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## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 301

[REG-103809-03]

RIN 1545-BA56

#### Disclosure of Return Information to the Department of Agriculture

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking by cross-reference to temporary regulations.

**SUMMARY:** The IRS is issuing regulations to incorporate and clarify the phrase "return information reflected on returns" in conformance with the terms of section 6103(j)(5) of the Internal Revenue Code (Code). These temporary regulations also remove certain items of return information that the IRS currently discloses, but the Department of Agriculture no longer needs, for conducting the census of agriculture. The text of the temporary regulations published in the Rules and Regulations section of this issue of the **Federal Register** serves as the text of the proposed regulations.

**DATES:** Written and electronic comments and requests for a public hearing must be received by August 1, 2003.

**ADDRESSES:** Send submissions to: CC:PA:RU (REG-103809-03), room 5226, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered between the hours of 8 a.m. and 4 p.m. to CC:PA:RU (REG-103809-03), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC, or sent electronically, via the IRS Internet site at <http://www.irs.gov/regs>.

**FOR FURTHER INFORMATION CONTACT:** Christine Irwin at (202) 622-4570 (not a toll-free number).

#### SUPPLEMENTARY INFORMATION:

##### Background

Temporary regulations in the Rules and Regulations section of this issue of the **Federal Register** amend the Procedure and Administration

Regulations (26 CFR Part 301) relating to Code section 6103(j)(5). The temporary regulations contain rules relating to the disclosure of return information reflected on returns to officers and employees of the Department of Agriculture for conducting the census of agriculture.

The text of the temporary regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the temporary regulations and these proposed regulations.

#### Special Analyses

It has been determined this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because no notice of proposed rulemaking is required, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the IRS will submit this notice of proposed rulemaking to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

#### Comments and Requests for Public Hearing

Before adoption of these proposed regulations as final regulations, the IRS will consider any written (a signed original and 8 copies) or electronic comments that the IRS timely receives. The IRS and Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying. The IRS may schedule a public hearing if any person who timely submits written comments requests such a hearing in writing. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

#### Drafting Information

The principal author of these regulations is Christine Irwin, Office of the Associate Chief Counsel, Procedure & Administration (Disclosure & Privacy Law Division).

#### List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

#### Proposed Amendments to the Regulations

Accordingly, 26 CFR part 301 is proposed to be amended as follows:

#### PART 301—PROCEDURE AND ADMINISTRATION

■ 1. The authority citation for part 301 continues to read in part as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*

■ 2. Section 301.6103(j)(5)-1 is added to read as follows:

#### § 301.6103(j)(5)-1 Disclosures of return information reflected on returns to officers and employees of the Department of Agriculture for conducting the census of agriculture.

[The text of this proposed section is the same as the text of § 301.6103(j)(5)-1T published elsewhere in this issue of the **Federal Register**.]

David A. Mader,

Assistant Deputy Commissioner of Internal Revenue.

[FR Doc. 03-14206 Filed 6-5-03; 8:45 am]

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## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

#### 29 CFR Part 1910

[Docket No. H-049D]

RIN 1218-AC05

#### Controlled Negative Pressure REDON Fit Testing Protocol

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

**ACTION:** Notice of proposed rulemaking and request for comments.

**SUMMARY:** OSHA is proposing to approve an additional controlled negative pressure (CNP) fit testing protocol for its Respiratory Protection Standard. The proposed protocol would affect OSHA respiratory protection standards for shipyard employment and construction. The proposed protocol is referred to as the CNP REDON fit testing protocol. Provisions contained in OSHA's current Respiratory Protection Standard allow individuals to propose additional fit testing protocols. This proposed revision is based on a new quantitative fit testing protocol submitted to OSHA for addition to the standard.

The proposed protocol requires three different test exercises followed by two

redonnings of the respirator, while the currently approved CNP protocol specifies eight test exercises, including one redonning of the respirator. In addition to amending the Respiratory Protection Standard to include the proposed protocol, this rulemaking is proposing to make several editorial and non-substantive technical revisions to this standard associated with the proposed protocol and the approved CNP protocol.

**DATES:** Submit written comments regarding this proposal, including comments on the information-collection determination described in section IV.C (Paperwork Reduction Act) of this notice, by the following dates:

*Hard copy.* Submitted (postmarked or sent) by September 4, 2003.

*Facsimile and electronic transmission.* Sent by September 4, 2003.

Please see the section below entitled **SUPPLEMENTARY INFORMATION** for additional information on submitting written comments.

**ADDRESSES:** Submit comments and attachments to comments using one of the procedures described below:

*Regular mail, express delivery, hand-delivery, and messenger service.* Submit three copies of written comments and attachments to the OSHA Docket Office, Docket No. H-049D, Technical Data Center, Room N-2625, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210; telephone (202) 693-2350. OSHA Docket Office and Department of Labor hours of operation are 8:15 a.m. to 4:45 p.m., EST.

Please note that security-related problems may result in significant delays in receiving comments and other written materials by regular mail. Telephone the OSHA Docket Office at (202) 693-2350 for information regarding security procedures associated with delivery of materials by express delivery, hand delivery, and messenger service.

*Facsimile.* Transmit written comments (including attachments) consisting of 10 or fewer pages by facsimile to the OSHA Docket Office at (202) 693-1648. You must include the docket number of this notice, Docket No. H-049D, in your comments.

