AIR EMISSIONS FROM HAZARDOUS/MEDICAL/INFECTIOUS WASTE INCINERATORS

§ 62.8610 Identification of Plan.

Section 111(d) Plan for Hazardous/Medical/Infectious Waste Incinerators and the associated State regulation in section 33–15–12–02 of the North Dakota Administrative Code submitted by the State on October 6, 1998.

§ 62.8611 Identification of Sources.

The plan applies to all existing hazardous/medical/infectious waste incinerators for which construction was commenced on or before June 20, 1996, as described in 40 CFR Part 60, Subpart Ce.

§ 62.8612 Effective Date.

The effective date for the portion of the plan applicable to existing hazardous/medical/infectious waste incinerators is July 12, 1999.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 72 and 73

[FRL–6341–2]

RIN 2060–A127

Revisions to the Permits and Sulfur Dioxide Allowance System Regulations Under Title IV of the Clean Air Act: Compliance Determination

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Title IV of the Clean Air Act (the Act), as amended by the Clean Air Act Amendments of 1990, authorized the Environmental Protection Agency (EPA or Agency) to establish the Acid Rain Program. The program sets emissions limitations to reduce acidic particles and deposition and their serious, adverse effects on natural resources, ecosystems, materials, visibility, and public health.

The allowance trading component of the Acid Rain Program allows utilities to achieve sulfur dioxide emissions reductions in the most cost-effective way. Utilities trade allowances and EPA records ownership and trades of allowances in the Allowance Tracking System for use in determining compliance at the end of each year. On January 11, 1993, EPA initially promulgated the regulations governing Acid Rain Program permitting and allowance trading. Today's action revises certain provisions in the regulations concerning the deduction of allowances for determining compliance. The revisions will improve the operation of the Allowance Tracking System and the allowance market generally, while still preserving the Act's environmental goals.

EFFECTIVE DATE: June 14, 1999.

ADDRESSES: *Docket.* Docket No. A–98–15, containing supporting information used in developing the proposed rule, is available for public inspection and copying between 8:30 a.m. and 3:30 p.m., Monday through Friday, at EPA's Air Docket Section, Waterside Mall, room 1500, 1st Floor, 401 M Street, S.W., Washington, DC 20460. EPA may charge a reasonable fee for copying.

FOR FURTHER INFORMATION CONTACT: Donna Deneen, Permits and Allowance Market Branch, Acid Rain Division (6204J), U.S. Environmental Protection Agency, 401 M Street S.W., Washington, DC 20460 (202–564–9089).

SUPPLEMENTARY INFORMATION: This preamble contains all of the responses to public comments received on the revisions finalized in today's action.

The information in this preamble is organized as follows:

I. Affected Entities

Entities potentially affected by this action are fossil-fuel fired boilers or turbines that serve generators producing electricity, generating steam, or cogenerating electricity and steam. Regulated categories and entities include:

Category	Examples of regulated entities
Industry: SIC 49—Electric, Gas and Sanitary Services.	Electric service providers, boilers from a wide range of industries.

EPA does not intend this table to be exhaustive, but rather to provide a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be affected by this action. This action could also affect other types of entities not listed in the table. To determine whether this action affects your facility, you should carefully examine the applicability criteria in § 72.6 and § 74.2 and the exemptions in §§ 72.7, 72.8, and 72.14 of title 40 of the Code of Federal Regulations. If you have questions regarding the applicability of this action to a particular entity, consult the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

II. Background

On January 11, 1993, EPA promulgated the regulations that implemented the major provisions of title IV of the Clean Air Act (CAA or the Act), including the Permits rule (40 CFR part 72) and the Sulfur Dioxide Allowance System rule (40 CFR part 73). Since promulgation, these rules have applied to three compliance years, 1995, 1996, and 1997, for which the rules required affected units to meet annual allowance holding requirements. During this time, the Agency has gained experience in implementing the requirements and also discovered ways it could improve the operation of the Allowance Tracking System and allowance market. On August 3, 1998, EPA proposed changes to certain provisions in 40 CFR parts 72 and 73 to make these improvements. 63 FR 41358 (1998). These proposed changes related to the allowance transfer deadline, compliance determinations, and the signature requirements for allowance transfer requests. EPA finalized the proposed changes to the allowance transfer deadline and signature requirements for allowance transfer requests on December 11, 1998. 63 FR 68401 (1998). Today's action finalizes changes related to the deduction of allowances for compliance determinations.

III. Public Participation

EPA proposed revisions to 40 CFR parts 72 and 73 in the **Federal Register** on August 3, 1998. 63 FR 41358. The notice invited public comments. EPA

received and granted a request to extend the comment period by 15 days from September 2, 1998 to September 17, 1998.

EPA offered to hold a public hearing upon request, but no one made such a request and EPA did not hold a hearing. However, after the close of the comment period, EPA held several meetings with all parties that submitted comments, in order to clarify the parties' comments and positions on the issues raised on the notice of proposed rule-making. The parties subsequently submitted late comments further explaining their positions. Copies of memoranda describing the new information received by EPA at the post-comment period meetings are in the rulemaking docket.

IV. Summary of Comments and Responses

During the comment period, EPA received seven letters (or ''initial comments'') regarding the proposed revisions to the compliance determination provisions in the regulations.[1] Several months after the comment period, EPA received three additional letters (or ''late comments'') from the same commenters concerning the provisions. All of the commenters were representatives of utility companies or groups of utility companies. A copy of each comment received is in the rulemaking docket.

EPA carefully considered all of the comments and, where appropriate, made changes reflected in the final regulations. The following sections contain a summary of the comments received and the Agency's responses.

