 Marine Coating Operations (Adopted 11/11/03)

Rule 74.24.1 Pleasure Craft Coating and Commercial Boatyard Operations (Adopted 01/08/02)

Rule 74.26 Crude Oil Storage Tank Degassing Operations (Adopted 11/08/94)

Rule 74.27 Gasoline and ROC Liquid Storage Tank Degassing Operations (Adopted 11/08/94)

Rule 74.28 Asphalt Roofing Operations (Adopted 05/10/94)

Rule 74.30 Wood Products Coatings (Adopted 06/27/06)

Rule 75 Circumvention (Adopted 11/27/78)

Rule 101 Sampling and Testing Facilities (Adopted 05/23/72)

Rule 102 Source Tests (Adopted 04/13/04)

Rule 103 Continuous Monitoring Systems (Adopted 02/09/99)

Rule 154 Stage 1 Episode Actions (Adopted 09/17/91)

Rule 155 Stage 2 Episode Actions (Adopted 09/17/91)

Rule 156 Stage 3 Episode Actions (Adopted 09/17/91)

Rule 158 Source Abatement Plans (Adopted 09/17/91)

Rule 159 Traffic Abatement Procedures (Adopted 09/17/91)

Rule 220 General Conformity (Adopted 05/09/95)

Rule 230 Notice to Comply (Adopted 11/09/99)

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[FR Doc. E8-24856 Filed 10-21-08; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

#### 49 CFR Part 40

[Docket OST-2003-15245]

RIN 2105-AD55

#### Procedures for Transportation Workplace Drug and Alcohol Testing Programs

**AGENCY:** Office of the Secretary, DOT.

**ACTION:** Response to comments.

**SUMMARY:** The Department is issuing this notice to respond to comments on the amendment to 49 CFR 40.67(b) issued as part of a final rule on June 25, 2008. The Department is not changing this amendment, which will go into effect, as scheduled, on November 1, 2008. Beginning on that date, direct observation collections will be required for all return-to-duty and follow-up tests. When additional testing methodologies appropriate for use in return-to-duty and follow-up testing (e.g., oral fluid and sweat specimens) are approved by the Department of Health and Human Services and adopted by the Department, the Department intends to make these methods available to employers and employees as an alternative to direct observation urine testing in these situations.

**DATES:** The effective date of 49 CFR 40.67(b), as amended by the Department on June 25, 2008, and delayed on August 26, 2008, is November 1, 2008.

**FOR FURTHER INFORMATION CONTACT:** Jim L. Swart, Director, U.S. Department of Transportation, Office of Drug and Alcohol Policy and Compliance, 1200

New Jersey Avenue, SE., Washington, DC 20590; (202) 366-3784 (voice), (202) 366-3897 (fax), or [jim.swart@dot.gov](mailto:jim.swart@dot.gov); or Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, U.S. Department of Transportation, same address, (202) 366-9310 (voice), (202) 366-9313 (fax), or [bob.ashby@dot.gov](mailto:bob.ashby@dot.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

On October 31, 2005, the Department of Transportation issued a notice of proposed rulemaking (NPRM) to amend 49 CFR Part 40, the Department's drug and alcohol testing procedures rule (70 FR 62276). The primary purpose of the NPRM was to propose making specimen validity testing (SVT) mandatory. Mandatory SVT is an important step in combating the safety problem of cheating on drug tests. Based on this NPRM, the Department issued a final rule on June 25, 2008 (73 FR 35961). The final rule included two provisions (49 CFR 40.67(b) and (i)) concerning the use of direct observation (DO) collections, another significant tool the Department uses to combat cheating.

Petitioners, including the Association of American Railroads (AAR), joined by the American Short Line and Regional Railroad Association; the Transportation Trades Department (TTD) of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO); the International Brotherhood of Teamsters; and the Air Transport Association (ATA), joined by the Regional Airline Association (RAA), asked the Department to delay the effective date of these two provisions, seek further comment on them, and reconsider them. In response to these petitions, the Department issued a notice delaying the effective date of 49 CFR 40.67(b) until November 1, 2008 (73 FR 50222; August 26, 2008). We opened a comment period on that provision, which closed on September 25, 2008. The Department did not delay the effective date of 49 CFR 40.67(i), which went into effect, as scheduled, on August 25, 2008.

The history of DO collections under Part 40 goes back to the beginnings of the Department's drug testing program. The principle that animates this history is that DO, because it is intrusive, is not appropriate to use in the great mass of testing situations (e.g., all pre-employment and random tests), but only in those situations in which there is a heightened incentive to cheat or circumstances demonstrating the likelihood of cheating. In this way, the Department has maintained the proper balance between the legitimate privacy