*Electronic.* You may submit comments electronically through the Internet on OSHA's Homepage at <http://ecommments.osha.gov>. If you would like to submit additional studies or journal articles, you must submit three copies of them to the OSHA Docket Office at the address above. These materials must clearly identify your electronic comments by name, date, subject, and

docket number so we can attach them to your comments.

All comments and submissions will be available for inspection and copying in the OSHA Docket Office at the address above. Comments and submissions posted on OSHA's web page will be available at <http://www.osha.gov>. Contact the OSHA Docket Office at (202) 693-2350 for information about materials not available on the OSHA web page and for assistance in using this web page to locate docket submissions. Because comments sent to the docket or to OSHA's web page are available for public inspection, the Agency cautions against including in these comments personal information such as social security numbers and birth dates.

**FOR FURTHER INFORMATION CONTACT:** For technical inquiries, contact Mr. John E. Steelnack, Directorate of Standards and Guidance, Room N-3718, OSHA, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693-2289 or facsimile (202) 693-1678. Copies of this **Federal Register** notice are available from the OSHA Office of Publications, Room N-3101, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington DC 20210; telephone (202) 693-1888. For an electronic copy of this notice, go to OSHA's website (<http://www.osha.gov>), and select "**Federal Register**," "Date of Publication," and then "2003."

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

The Respiratory Protection Standard currently includes three (3) quantitative fit testing protocols: Generated aerosol fit testing protocol; ambient aerosol condensation nuclei counter (CNC) fit testing protocol; and controlled negative pressure (CNP) fit testing protocol. The standard specifies the procedure to be followed to add new test protocols as they are developed and validated. The criteria for determining that a fit testing protocol is valid include: (1) A test report prepared by an independent government research laboratory (e.g., Lawrence Livermore National Laboratory, Los Alamos National Laboratory, the National Institute for Standards and Technology) stating that the laboratory tested the protocol and found it to be accurate and reliable; or (2) an article published in a peer-reviewed industrial hygiene journal describing the protocol and explaining how the test data support the protocol's accuracy and reliability. When a protocol meets such criteria, OSHA conducts a notice-and-comment

rulemaking under Section 6(b)(7) of the Occupational Safety and Health Act of 1970. OSHA believes the CNP REDON meets these criteria as described below.

## **II. Summary and Explanation of the Proposal**

*Introduction.* In his letter submitting the protocol for review, Dr. Crutchfield included copies of two peer-reviewed articles from industrial hygiene journals describing the accuracy and reliability of the CNP REDON fit testing protocol. (See Exs. 2 and 3; Section III below provides complete reference information on these articles.) In this submission, Dr. Crutchfield also described in detail the equipment and procedures required to administer the proposed protocol. According to this description, the proposed protocol is a variation of the controlled negative pressure (CNP) fit testing protocol developed by Dr. Crutchfield in the early 1990s, which OSHA approved for inclusion in Part I.C of Appendix A when the Agency developed the final Respiratory Protection Standard. The proposed protocol uses the same fit test requirements and test instrumentation specified for the CNP fit testing protocol in paragraphs (a) and (c) of Part I.C.4 of Appendix A of this standard. However, the proposed protocol includes only three test exercises followed by two redonnings of the respirator, instead of the eight test exercises and one respirator redonning required in paragraph (b) of the CNP fit testing protocol. The three tests, listed in order of administration, are normal breathing, bending over, and head shaking. The procedures for administering these three test exercises and the two respirator donnings to an employee, and for measuring respirator leakage during each test, are described below:

- *Facing forward.* In a normal standing position, without talking, the test participant shall breathe normally; then, while facing forward, he/she shall hold his/her breath for 10 seconds for test measurement.
- *Bending over.* The test participant shall bend at the waist as if he/she is going to touch his/her toes; then, while facing parallel to the floor, he/she shall hold his/her breath for 10 seconds for test measurement.
- *Head shaking.* The test participant shall shake his/her head back and forth vigorously several times while shouting for approximately three seconds; then, while facing forward, he/she shall hold his/her breath for 10 seconds for test measurement.
- *First redonning (REDON-1).* The test participant shall remove and redon the respirator mask; after redonning the

mask, he/she shall face forward and hold his/her breath for 10 seconds for test measurement.

- *Second redonning (REDON-2)*. The test participant shall remove and redon the respirator mask again; after redonning the mask, he/she shall face forward and hold his/her breath for 10 seconds for test measurement.

As noted earlier, Dr. Crutchfield submitted two peer-reviewed journal articles that provided information on the accuracy and reliability of the proposed CNP REDON fit testing protocol. In the first of these articles, the most important conclusion made by the authors is that the proposed CNP REDON fit testing protocol results in substantially lower respirator fit factors overall than the most commonly used ambient aerosol (AA) fit testing protocol. Accordingly, lower fit factors indicate that the proposed protocol would detect more respirator leaks than the AA protocol, thereby providing employees with an increased margin of safety when they select respirators. The main conclusion reached by the authors in the second article is that the overall fit factors obtained from the three exercises and two redonnings required by the proposed protocol are the same as the overall fit factors found when using the eight-exercise CNP protocol described in the Respiratory Protection Standard. Therefore, compared to the eight-exercise CNP protocol, the same overall fit factors can be obtained in less time using the proposed protocol.