A. Allowance Deductions From Other Units at the Same Source

After the allowance transfer deadline, EPA determines whether each affected unit is in compliance with the requirement to hold allowances at least equal to the unit's sulfur dioxide emissions for the previous year. *See* 40 CFR 72.9(c)(1)(i). Units that do not meet the requirement are subject to the excess emissions and offset plan requirements in 40 CFR part 77.

On August 3, 1998, EPA proposed revisions that would change how it deducts allowances and determines the amount of excess emissions at a unit at the end of a compliance year. Under the proposed revisions, EPA would allow reduction (but not complete avoidance) of excess emissions that a unit would otherwise have after deductions for compliance under § 73.35(b)(2). EPA would allow excess emissions to be reduced at a unit by allowing deductions of up to a certain number of allowances for that unit from the allowance accounts of other units at the same source that had unused allowances. The proposed revisions included a formula for calculating the allowance deductions allowed from other units' accounts. The formula would result in the unit making an excess emissions penalty payment equal to about three times the allowance price of the allowances needed to offset the unit's excess emissions in the absence of allowance deductions from other units' accounts. The Agency proposed these changes because EPA was concerned that a utility could become subject to an enormous penalty payment for making inadvertent, minor errors when accounting for allowances at the end of the year even if the utility had enough allowances among the units at the source.

All the commenters expressed general support of EPA's decision to propose rule changes that would allow utilities to reduce the effects of inadvertent, minor errors in accounting for allowances. The specific approach proposed by EPA for doing this, however, generated a variety of comments. The following discussion addresses these comments.

Comment: Several commenters stated in their initial comments that the proposed provision limiting the use of unused allowances to those held by other units at the same source was inconsistent with section 403(d)(2) of the Act.[2] The commenters argued that section 403(d)(2) authorizes ''aggregation of allowances among units with the same designated representative'' for purposes of determining compliance with the requirement to hold allowances covering a unit's annual SO_2 emissions. Comments of UARG at 7 (September 16, 1998). While section 403(d)(1) requires the Administrator to promulgate regulations establishing a system for issuing, recording, and tracking allowances, section 403(d)(2) provides:

> In order to insure electric reliability, such regulations shall not prohibit or affect temporary increases and decreases in emissions within utility systems, power pools, or utilities entering into allowance pool agreements, that result from their operations, including emergencies and central dispatch, and such temporary emissions increases and decreases shall not require transfer of allowances among units nor shall it require recordation. The owners or operators of such units shall act through a designated representative. Notwithstanding the preceding sentence, the total tonnage of emissions in any calendar year (calculated at the end thereof) from all units in such a utility system, power pool, or allowance pool agreements shall not exceed the total allowances for such units for the calendar year concerned. 42 U.S.C. 7651b(d)(2).

Commenters claimed that the last sentence of this section requires EPA to allow units with a common designated representative and included in the same utility system, power pool, or allowance pool to aggregate their allowances for use in determining whether these units hold allowances at least equal to their annual SO_2 emissions. The commenters noted that EPA acknowledges that title IV requires allowances to be held for a unit but does not specify the account in which the allowances must be held. According to these commenters, EPA should revise § 73.34 to allow a designated representative to cover a unit's emissions with allowances from any accounts for which he or she is the designated representative. The commenters argued that EPA should allow this regardless of whether the accounts are for units at the same source.

One of the commenters added that EPA's position that plant owners must fill thousands of unit compliance subaccounts with an exact or an excess number of allowances in order to avoid a penalty is unproductive both for EPA and plant owners. The commenter stated that EPA should give the designated representative the option of naming the unit's compliance subaccount as the primary allowance source and general accounts as secondary and tertiary accounts from which EPA could deduct allowances at year end.

Response: EPA disagrees with the commenters who asserted that the provision limiting the use of unused allowances to those held by other units at the same source is inconsistent with section 403(d)(2) of the Act. As discussed below, EPA maintains that the same-source limitation—coupled with the limit on the number of allowances a unit can use from another unit—are consistent with the pervasive unit-by-unit orientation of title IV (including section 403(d)(2)).[3] *See also*

[1] Although EPA received five of the seven comment letters one to five days after the close of the comment period, EPA is responding to all seven comment letters.

[2] These commenters subsequently stated, in late comments, that the Agency would satisfy all their concerns if, among other things, EPA increased the amount of allowances potentially deducted from other units at the same source beyond the amount provided in the proposed revisions. Because regulations implementing the Acid Rain Program must be consistent with title IV, EPA is addressing here the issue of statutory consistency.

[3] To the extent some commenters asserted section 403(d)(2) authorizes, rather than requires, the Agency to allow the use of allowances from units

Continued

63 FR 41362 (consistency with section 403(g), 411, and 414). Further, to the extent allowing a unit to use any allowances from another unit is a departure from a strict unit-by-unit approach, the same-source limitation closely restricts any such departure by allowing a unit to use only allowances held for units that are at the same geographic location, i.e., the same plant.

As explained in the preamble of the proposed rule, title IV incorporates a pervasive unit-by-unit orientation, particularly with regard to SO_2 emissions. Title IV requires: determination of applicability of the Acid Rain Program unit-by-unit; allocation of allowances and setting of SO_2 emissions limitations generally unit-by-unit; determination of excess emissions and penalties unit-by-unit; and monitoring of emissions generally unit-by-unit. *See* 63 FR 41360.

Maintaining that section 403(d)(2) similarly reflects this unit-by-unit orientation, EPA rejects the commenters' interpretation that section 403(d)(2) requires the Agency to allow designated representatives to use allowances from units at other sources. The last sentence of section 403(d)(2) is ambiguous, but EPA maintains that a reasonable interpretation is that this section requires a unit-by-unit orientation in compliance. The first sentence of the section states that the allowance system regulations shall not prohibit temporary changes in emissions by units included in utility systems, power pools, or allowance pools and that such changes will not require allowance transfers. The second sentence requires that all owners or operators of such units act through a designated representative. The third sentence states that total annual emissions from ''all'' such units cannot ''exceed the total allowances for such units'' for the year involved. *Id.*

This reference in the third sentence to ''all'' units either could mean each and every unit in a particular utility system, power pool, or allowance pool or could mean all units in the aggregate in such a system or pool. Thus, the statutory language could arguably support either of two possible interpretations: (1) Total annual emissions for each unit in a particular utility system, power pool, or allowance pool must not exceed the unit's total allowances; or (2) the aggregate annual emissions of all the units in the utility system, power pool, or allowance pool must not exceed the aggregate allowances for all these units. While the commenters support the second interpretation, EPA has consistently followed the first interpretation. *See* 56 FR 63002, 63049–50 (1991) (explaining that section 403(d)(2) does not ''require or authorize'' pool-wide compliance). For the following reasons, EPA continues to adopt the first interpretation.

First, as discussed above, title IV incorporates a unit-by-unit orientation. While these other provisions of title IV may not be determinative of the proper interpretation of section 403(d)(2), EPA maintains it is reasonable to interpret section 403(d)(2) to reflect the same unit-by-unit orientation that Congress adopted in the major statutory provisions governing the Acid Rain Program. The commenters' interpretation would represent a significant departure from the other provisions of title IV.

Second, contrary to the commenters' claim, the legislative history of title IV supports EPA's interpretation, rather than the commenters' interpretation, of section 403(d)(2). The most authoritative document in the legislative history, the Conference Report that accompanied the Clean Air Act Amendments of 1990, states that section 403(d):

> Makes it clear that allowances are annual; temporary increases and decreases in emissions within utility systems or power pools do not require allowance transfers or recordation so long as the total tonnage emitted in any year matches allowances held for that year. Thus, *utilities must ''true up'' at year end to ensure that allowances match emissions for each unit.* Conference Report, House Rep. No. 101–952, 101st Cong. 2d Sess. at 343 (October 26, 1990) (emphasis added).

In short, the Conference Report indicates that, at the end of each year, allowances must cover emissions *for each unit* in a utility system or pool, not for all units in the system or pool on an aggregate basis.

Ignoring the Conference Report, the commenters instead focused on comparing the enacted provisions of title IV with provisions of an earlier House version (H.R. 3030) of title IV. The House bill (in section 503(d)(4) of H.R. 3030) required promulgation of regulations for a system of issuing, recording, and tracking allowances and stated that:

> In order to insure electric reliability, such regulations shall not prohibit or affect temporary increases and decreases in emissions within utility systems or power pools that result from their operations, including emergencies and central dispatch, and such temporary emissions increases and decreases shall not require transfer of allowances among units nor shall it require recordation. Notwithstanding the preceding sentence, the total tonnage of emissions in any calendar year (calculated at the end thereof) from each unit involved shall not exceed the allowances allocated to the unit for the calendar year concerned and issued to the owner or operator of the unit for that year, plus or minus allowances transferred to or from the unit for such calendar year or carried forward to that year from prior years. House Rep. No. 101–490, 101st Cong. 2d Sess. at 629–30 (May 17, 1990).

In the House Committee Report accompanying the House bill, the House Committee on Commerce and Energy explained this House bill provision using language subsequently adopted word-for-word in the Conference Report (quoted above) to explain section 403(d)(2) of the final version of title IV. *See* House Rep. No. 101–490 at 373–74. In particular, the House Report explained that utilities must ensure at the end of each year that ''allowances match emissions for each unit.'' *Id.* at 374. The fact that the Conference Committee explained section 403(d)(2) using, word-for-word, the House Committee's explanation of unit-by-unit compliance provided under the House bill indicates that Congress intended to continue to require unit-by-unit compliance in section 403(d)(2). This also shows that Congress did not intend the language differences between section 403(d)(2) and the comparable House bill provision to alter the requirement for unit-by-unit compliance. Thus, the Conference Report and House Committee Report belie the importance the commenters place on the difference between the reference in section 403(d)(2) to total emissions and total allowances for ''all units'' in a utility system, power pool, or allowance pool agreements and the reference in the House bill to emissions and allowances of ''each unit.''

Rather than addressing the Conference Report or the House Committee Report, the commenters based their argument on a floor statement of one member of the House of Representatives. The Courts do not generally consider Congressmen's floor statements alone as providing authoritative explanations of Congressional intent. *See, e.g., Garcia* v. *U.S,* 469 U.S. 70, 76 and 78 (1984); *Brock* v. *Pierce,* 476 U.S. 253, 263 (1986); and *U.S.* v. *McGoff,* 831 F.2d 1071, 1090–91 (D.C. Cir. 1987).

Moreover, the floor statement on which the commenters rely does not support their interpretation of section 403(d)(2). In the statement cited by the commenters, Congressman Oxley stated:

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at other sources, EPA interprets the provision to mean that the Agency is neither required nor authorized to allow the use of such allowances.