*Peer-reviewed articles.* In the first peer-reviewed article, entitled "Effect of exercise and mask donning on measured respirator fit" and published in *Applied Occupational and Environmental Hygiene*, Dr. Crutchfield and his colleagues tested 14 Air Force personnel who wore elastomeric full facepiece or half mask air purifying respirators while being fit tested using either AA fit testing equipment (the Portacount Plus®, manufactured by TSI, Inc., St. Paul, MN) or CNP fit testing equipment (FitTester 3000®, manufactured by Occupational Health Dynamics, Birmingham, AL) (Ex. 2). The study participants wore their usual respirator mask for half of the tests (mask 1), and a respirator mask that was either a size larger or smaller than their usual mask for the other half of the tests (mask 2). The purpose of using the second mask was to obtain poor respirator fit (*i.e.*, to ensure respirator leakage on some of the tests). Each study participant received three fit tests per day for five consecutive days; they removed and redonned the respirator between fit tests. During a fit test, they engaged in one of two test-exercise procedures. The

first procedure (procedure 1) consisted of the three test exercises described in the proposed protocol (*i.e.*, facing forward, bending over, and head shaking), with no repeated donnings. The second procedure (procedure 2) consisted of the following nine exercises (listed in order of administration): Normal breathing; deep breathing; side-to-side head turning (pausing to inhale at each extreme position); up-and-down head nodding (pausing to inhale at each extreme position); talking loudly (reading a standard passage, counting backward from 100, or reciting a memorized poem or song); grimacing (contracting the facial muscles); bending over (as if touching the toes); jogging in place; and normal breathing. Only the first AA fit test administered each day with each mask (1 and 2) used the second test-exercise procedure; the remaining AA fit tests, and all of the CNP fit tests, used the first test-exercise procedure.

The authors used the AA fit test equipment to compare fit factors for both procedures 1 and 2 under the two mask conditions. This comparison showed that, for mask 1, the log-transformed median overall fit factor obtained under procedure 1 was significantly lower than it was for procedure 2, while no significant difference was found between the procedures for mask 2. Additionally, the authors compared fit factors obtained from the two types of fit test equipment (*i.e.*, CNP and AA) under procedure 1. Accordingly, they found that the log-transformed median fit factors obtained using either type of equipment did not differ significantly among the three test exercises (*i.e.*, facing forward, bending over, and head shaking) for mask 1. However, for mask 2, the data obtained using both types of equipment showed that the bending over test exercise resulted in a significantly lower log-transformed mean fit factor than was obtained using the normal breathing test exercise.

Assessing the fit factors for procedure 2 using the AA fit test equipment, the authors found that the talking exercise resulted in a significantly lower log-transformed mean fit factor than the fit factor determined using the normal breathing exercise for mask 1; for mask 2, the log-transformed mean fit factors for both the talking and bending over exercises were significantly lower than the fit factor obtained for the normal breathing exercise. A subsequent analysis showed that the initial normal breathing exercise, as well as the bending over and the head shaking exercises, accounted for most of the fit testing failures. Finally, after collapsing

the data across mask conditions and exercise procedures, the authors found that the log-transformed median fit factor for the CNP equipment was significantly lower than the log-transformed median fit factor for the AA equipment.

The authors concluded that the results obtained using the AA equipment showed that the three exercises in procedure 1 were as effective in determining poor mask fit as the nine exercises that composed procedure 2. In reaching this conclusion, they specifically discounted the talking exercise, which was assessed in this study using only the AA equipment. In doing so, they asserted that the prolonged exhalation associated with the talking exercise may increase particle migration from the lungs to the sampling probe, which would cause the probe to detect an increase in particle concentration; consequently, the talking exercise likely results in artificially low fit factors. They also concluded that CNP equipment used with the three exercises in procedure 1 detected more poorly fitting masks than AA equipment used with either exercise procedure. The authors noted as well that the study participants took substantially less time to perform the three exercises in procedure 1 than the nine exercises in procedure 2, regardless of the type of equipment used.

The second peer-reviewed article, entitled "A faster, more rigorous protocol for fit testing emergency response respirators" and published in *Semiconductor Safety Association Journal*, describes a study in which 511 firefighters were fit tested for the Scott Model AV-2000 self-contained breathing apparatus using CNP fit testing equipment (Ex. 3). To detect respirator leakage, the authors converted the respirator, which normally operates at positive pressure, to operate in the negative pressure mode. During fit testing, the firefighters performed one of two exercise procedures. The first exercise procedure (procedure 1), administered to 407 firefighters, consisted of the full complement of exercises described in the proposed protocol (*i.e.*, facing forward, bending over, head shaking, and two mask redonnings). The second procedure (procedure 2), administered to 104 of the firefighters, replicated the CNP test exercises listed in Part I.4(b) of Appendix A in the Respiratory Protection Standard, including (listed in order of administration): Normal breathing; deep breathing; side-to-side head turning (pausing to inhale at each extreme position); up-and-down head nodding (pausing to inhale at each

extreme position); talking (reading a standard passage, counting backward from 100, or reciting a memorized poem or song); grimacing (contracting the facial muscles); bending over (as if touching the toes); and breathing normally (remove and redon the respirator mask, then breathe normally). In addition, the authors used a short screening procedure to identify firefighters who could not pass the a complete fit testing protocol. Eighty-five (85) of the firefighters in procedure 1 (20.9%) and 30 of the firefighters in procedure 2 (28.8%) did not pass this screening test.