Barriers to allowance transactions may take any number of forms, and the Administrator must use great care to avoid doing anything to help erect those barriers. That is why the conference committee has streamlined the process whereby a utility or utilities can pool allowances so as to operate within the confines of the law. Under provisions of the allowance tracking system, we have provided for the creating of allowance pools. Owners or operators need only record with the Administrator that they intend to enter into such agreements. Once in place, these voluntary pooling agreements can operate to reduce the number of actual transfers of allowances and, thus, the overall compliance burden. For example, utilities or operating companies can keep and share one set of allowance books to accommodate their emission allowance requirements. Here, as elsewhere, it is necessary to keep the volume of information that buyers and sellers are required to provide to a minimum, lest the system breakdown in the face of heavy trading. *A Legislative History of the Clean Air Act Amendments of 1990,* Vol. 1 at 1418 (1990) (quoting from House debate on the Conference Report and bill on October 26, 1990).

The Congressman's statement addresses the use of allowance pools to reduce ''[b]arriers to allowance transactions,'' *not* the use of allowance pools to show compliance with the requirement to hold allowances at least equal to each unit's annual SO_2 emissions. *Id.* The ability to hold allowances in a single account for all units in a utility system, power pool, or allowance pool reduces the number of allowance transfers submitted to the Administrator for recordation in the Allowance Tracking System. Once such an allowance account is established, a utility system, power pool, or allowance pool can, for internal bookkeeping purposes, move allowances among any of the units in the utility system, power pool, or allowance pool throughout the year and, for purposes of the Allowance Tracking System, hold the allowances in the same account (i.e., a general account for the utility system, power pool, or allowance pool). *See* 40 CFR 73.31(c) (providing for the establishing of ''general accounts'' by ''any person''). However, this does not negate the requirement that, for compliance purposes, the designated representative must ultimately transfer the allowances to each unit's individual allowance account by the allowance transfer deadline. In fact, this is just the sort of annual ''true up'' for each unit that Congress described in the Conference Report.

In short, EPA concludes that its long-standing interpretation of the ambiguous language in section 403(d)(2) is a reasonable reading of the statutory language and is consistent with other provisions of title IV and with the legislative history.

Today's final rule is consistent with the requirement, reflected in section 403(d)(2), that each unit have allowances covering its emissions. The rule restricts the number of allowances that can be held for a unit by other units and requires that these other units must be at the same source. As a result, EPA believes that there is still strong incentive for owners and operators to hold sufficient allowances in an affected unit's account and that owners and operators will routinely comply on a unit-by-unit basis and only use allowances from other units at the source in unusual circumstances, e.g., to correct an inadvertent error. Of course, the allowances that a unit uses from other units must be from the same geographic location, i.e., the same plant. *See* 63 FR 41362–41363 (explaining that, in effect, common stack units can already use allowances from other units, but only at the same plant, under § 73.35(e)). EPA therefore maintains that today's final rule is consistent with section 403(d)(2) and strikes a reasonable balance between the unit-by-unit orientation of title IV and compliance flexibility to reduce excess emission penalty payments where units fail to hold enough allowances because of inadvertent, minor errors.

The same-source restriction in the final rule is not only consistent with title IV, but also is practical to implement. The restriction ensures that only one designated representative is involved in the deduction of allowances from other units' compliance subaccounts. The limitation thereby minimizes the changes necessary to existing contracts involving allowance agreements among different owners of units.

Finally, in response to the commenter that supported allowing a designated representative the option of naming a unit's primary, secondary, and tertiary accounts from which EPA would deduct allowances, EPA notes that the allowance account tracking necessary to implement the approach would be far too complicated and unwieldy. Such a time and resource intensive approach would likely cause significant and unacceptable delays in EPA's ability to perform timely end of year accounting and unfreeze allowance accounts. After the allowance transfer deadline, allowances that are useable for the compliance year must be frozen until EPA completes the process of deducting allowances to cover each unit's emissions.

Comment: Several commenters stated in initial comments that units should be able to use available allowances from other unit accounts after the allowance transfer deadline to avoid all excess emissions. They argued that the language in section 403(d)(2), quoted and discussed above, reflects Congress' intent that EPA allow full offsetting. One of these commenters argued that allowing the use of allowances from other unit accounts to avoid excess emissions completely would not compromise the Acid Rain Program's unit-by-unit orientation because EPA would deduct allowances from the affected unit's compliance subaccount first, before allowing deductions from other units at the same source. The commenter also pointed out that under the proposed rule, the consequences of making an inadvertent error (such as transposing figures in allowance serial numbers in an allowance transfer form so the transaction transfers an insufficient number of allowances to a unit) could widely vary, depending on the exact error made. Suggesting that the penalties should not differ for the same type of error, the commenter argued that allowing units to avoid excess emissions with all available allowances at other unit accounts would address this concern.

Response: EPA rejects the commenters' views that EPA must allow the full use, instead of the limited use, of allowances in other units' compliance subaccounts. As discussed above, the Act has a pervasive unit-by-unit orientation and, therefore, the final rule allows the designated representative to use, for a unit that would otherwise have excess emissions, a large portion (but not all) of the needed allowances from the compliance subaccounts of other units at the same source. Further, for the reasons detailed above, EPA rejects the commenters' interpretation of section 403(d)(2).

In response to the commenter who claimed that allowing the complete avoidance of excess emissions would not compromise the unit-by-unit orientation of title IV, EPA does not agree. Allowing units to use allowances from other unit compliance subaccounts to avoid completely excess emissions and the resulting excess emissions penalty payment provides owners and operators with little or no incentive to ensure that the individual account for each of their units holds sufficient allowances at the end of each year. While the flexibility to deduct allowances from other units is aimed at minor, inadvertent errors, owners and operators can use this flexibility when any errors occur. 63 FR 41363. Providing this flexibility without any significant, excess emissions penalty

payment would likely discourage efforts to ensure unit-by-unit compliance and encourage routine use of allowances from other units at the same source.