Comparisons among the firefighters who completed a fit testing protocol showed that the log-transformed median overall fit factor did not vary significantly between the two exercise procedures. However, after plotting the overall fit factors of the individual firefighters for the two exercises (*i.e.*, one plot for each exercise), the authors noted that the overall fit factors for procedure 1 were substantially less than the fit factors for procedure 2 at the low end of the two distributions. They interpreted this difference as indicating that the fit factors obtained using procedure 1 were more conservative (*i.e.*, lower) than the fit factors obtained for procedure 2 at lower levels of respirator fit. Based on these results, the authors concluded that the two exercise procedures resulted in similar fit factors, and that procedure 1, with three exercises and two respirator redonnings, took substantially less time to administer than procedure 2, with eight exercises (including one redonning).

*Editorial and technical revisions to the Respiratory Protection Standard.* In addition to proposing the CNP REDON fit testing protocol, this rulemaking is proposing to make several editorial and technical revisions to the Respiratory Protection Standard. The first editorial revision would add the proposed CNP REDON protocol to the exception already specified for the approved CNP protocol under paragraph 14(a) of Part I.A in Appendix A of the Standard. Accordingly, paragraph 14(a) would except both the approved CNP protocol and the CNP REDON protocol from the test exercises specified for the other approved fit testing protocols listed in the appendix. OSHA believes that this revision is necessary because the proposed protocol consists of a test exercise procedure that differs substantially from the procedure required for the other approved fit testing protocols.

The second editorial revision involves the introductory paragraph describing the CNP protocol under Part I.C.4 of

Appendix A. The eighth sentence in this paragraph refers to the CNP instrument manufacturer as "Dynatech Nevada." However, the instrument manufacturer now is Occupational Health Dynamics of Birmingham, Alabama. OSHA is proposing to revise this sentence to identify the current manufacturer of this instrument.

In an earlier comment to OSHA (Ex. 14), Dr. Crutchfield noted that test administrators use either an auditory warning device or the screen tracing currently provided on the CNP test instrument to detect participants' failure to hold their breath for the required 10-second period when measuring respirator fit. While using the screen tracing for this purpose was not part of the CNP protocol approved earlier by OSHA, the Agency believes that such a visual warning device would be useful in measuring respirator fit under both the approved CNP protocol and the proposed CNP REDON protocol. Therefore, OSHA is proposing to revise paragraph (c) of the approved CNP protocol (under Part I.A.4 of the standard) to include the screen tracing currently provided on the CNP test instrument as a visual warning device to detect non-compliance with the breath hold procedure.

In a 1998 journal article entitled "CNP fit testing under OSHA's updated respiratory protection standard" published in *Respiratory Protection Update*, Dr. Crutchfield indicated that OSHA's description of the CNP fit test requirements in paragraphs (a)(2) and (a)(5) of the approved CNP protocol contained several errors (Ex. 8). In this regard, the default test pressure in paragraph (a)(2) should read -15 (not -1.5) mm of water, while the breath hold requirement in paragraph (a)(5) should be 10 (not 20) seconds. Accordingly, the Agency is proposing to revise these parameters because implementing correct fit test procedures will improve the assessment of respirator fit factors using the approved CNP protocol, as well as the proposed CNP REDON protocol should the Agency approve it in a final rulemaking.

*Conclusions.* OSHA believes that the information submitted by Dr. Crutchfield in support of the proposed protocol meets the criteria for proposed fit testing protocols established by the Agency in Part II of Appendix A of the Respiratory Protection Standard. Therefore, the Agency concludes that the proposed protocol warrants notice-and-comment rulemaking under Section 6(b)(7) of the OSH Act, and is initiating this rulemaking to determine whether to approve the proposed protocol for inclusion in Part I of Appendix A of the

standard. However, because the only difference between the proposed protocol and the existing CNP protocol in Part I.C.4 of Appendix A is the exercise procedure used during fit testing, the Agency is limiting the proposed regulatory text (see section V below) to a description of the exercise procedure, and is referring to paragraphs (a) and (c) of Part I.C.4 for information on the CNP fit test requirements and the CNP test instrument. In addition, if approved, the protocol would be an alternative to the existing quantitative fit testing protocols already listed in the Part I of Appendix A; employers would be free to select this alternative or to continue using any of the other protocols currently listed in the appendix. The Agency also believes that the proposed editorial and technical revisions to Part I of Appendix A are necessary for proper implementation of both the approved CNP protocol and the proposed CNP REDON protocol.

*Issues for public comment.* OSHA invites comments and data from the public regarding the accuracy and reliability of the CNP REDON protocol, as well as its effectiveness in detecting respirator leakage and its usefulness in selecting respirators that will protect employees from airborne contaminants in the workplace. Specifically, the Agency invites public comment on the following issues:

- Were the studies described in the peer-reviewed articles well controlled, and conducted according to accepted experimental design practices and principles?
- Were the results of the studies described in the peer-reviewed articles properly, fully, and fairly presented and interpreted?
- Will the proposed protocol reliably identify respirators with unacceptable fit as effectively as the quantitative fit testing protocols already listed in Part I.C of Appendix A of the Respiratory Protection Standard?
- Will the proposed protocol generate reproducible fit testing results?
- Should OSHA expand application of the proposed protocol fit test exercises to other quantitative fit tests (*e.g.*, ambient aerosol tests)?
- Will the proposed editorial and technical revisions to Part I of Appendix A improve proper implementation of the approved CNP protocol and the proposed CNP REDON protocol?

### III. References

The preamble to this proposal cites the following references:

- (1) Crutchfield C.D., E.O. Fairbank, and S.L. Greenstein. "Effect of exercise

and mask donning on measured respirator fit." *Applied Occupational and Environmental Hygiene*, vol. 14 (no. 12), pages 827-837, 1999. (See Ex. 2.)

(2) Crutchfield, C.D., W.F. Peate, and D.W. Kautz. "A faster, more rigorous protocol for fit testing emergency response respirators." *Semiconductor Safety Association Journal*,<sup>1</sup> vol. 13 (no. 4), pages 23-29, 1999. (See Ex. 3.)

Copies of these references are available from the OSHA's Docket Office, Room N-2625, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, DC 20210; telephone (202) 693-2350 or facsimile (202) 693-1648.

#### IV. Procedural Determinations

##### A. Legal Considerations

Employers covered by this proposal already must comply with the fit testing requirements specified in paragraph (f) of OSHA's Respiratory Protection Standard at 29 CFR 1910.134.

Accordingly, these provisions currently are protecting their employees from the significant risk that results from poorly fitting respirators. For this proposal, the Agency preliminarily determined that the new CNP fit testing protocol provides employees with protection that is comparable to the protection afforded to them by the existing fit testing provisions. In this regard, the proposal is not expected to replace existing fit testing protocols, but instead would be an alternative to them. Therefore, OSHA preliminarily finds that the proposal would not directly increase or decrease the protection afforded to employees, nor would it increase employers' compliance burdens. As demonstrated in the following section, the proposal may reduce employers' compliance burdens by decreasing the time required for fit testing respirators for employee use.

##### B. Preliminary Economic Analysis and Regulatory Flexibility Certification

The proposal is not a significant rulemaking under Executive Order 12866, or a "major rule" under the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501) or Section 801 of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 601). The proposal would impose no additional costs on any private or public sector entity, and does not meet any of the criteria for a significant or major rule specified by the Executive Order or relevant statutes.

The proposal offers employers an additional option to fit test their

employees for respirator use. In addition to the existing CNP protocol, which would continue to be an option, the Agency would add the CNP REDON protocol as a supplemental option. According to a recent NIOSH-BLS survey of respirator use, approximately 25,000 establishments currently use the existing CNP fit testing protocol out of some 282,000 establishments requiring respirator use (Ex. 6-3, Docket H-049C). Employers would have a choice between the existing protocol consisting of eight exercises, including one redonning of the respirator, or the new protocol, which involves three exercises and two redonnings of the respirator. By providing regulatory flexibility to these employers, the proposal may reduce their costs in terms of decreasing fit testing time. In this regard, OSHA assumes that the proposed CNP REDON protocol would be adopted by some employers who use the existing CNP protocol, as well as some employers who are purchasing new or replacement equipment for administering fit tests; these employers would adopt the proposed protocol because it consists of fewer exercises than the existing CNP and ambient aerosol protocols, thereby decreasing the time and cost required for fit testing. However, the Agency believes that the proposed protocol is unlikely to be adopted by employers who currently use the ambient aerosol protocols because of the equipment and training investment they have already made to administer these protocols. Finally, the Agency proposes to include the screen tracing in the existing and proposed CNP fit testing protocols as a visual warning device to detect non-compliance with the breath hold procedure. OSHA concludes that this proposal would add no additional cost burden to employers because, as noted earlier, the manufacturer already provides this capability on the CNP test equipment. Therefore, the Agency preliminarily concludes that this proposed rulemaking would impose no additional costs on these employers. Consequently, the proposal requires no Preliminary Economic Analysis. Furthermore, because the proposal imposes no costs on employers, OSHA certifies that it would not have a significant impact on a substantial number of small businesses. Accordingly, the Agency need not prepare an Initial Regulatory Flexibility Analysis.

##### C. Paperwork Reduction Act

After thoroughly analyzing the proposed fit testing provisions in terms of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.* and 5 CFR part

1320), OSHA believes that these provisions would not add to the existing collection-of-information (*i.e.*, paperwork) requirements regarding fit testing employees for respirator use. The paperwork requirement specified in paragraph (m)(2) of the existing Respiratory Protection Standard at 29 CFR 1910.134 specifies that employers must document and maintain the following information on quantitative fit tests administered to employees: The name or identification of the employee tested; the type of fit test performed; the specific make, model, style, and size of respirator tested; the date of the test; and the strip chart recording or other recording of the test results. The employer must maintain this record until the next fit test is administered. However, this paperwork requirement would remain the same whether employers currently use the other fit testing protocols already listed in Part I of Appendix A of the Respiratory Protection Standard, or implement the proposed fit testing protocol instead. Therefore, use of the proposed fit testing protocol in the context of the existing fit testing protocols does not require an additional paperwork burden determination because OSHA already accounted for this burden during the final rulemaking for the Respiratory Protection Standard (*see* 63 FR 1152-1154; OMB Control Number 1218-0099).

Interested parties who wish to comment on OSHA's determination that the proposed fit testing protocol contains no additional paperwork requirements compared to the existing paperwork requirements must send their written comments to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for OSHA, Office of Management and Budget, Room 10235, 725 17th Street, NW., Washington, DC 20503. The Agency also encourages commenters to submit their comments on this paperwork determination to OSHA along with their other comments on the proposed rule.