In response to the same commenter's concerns that under EPA's proposal the amount of a unit's allowance deficiency and the resulting penalty payment resulting from an inadvertent error could vary widely depending on the specific error, EPA notes that this potential variance already exists under the current rule. The proposed rule—and to a greater extent, today's final rule—actually reduces the potential variance by reducing the penalty payment for minor, inadvertent errors. By reducing the potential penalties, the final rule helps to alleviate the problem of widely divergent penalties. As discussed above, EPA believes that the final rule thus balances the unit-by-unit orientation of title IV with increased compliance flexibility.

Comment: EPA received several initial and late comments on the formula, in proposed § 73.35(b)(3)(i), for calculation of the maximum allowances available for a unit for deduction from other unit accounts. The proposed formula would use a ratio of three times the average allowance price for the year to the excess emissions penalty per ton in order to limit deductions from other unit accounts. Notwithstanding the ratio, the proposed formula also would not allow deductions from other unit accounts that would bring excess emissions below 10 tons. This would establish a minimum penalty where the formula is used.

In their initial comments, several commenters raised objections to the formula. After objecting to any limitation being placed on the number of allowances that could be deducted, one commenter stated that if EPA adopted such a limitation, the Agency should revise the formula to allow use of more allowances from other unit accounts. Specifically, this commenter recommended revising the formula to change the ratio of three times the allowance price to the excess emissions penalty to a ratio of one times the allowance price to the excess emissions penalty. The commenter also recommended, notwithstanding the formula, imposing a 10 percent cap as the maximum amount of allowances that a unit could not use from other units' accounts to offset a unit's emissions. The commenter claimed that this approach would result in utilities planning to comply under the existing unit-by-unit approach to avoid the financial penalty represented by even a limited discount factor.

A second commenter argued in initial comments that, because minor accounting mistakes would typically result in less than 10 tons of excess emissions, EPA's proposed formula and 10-ton minimum penalty was arbitrary and capricious. This commenter further claimed that if EPA did not revise the proposal to allow the use of unlimited allowances from other unit accounts, EPA should at least revise the formula to penalize the first excess emission ton much less than the eleventh excess emission ton. In a third set of initial comments, another commenter stated that EPA should revise the formula to allow deduction of any needed allowances from other unit accounts without penalty if less than 10 tons of excess emissions occurred. A fourth commenter characterized the formula as too complicated.

As noted above, EPA held several post-comment period meetings with all parties that submitted initial comments. During these meetings, the parties and EPA discussed the initial comments and their views concerning issues, raised in the preamble of the proposed rule, about the proposed formula. In particular, the participants addressed reducing or removing the allowance-price-to-excess-emissions-penalty ratio, retaining the 10-ton minimum, and adding a percentage cap on the amount of allowances that a unit could not use from other units' accounts to offset a unit's emissions. The participants discussed these issues in the context of alternative scenarios for the formula, all of which were logical outgrowths of the proposed rule. As a result of these discussions, the commenters submitted late comments to the Agency on these issues to supplement their views. EPA has taken these late comments into consideration in developing the final rule.

Response: The proposed formula generally would make it four times as expensive to not hold enough allowances in a unit account than to hold enough allowances in the unit's account, as of the allowance transfer deadline.[4] EPA agrees that, in light of the kinds of errors the revisions are meant to address (i.e., inadvertent, minor ones), the penalty payment, after application of the proposed formula, could still be excessive. Therefore, EPA believes that it should modify the proposed formula to allow the deduction of more allowances from other units at the same source.

EPA considered the suggestion, in initial comments, of increasing the allowances allowed to be deducted from other unit accounts by changing the proposed formula so that it contains a ratio of one times the average allowance price to the excess emissions penalty, instead of three times the average allowance price to the excess emissions penalty. EPA agrees that such a change would result in a total penalty payment that is more in line with the gravity of making an inadvertent, minor error. Nevertheless, EPA is concerned that making only this change would fail to address comments that the deduction formula is overly complicated. EPA maintains that the penalty formula will be more effective if it is simpler and easier to apply.

EPA and the commenters discussed a simplified formula for calculation of penalties in the post-comment meeting on December 3, 1998. In late comments, commenters stated that if EPA adopted this simplified formula, the Agency would satisfy their concerns about the proposed formula. Under the simplified formula, the owner or operator of a unit may use from the compliance subaccounts of other units at the same source up to 95 percent of the allowances needed after using all the allowances in the unit's own compliance subaccount. However, the simplified formula retains the 10-ton minimum on the amount of excess emissions remaining after using allowances from other units' accounts.

The simplified formula has a result comparable to that of the formula suggested in initial comments that would reduce the ratio in the proposal from three to one times the average allowance price to the excess emissions penalty. Under 1998 market conditions, both the commenter's suggested formula and the simplified formula would result in allowing deduction of 95 percent of the allowances needed by a unit from other unit accounts (i.e., using the 1998 average allowance price of $117 and an excess emissions penalty of $2581 per ton of excess emissions). While the average allowance price and excess emissions penalty may change each year, resulting in a disparity in the allowances calculated under the commenter's suggested formula and the

[4] Under the proposed revisions, a unit that simply complied with the allowance holding requirement would use one allowance for each ton of emissions (e.g., 100 allowances for 100 tons of SO_2). However, if the unit failed to comply with the allowance holding requirement using its own allowances, the unit would use one allowance (i.e., from either another unit account or a future year account under the offset provisions in § 77.3) for each ton of emissions (e.g., 100 allowances for 100 tons of SO_2), plus its owners and operators would be subject to an excess emissions penalty payment approximately equal to the cost of three allowances for each ton of emissions (e.g., the cost of 300 allowances).

formula in the final rule,[5] EPA believes this is not a significant concern. EPA sees no overwhelming reason to ensure the penalty payment increases as average allowance price increases, as long as the penalty payment for excess emissions remains significant and provides owners and operators with a strong incentive to comply with the allowance holding requirements on a unit-by-unit basis.

Under both the proposed formula and the simplified formula, the excess emissions remaining after deductions from other unit accounts are subject to the excess emissions penalty of $2000 per ton, as adjusted by the Consumer Price Index.

In light of the late comments unanimously supporting the simplified formula discussed in the December 3, 1998 post-comment period meeting, EPA has decided to modify the proposal and adopt the simplified formula. Use of the simplified formula will increase, by an amount comparable to the amount suggested in initial comments, the number of allowances that can be deducted from other unit accounts. EPA believes that the simplified formula will achieve the objectives intended by the proposed formula, but will be far easier for both the utilities and EPA to use to calculate the amount of excess emissions.

As noted above, the simplified formula retains the 10-ton minimum on the amount of excess emissions that remains after deducting allowances from other units' accounts. EPA believes the restriction is necessary to ensure that, for units with 10 or more tons of emissions exceeding the allowances in their unit accounts (before deducting from other unit accounts), the penalty remains significant. This will provide owners and operators with a strong incentive to meet their allowance holding requirements on a unit-by-unit basis. EPA also notes that, under the final rule, a unit having the minimum 10 tons of excess emissions (after the formula is applied) for 1998 will be subject to a penalty payment of $25,810, about the same maximum penalty that can be assessed per day of violation under sections 113(b) and (d) in the Clean Air Act.

B. Role of Authorized Account Representative

Comment: EPA received several comments on two options, presented in the proposal, concerning the role of the authorized account representative (who also is, for any affected unit, the designated representative) in deducting allowances from other unit accounts. Option 1 would prescribe the unit accounts for, and order of, such deductions but allow the authorized account representative, before the allowance transfer deadline, to tell EPA not to make any deductions from other unit accounts. Option 2 would allow the authorized account representative to specify, within 15 days of receiving notice from the Agency of a unit's failure to hold sufficient allowances, the serial numbers of the allowances to deduct and the compliance subaccounts from which to deduct those allowances. All of the commenters supported Option 2. One commenter argued that Option 2 is consistent with section 403(d)(2) in the Act which states that owners and operators must ''act through a designated representative'' and language in Parts 72 and 73 of the current regulations that authorize designated representatives to specify by serial number the allowances deducted from compliance. Several commenters also noted Option 2 was preferable because it would avoid potential allowance surrender issues that could arise where units at a source are jointly owned.

Response: In light of the comments received, the Agency has chosen Option 2 over Option 1 for the final rule. As pointed out in the comments, Option 2 will provide owners and operators with more flexibility because the authorized account representative can specify any unused allowance for deduction, as long as a unit at the same source holds the allowance. This flexibility makes it unnecessary for owners and operators to renegotiate their allowance agreements in order to take into account the Agency-mandated pattern in Option 1 for allowance deduction from other unit accounts. EPA recognizes that Option 2 may delay its end-of-year compliance determinations and the unfreezing of allowance accounts. 63 FR 41362. However, EPA believes the benefits of Option 2, highlighted by the commenters, outweigh the drawbacks of such a delay. In adopting Option 2, EPA made a few, minor word changes to the proposed revisions of §§ 72.2 and 73.35 in order to make the rule easier to understand.

C. Effective Date of Rule Revisions

Comment: One commenter, in a late comment, urged the Agency to finalize the rule in a manner that would allow the compliance determination revisions to apply to the 1998 compliance year.

Response: Today's rule will apply to all compliance years for which the excess emissions penalty payment deadline under § 77.6(a)(3) (i.e., July 1) is on or after the effective date of today's rule. Section 77.6(a)(3) requires submission of the payment within 30 days of notice by the Administrator of completion of its process for determining end-of-year compliance, but not later than July 1. EPA anticipates that July 1 will be the applicable deadline for the 1998 compliance year. EPA believes that the penalty payment deadline should be the cut-off date because that deadline is the date on which the designated representative must determine, and notify EPA of, the specific number of tons of excess emissions at a unit. Today's rule can change the amount of a unit's excess emissions and so should apply only if it is effective before the July 1 deadline for determining excess emissions for the compliance year.

EPA considered applying today's rule revisions only to those compliance years for which the annual compliance certification and excess emissions offset plan deadline (60 days after the end of the year) is on or after the effective date of the revisions. This approach, however, would prevent use of the new provisions for the 1998 compliance year and would serve no useful purpose. Neither the annual compliance certification nor the excess emissions offset plan requires the designated representative to state the specific number of tons of excess emissions at a unit. Instead, the designated representative must indicate whether a unit held enough allowances in its compliance subaccount and, if not, whether EPA should deduct immediately (i.e., as soon as EPA completes its determination of end-of-year compliance) allowances to offset the unit's excess emissions. EPA must deduct offsetting allowances immediately unless the designated representative makes the unusual showing that the deduction would jeopardize electric reliability. *See* 40 CFR 72.90(c)(1) and 77.3(d). Since any unit having excess emissions under the current rule will still have excess emissions under today's rule, the required information in the annual compliance certification and offset plan is the same under either rule. Therefore, it is unnecessary to limit the application of the revisions to only compliance years for which the annual compliance certification and excess emissions offset plan deadline (60 days after the end of the year) is on or after the effective date of the revisions. Today's rule will

[5] As of December 1998, the market price of an allowance was about $190, an amount which, if it had been the average allowance price for 1998, would have resulted in 93 percent of a unit's needed allowances to be deducted from other unit accounts.

instead apply to all compliance years for which the July 1 excess emissions penalty payment deadline is on or after the effective date of the revisions. The 1998 compliance year will therefore be the first year to which the rule will apply.

D. Impacts of Rule Revisions on Acid Rain Permits

EPA designed today's revisions to become effective without changing the contents of existing acid rain permits and the State regulations for issuing acid rain permits. With the exception of changes in the definitions of ''compliance subaccount'' and ''current year subaccount,'' all of today's revisions are in 40 CFR part 73. As explained in the preamble to the proposed rule (63 FR 41364), it is unnecessary for State permitting authorities to revise the acid rain permits they have issued or regulations they have adopted to reflect today's final revisions to 40 CFR part 73.

Similarly, the revisions can go into effect without State permitting authorities revising acid rain permits or regulations to reflect the revised definitions of ''compliance subaccount'' and ''current year subaccount'' in 40 CFR part 72. Even if a State issued an acid rain permit before today's revision of the definitions become effective, the Agency will apply the final revised definitions, along with the revisions in 40 CFR part 73, to the units covered by the permit. The Agency will use the revised definitions in determining end-of-year compliance for all calendar years for which the July 1 excess emissions penalty payment deadline is on or after the effective date of the revised definitions.

Moreover, the revised definitions will not affect the permitting activities of State permitting authorities under 40 CFR part 72. Instead, the revised definitions affect EPA's operation of the Allowance Tracking System under 40 CFR part 73.

While EPA will apply the revised definitions in § 72.2, State permitting authorities should revise their own regulations to reflect the new definitions. This will avoid any potential confusion on the part of regulated entities and the public as to how EPA determines end-of-year compliance.

V. Administrative Requirements

A. Docket

A docket is an organized and complete file of all the information considered by EPA in the development of this rulemaking. The docket is a dynamic file since EPA and participants add material throughout the rulemaking development. The docketing system allows members of the public and industries involved to identify and locate documents readily so that they can effectively participate in the rulemaking process. Along with the preambles of the proposed and final rule (which include EPA responses to significant comments), the contents of the docket will serve as the record in case of judicial review to the extent provided in section 307(d)(7)(A) of the Act.

B. Executive Order 12866: Regulatory Planning and Review

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

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

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

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

Pursuant to the terms of Executive Order 12866, OMB has determined that today's rule is not a ''significant regulatory action.''

C. Executive Order 12875: Enhancing Intergovernmental Partnerships

Under Executive Order 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments or unless EPA consults with those governments. If EPA complies by consulting, Executive Order 12875 requires EPA provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and tribal governments ''to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates.''

Today's rule does not create a new mandate on State, local or tribal governments. It modifies an existing mandate in a way that imposes no additional duties and no additional costs on these entities. Accordingly, the requirements of section 1(a) of Executive Order 12875 do not apply to this rule.

D. Executive Order 13084: Consultation and Coordination With Indian Tribal Governments

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments or unless EPA consults with those governments. If EPA complies by consulting, EPA must provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments ''to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.''

Today's rule does not significantly or uniquely affect, or impose any substantial direct compliance costs on, the communities of Indian tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

E. Unfunded Mandates Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for

federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, before promulgating a proposed or final rule that includes a federal mandate that may result in expenditure by State, local, and tribal governments, in aggregate, or by the private sector, of $100 million or more in any one year. Section 205 generally requires that, before promulgating a rule for which a written statement must be prepared, EPA must identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the Administrator explains why that alternative was not adopted. Finally, section 203 requires that, before establishing any regulatory requirements that may significantly or uniquely affect small governments, EPA must have developed a small government agency plan. The plan must provide for notifying any potentially affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Because today's rule is estimated to result in the expenditure by State, local, and tribal governments or the private sector of less than $100 million in any one year, the Agency has not prepared a budgetary impact statement or specifically addressed the selection of the least costly, most cost-effective, or least burdensome alternative. Because small governments will not be significantly or uniquely affected by this rule, the Agency is not required to develop a plan with regard to small governments.

Today's final revisions to parts 72 and 73 will potentially reduce the burden on regulated entities by providing more flexible allowance holding requirements. The revisions will not otherwise have any significant impact on State, local, and tribal governments.

F. Paperwork Reduction Act

Today's final revisions to parts 72 and 73 will not impose any new information collection burden subject to the Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*). OMB has previously approved the relevant information collection requirements contained in parts 72 and 73 under the provisions of the Paperwork Reduction Act and has assigned OMB control number 2060–0258. 58 FR 3590, 3650 (1993).

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.

Copies of the previously approved ICR may be obtained from the Director, Regulatory Information Division; EPA; 401 M St. SW (mail code 2137); Washington, DC 20460 or by calling (202) 564–2740. Include the ICR and/or OMB number in any correspondence.

G. Regulatory Flexibility

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, *et seq.*, generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small government jurisdictions.

As discussed above, today's final revisions will reduce the burden on regulated entities by adding flexibility to the regulations. For this reason, EPA has determined that this rule will not have a significant economic impact on a substantial number of small entities.