##### D. Federalism

The Agency reviewed the proposal according to the most recent Executive Order on Federalism (Executive Order 13132, 64 FR 43225, August 10, 1999). This Executive Order requires that Federal agencies, to the extent possible, refrain from limiting state policy options, consult with states before taking actions that restrict their policy options, and take such actions only when clear constitutional authority exists and the problem is national in scope. The Executive Order allows Federal agencies to preempt state law

<sup>1</sup> Now the *Semiconductor Environmental Safety and Health Association Journal*.

only with the expressed consent of Congress. In such cases, Federal agencies must limit preemption of state law to the extent possible.

Under section 18 of the Occupational Safety and Health Act of 1970 (OSH Act), Congress expressly provides OSHA with authority to preempt state occupational safety and health standards to the extent that the Agency promulgates a Federal standard under section 6 of the OSH Act. Accordingly, section 18 of the OSH Act authorizes the Agency to preempt state promulgation and enforcement of requirements dealing with occupational safety and health issues covered by OSHA standards unless the state has an OSHA-approved occupational safety and health plan (*i.e.*, is a State-plan State). (*See Gade v. National Solid Wastes Management Association*, 112 S. Ct. 2374 (1992).) Therefore, with respect to states that do not have OSHA-approved plans, the Agency concludes that this proposal conforms to the preemption provisions of the OSH Act. Additionally, section 18 of the OSH Act prohibits states without approved plans from issuing citations for violations of OSHA standards; the Agency finds that the proposed rulemaking does not expand this limitation.

OSHA has authority under Executive Order 13132 to propose adding the CNP REDON fit testing protocol to its Respiratory Protection Standard at 29 CFR 1910.134 because the problems addressed by these requirements are national in scope. In this regard, the proposal offers hundreds of thousands of employers across the nation an opportunity to adopt an additional protocol to use in assessing respirator fit among their employees. Therefore, the proposal would provide employers in every state with an alternative means of complying with the fit testing requirements specified in paragraph (f) of OSHA's Respiratory Protection Standard.

Should OSHA adopt the proposed fit testing protocol in a final rulemaking, section 18(c)(2) of the OSH Act (29 U.S.C. 667(c)(2)) requires State-plan States to adopt the same protocol, or develop an alternative that is at least as effective as that protocol. However, compliance with the new fit testing protocol would only provide employers with an alternative to the existing requirements for fit testing protocols specified in its Respiratory Protection Standard; therefore, the alternative is not, itself, a mandatory standard. Accordingly, State-plan States are not obligated to adopt the final provisions that result from this rulemaking. Nevertheless, OSHA strongly

encourages them to adopt the final provisions to provide compliance options to employers in their states.

#### E. State Plans

The Agency strongly encourages the 24 states and two territories with their own OSHA-approved occupational safety and health plans to revise their current Respiratory Protection Standard should the Agency adopt the proposed fit testing protocol based on this rulemaking. OSHA believes that such a revision would provide employers in the State-plan States with any economic benefits that may accrue from its enactment, while protecting the safety and health of employees who use respirators against airborne hazardous substances in the workplace. These states and territories are: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington, and Wyoming. Connecticut, New Jersey, and New York have OSHA-approved State Plans that apply to state and local government employees only.

#### F. Unfunded Mandates

OSHA reviewed the proposal according to the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 *et seq.*) and Executive Order 12875. As discussed above in section IV.B (Preliminary Economic Analysis and Regulatory Flexibility Certification) of this preamble, the Agency has made a preliminary determination that the proposal imposes no additional costs on any private or public sector entity. The substantive content of the proposal applies only to employers whose employees use respirators for protection against airborne workplace contaminants, and compliance with the proposal would be strictly optional for these employers. Accordingly, the proposal would require no additional expenditures by either public or private employers.

OSHA standards do not apply to state and local governments, except in states that have voluntarily elected to adopt a State Plan approved by the Agency. Consequently, the proposal does not meet the definition of a "Federal intergovernmental mandate" (*see* section 421(5) of the UMRA (2 U.S.C. 658(5)). In conclusion, the proposal does not mandate that state, local, and tribal governments adopt new, unfunded regulatory obligations.

#### G. Applicability of Existing Consensus Standards

When OSHA promulgated its original respirator fit testing protocols on January 8, 1998 under Appendix A of its final Respiratory Protection Standard (29 CFR 1910.134), no national consensus standards addressed these protocols. However, the American National Standards Institute (ANSI) subsequently developed a national consensus standard on fit testing protocols as an adjunct to its respiratory protection program, ANSI Z88.2-1992. ANSI approved this national consensus standard, entitled "Respirator Fit Testing Methods," on June 8, 2001 as ANSI Z88.10-2001.

Paragraph 7.3 of ANSI Z88.10-2001 provides the requirements for conducting the CNP fit test, including requirements for test instrumentation and administering the fit test; these requirements are consistent with the CNP fit test requirements specified in 1998 by OSHA in Part I.C.4 of its Respiratory Protection Standard. In addition, section 9 and Table 1 of ANSI Z88.10-2001 describe the exercises required during CNP fit testing; these required exercises duplicate the exercises described in this CNP REDON proposal, except that the second respirator redonning is optional under the ANSI standard.<sup>2</sup> However, paragraph 9.2 of the ANSI standard specifies that one optional exercise must be included with the required exercises.

OSHA concludes that the CNP REDON fit testing protocol proposed in this rulemaking closely matches the requirements of the recent ANSI Z88.10-2001 standard. The proposed CNP REDON protocol relies on the CNP test procedures and instrumentation described in paragraphs (a) and (c) of Part I.C.4 in Appendix A of the Respiratory Protection Standard, which are similar to requirements specified in paragraph 7.3 of the ANSI standard. Any differences between these OSHA requirements and the provisions of the ANSI standard appear to be minor. In addition, the fit testing exercises in the proposed CNP REDON protocol are the same exercises in the ANSI standard when a second respirator redonning is selected as the optional exercise.

<sup>2</sup>Other optional exercises include deep breathing, side-to-side head movement, up-and-down head movement, stepping up and down, a second normal breathing exercise, grimacing followed by normal breathing, painter or sand-blaster movements, and other job-specific movements.

*H. Review of the Proposed Standard by the Advisory Committee for Construction Safety and Health (ACCSH)*

This proposal would revise Part I.C of Appendix A of OSHA's current Respiratory Protection Standard (29 CFR 1910.134) by including the CNP REDON protocol with the three fit testing protocols already approved by the Agency, and would also make several technical revisions to the approved CNP protocol. Accordingly, this proposal would revise the fit testing requirements specified by the Respiratory Protection Standard for the construction industry (see 29 CFR 1926.103).

OSHA's regulation governing the Advisory Committee on Construction Safety and Health (ACCSH) at 29 CFR 1912.3 requires the Agency to consult with the ACCSH whenever the Agency proposes a rulemaking that involves the occupational safety and health of construction employees. OSHA met with the ACCSH and described the CNP proposed rule at the ACCSH meeting on December 5, 2002. The ACCSH members had no questions or comments on this proposal at this meeting. Subsequently, OSHA distributed the proposed CNP rule to the ACCSH membership for their review prior to their next regular meeting on May 22, 2003. OSHA staff discussed the CNP proposal and answered questions from the ACCSH members during their meeting on May 22, 2003. The ACCSH then recommended that OSHA proceed with publishing the proposal.

*I. Public Participation*

The Agency requests members of the public to submit written comments and other information concerning this proposal. These comments may include objections to the proposal, as well as comments that endorse or support the proposed amendment set forth in this notice. OSHA welcomes such comments and information so that the record of this rulemaking will represent a balanced public response on the issues involved. (See the sections above titled **DATES** and **ADDRESSES** for information on submitting these comments and information to the Agency.) Submissions received within the specified comment period will become part of the record, and will be available for public inspection and copying in the OSHA Docket Office.

*J. List of Subjects in 29 CFR Part 1910*

Hazardous substances; Health; Occupational safety and health; Quantitative fit testing; Respirators; Respirator selection.

*K. Authority and Signature*

John L. Henshaw, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, directed the preparation of this notice. Accordingly, the Agency issues the proposed amendment under the following authorities: Sections 4, 6(b), 8(c), and 8(g) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Section 107, Contract Work Hours and Safety Standards Act. (Construction Safety Act; 40 U.S.C. 333); Section 41, Longshore and Harbor Worker's Compensation Act (33 U.S.C. 941); Secretary of Labor's Order No. 5-2002 (67 FR 65008); and 29 CFR part 1911.

Signed at Washington, DC on May 28, 2003.

**John L. Henshaw,**

*Assistant Secretary of Labor.*

**V. Proposed Amendment to Standard**

For the reasons stated in the preamble, the Agency proposes to amend 29 CFR part 1910 as follows:

**PART 1910—[AMENDED]**

**Subpart I—[Amended]**

1. Revise the authority citation for subpart I of part 1910 to read as follows:

**Authority:** Sections 4, 6 and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657); Section 107, Contract Work Hours and Safety Standards Act (the Construction Safety Act; 40 U.S.C. 333); Section 41, Longshore and Harbor Worker's Compensation Act (33 U.S.C. 941); and Secretary of Labor's Order Nos. 8-76 (41 FR 25059), 9-83 (48 FR 35736), 1-90 (55 FR 9033), 6-96 (62 FR 111), 3-2000 (65 FR 50017), or 5-2002 (67 FR 65008), as applicable.

Sections 29 CFR 1910.132, 1910.134, and 1910.138 also issued under 29 CFR part 1911.

Sections 29 CFR 1910.133, 1910.135, and 1910.136 also issued under 29 CFR part 1911 and 5 U.S.C. 553.

2. Appendix A to § 1910.134 is amended as follows in Part I:

A. In Section A, revise the introductory text of paragraph 14(a);

B. In Section C, paragraph 4, 8th sentence, remove the name "Dynatech Nevada" and add, in its place, "Occupational Health Dynamics of Birmingham, Alabama."

C. In Section C, paragraphs 4(a)(2) and (5) are revised.

D. In Section C, paragraph 4(c)(1) is revised.

E. In Section C, paragraph 5 is added at the end of Part I.

The revised and added text reads as follows:

**§ 1910.134 Respiratory protection.**

\* \* \* \* \*

**Appendix A to § 1910.134: Fit Testing Procedures (Mandatory)**

\* \* \* \* \*

**Part I. OSHA—Accepted Fit Testing Protocols**

A. Fit Testing Procedures—General Requirements

\* \* \* \* \*

14. Test Exercises. (a) Employers shall perform the following test exercises for all fit testing methods prescribed in this appendix, except for the CNP quantitative fit testing protocol and the CNP REDON quantitative fit testing protocol. For these two protocols, employers shall ensure that the test subjects (*i.e.*, employees) perform the exercise procedure specified in Part I.C.4(b) of this appendix for the CNP quantitative fit testing protocol, or the exercise procedure described in Part I.C.5(b) of this appendix for the CNP REDON quantitative fit testing protocol. For the remaining fit testing methods, employers shall ensure that the test exercises are performed in the appropriate test environment in the following manner:

\* \* \* \* \*

C. \* \* \*

\* \* \* \* \*

(a) \* \* \*

\* \* \* \* \*

(2) The CNP system default selected for test pressure shall be set at -15.0 mm (-0.58 inches) of water, and the modeled inspiratory flow rate shall be 53.8 liters per minute for performing fit tests.