H. Applicability of Executive Order 13045: Children's Health Protection

Executive Order 13045 (62 FR 19885, April 29, 1997) applies to any rule if EPA determines (1) that the rule is economically significant as defined under Executive Order 12866, and (2) that the environmental health or safety risk addressed by the rule has a disproportionate effect on children. If the regulatory action meets both criteria, EPA must evaluate the environmental health or safety effects of the planned rule on children and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by EPA.

This final action is not subject to Executive Order 13045, because the action is not economically significant as defined by Executive Order 12866 and does not address an environmental health or safety risk having a disproportionate effect on children.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d)(15 U.S.C. 272 note), directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, or business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA requires EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

Today's final rule does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the NTTAA.

J. Congressional Review Act

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 rule 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 rule is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective 30 days after publication in the **Federal Register**.

List of Subjects in 40 CFR Parts 72 and 73

Environmental protection, Acid rain, Administrative practice and procedure,

Air pollution control, Compliance plans, Electric utilities, Penalties, Reporting and recordkeeping requirements, Sulfur dioxide.

Dated: May 5, 1999.

Carol M. Browner,

Administrator.

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 72—[AMENDED]

1. The authority citation for part 72 continues to read as follows:

Authority: 42 U.S.C. 7601 and 7651, *et seq.*

2. Section 72.2 is amended by:

a. Removing from the definition of ''Compliance subaccount'' the words ''by the unit'' whenever they appear and the word ''unit's'' after the words ''meeting the''; and

b. Removing from the definition of ''Current year subaccount'' the words ''by the unit'' and replacing the word ''its'' with the word ''the''.

3. Section 72.40 is amended by adding to paragraph (a)(1) the words '', or in the compliance subaccount of another affected unit at the same source to the extent provided in § 73.35(b)(3),'' after the words ''under § 73.34(c) of this chapter)''.

PART 73—[AMENDED]

4. The authority citation for part 73 continues to read as follows:

Authority: 42 U.S.C. 7601 and 7651, *et seq.*

5. Section 73.35 is amended by revising paragraph (a)(2) and adding paragraph (b)(3) to read as follows:

§ 73.35 Compliance.

(a) * * *

(2) Such allowance is:

(i) Recorded in the unit's compliance subaccount; or

(ii) Transferred to the unit's compliance subaccount, with the transfer submitted correctly pursuant to subpart D of this part for recordation in the compliance subaccount for the unit by not later than the allowance transfer deadline in the calendar year following the year for which compliance is being established; or

(iii) Held in the compliance subaccount of another affected unit at the same source in accordance with paragraph (b)(3) of this section.

(b) * * *

(3)(i) If, after the Administrator completes the deductions under paragraph (b)(2) of this section for all affected units at the same source, a unit would otherwise have excess emissions and one or more other affected units at the source would otherwise have unused allowances in their compliance subaccounts and available for such other units under paragraph (a)(1) and (a)(2)(i) and (ii) of this section for the year for which compliance is being established, the Administrator will notify in writing the authorized account representative. The Administrator will state that the authorized account representative may specify in writing which of such allowances to deduct up to the amount calculated as follows, in order to reduce the tons of excess emissions otherwise at the unit:

Maximum deduction from other units = 0.95 × Excess emissions if no deduction from other units

Where:

''Maximum deduction from other units'' is the maximum number of allowances that may be deducted for the year for which compliance is being established, for the unit otherwise having excess emissions, from the compliance subaccounts of other units at the same source, rounded to the nearest allowance.

''Excess emissions if no deduction from other units'' is the tons of excess emissions that the unit would otherwise have if no allowances were deducted for the unit from other units under this paragraph (b)(3)(i) or paragraph (b)(3)(ii) of this section.

(ii) Notwithstanding paragraph (b)(3)(i) of this section, if the amount calculated results in less than 10 tons of excess emissions, the maximum deduction from other units shall be adjusted so that 10 tons of excess emissions, or the tons of excess emissions that would result if no allowances could be deducted from other units, whichever is less, remain for the unit.

(iii) If the authorized account representative submits within 15 days of receipt of a notification under paragraph (b)(3)(i) of this section a written request specifying allowances to deduct in accordance with paragraphs (b)(3)(i) and (ii) of this section, the Administrator will deduct such allowances, and reduce the tons of excess emissions otherwise at the unit by an equal amount, up to the amount calculated under paragraphs (b)(3)(i) and (ii) of this section.

* * * * *

[FR Doc. 99–12007 Filed 5–12–99; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–300773A; FRL–6077–3]

RIN 2070–AB78

Diphenylamine; Pesticide Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a tolerance for residues of diphenylamine in or on pears. IR-4 requested this tolerance under the Federal Food, Drug, and Cosmetic Act, as amended by the Food Quality Protection Act of 1996.

DATES: This regulation is effective May 13, 1999. Objections and requests for hearings must be received by EPA on or before July 12, 1999.

ADDRESSES: Written objections and hearing requests, identified by the docket control number, [OPP–300773A], must be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. Fees accompanying objections and hearing requests shall be labeled ''Tolerance Petition Fees'' and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251. A copy of any objections and hearing requests filed with the Hearing Clerk identified by the docket control number, [OPP–300773A], must also be submitted to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring a copy of objections and hearing requests to Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA.

A copy of objections and hearing requests filed with the Hearing Clerk may be submitted electronically by sending electronic mail (e-mail) to: opp-docket@epa.gov. Copies of objections and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Copies of objections and hearing requests will also be accepted on disks in WordPerfect 5.1/6.1 file format or ASCII file format. All copies of objections and hearing requests in electronic form must be identified by the docket control number [OPP–300773A]. No Confidential Business Information (CBI) should be submitted through e-mail. Electronic copies of