\* \* \* \* \*

(5) The test subject shall be trained to hold his/her breath for at least 10 seconds.

\* \* \* \* \*

(c) \* \* \*

(1) The test instrument shall have an effective audio warning device, or a visual warning device in the form of a screen tracing, that indicates when the test subject fails to hold his/her breath during the test. The test shall be terminated if the test subject fails to hold his/her breath during the test. The test subject then may be refitted and retested.

\* \* \* \* \*

5. Controlled negative pressure (CNP) REDON quantitative fit testing protocol.

(a) When administering this protocol to test subjects, employers shall comply with the requirements specified in paragraphs (a) and (c) of Part I.C.4 of this appendix (Controlled negative pressure (CNP) quantitative fit testing protocol), except they may use the test exercises described below in paragraph (b) of this protocol instead of the test exercises specified in paragraph (b) of Part I.C.4 of this appendix.

(b) Employers shall ensure that each test subject being fit tested using this protocol follows the exercise and measurement procedures, including the order of administration, described below in Table A-1 of this appendix.

TABLE A-1.—CNP REDON QUANTITATIVE FIT TESTING PROTOCOL

Name of exercise <sup>1</sup>	Exercise procedure	Measurement procedure
Facing Forward .....	Stand and breathe normally, without talking .....	Face forward while holding breath for 10 seconds.
Bending Over .....	Bend at the waist as if going to touch his/her toes .....	Face parallel to the floor while holding breath for 10 seconds.
Head Shaking .....	For about three seconds, shake head back and forth vigorously several times while shouting.	Face forward while holding breath for 10 seconds.
REDON-1 .....	Remove and redon the respirator mask .....	Face forward while holding breath for 10 seconds.
REDON-2 .....	Remove and redon the respirator mask again .....	Face forward while holding breath for 10 seconds.

<sup>1</sup> Exercises are listed in the order in which they are to be administered.

(c) After completing the test exercises, the test administrator shall question each test subject regarding the comfort of the respirator. If the test subject states that the respirator is unacceptable, the employer shall ensure that the test administrator repeats the protocol using another respirator model.

(d) When calculating the overall fit factor for each test subject, employers shall determine the harmonic mean of the fit factors measured for each test exercise.

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**DEPARTMENT OF HOMELAND SECURITY**

**Coast Guard**

**33 CFR Part 165**

[CGD13-03-013]

RIN 1625-AA00

**Safety Zone; Fireworks Display, Columbia River, Astoria, OR**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard proposes establishing a safety zone for an annual fireworks display on the waters of the Columbia River in the vicinity of Astoria, Oregon. The Captain of the Port, Portland, Oregon, is taking this action to safeguard watercraft and their occupants from safety hazards associated with the fireworks display. Entry into this safety zone is prohibited unless authorized by the Captain of the Port.

**DATES:** Comments and related material must reach the Coast Guard by July 7, 2003.

**ADDRESSES:** You may mail comments and related material to U.S. Coast Guard MSO/Group Portland, 6767 N. Basin Ave, Portland, Oregon 97217. U.S. Coast Guard Group/MSO Portland maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part

of this docket and will be available for inspection or copying at U.S. Coast Guard MSO/Group Portland, 6767 N. Basin Ave, Portland, OR 97217 between 7 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Lieutenant Junior Grade Tad Drozdowski, at (503) 240-9370.

**SUPPLEMENTARY INFORMATION:**

**Request for Comments**

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (CGD13-03-013), indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

**Public Meeting**

We do not now plan to hold a public meeting. But you may submit a request for a meeting by writing to U.S. Coast Guard Group/MSO Portland at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

**Background and Purpose**

The Coast Guard is establishing a safety zone regulation to allow a safe annual fireworks display. The fireworks will occur annually on the second Saturday in August. This event will result in a number of vessels congregating near the fireworks launching area. The safety zone is needed to provide for the safety of the spectators and their watercraft from the

inherent safety hazards associated with the fireworks display. Without providing an adequate safety zone, the public could be exposed to falling burning debris within blast range should a catastrophic accident occur on the launching barge. This safety zone will be enforced by representatives of the Captain of the Port, Portland, Oregon. The Captain of the Port may be assisted by other federal and local agencies. The Coast Guard plans to publish a notice of implementation at least 30 days prior to the event.

**Regulatory Evaluation**

This proposed rule is not a “significant regulatory action” under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not “significant” under the regulatory policies and procedures of the Department of Homeland Security (DHS).

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. This expectation is based on the fact that the regulated area established by the rule would encompass less than one mile of the Columbia River for a period of only one hour, annually.

**Small Entities**

Under the Regulatory Flexibility Act (5 U.S.C. 601-612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule