

*Recovered materials* means waste materials and by-products recovered or diverted from solid waste, but the term does not include those materials and by-products generated from, and commonly reused within, an original manufacturing process (Executive Order 13101 and 42 U.S.C. 6903(19) and <http://www.epa.gov/cpg/>). For paper and paper products, see the definition at FAR 11.301 (42 U.S.C. 6962(h)).

*Remanufactured* means factory rebuilt to original specifications.

*Renewable energy* means energy produced by solar, wind, geothermal, and biomass power.

*Renewable energy technology* means—

(1) Technologies that use renewable energy to provide light, heat, cooling, or mechanical or electrical energy for use in facilities or other activities; or

(2) The use of integrated whole-building designs that rely upon renewable energy resources, including passive solar design.

(c)(1) The offeror must identify products that—

(i) Are compliant with the recovered and post-consumer material content levels recommended in the Recovered Materials Advisory Notices (RMANs) for EPA-designated products in the CPG program (<http://www.epa.gov/cpg/>);

(ii) Contain recovered materials that either do not meet the recommended levels in the RMANs or are not EPA-designated products in the CPG program (see FAR 23.401 and <http://www.epa.gov/cpg/>);

(iii) Are energy-efficient, as defined by either ENERGY STAR® and/or FEMP's designated top 25th percentile levels (see ENERGY STAR® at <http://www.energystar.gov/> and FEMP at <http://www.eere.energy.gov/femp/procurement/>);

(iv) Are water-efficient;

(v) Use renewable energy technology;

(vi) Are remanufactured; and

(vii) Have other environmental attributes.

(2) These identifications must be made in each of the offeror's following mediums:

(i) The offer itself.

(ii) Printed commercial catalogs, brochures, and pricelists.

(iii) Online product website.

(iv) Electronic data submission for GSA *Advantage!* submitted via GSA's Schedules Input Program (SIP) software or the Electronic Data Inter-change (EDI). Offerors can use the SIP or EDI methods to indicate environmental and other attributes for each product that is translated into respective icons in GSA *Advantage!*.

(d) An offeror, in identifying an item with an environmental attribute, must possess evidence or rely on a reasonable basis to substantiate the claim (see 16 CFR part 260, Guides for the Use of Environmental Marketing Claims). The Government will accept an offeror's claim of an item's environmental attribute on the basis of—

(1) Participation in a Federal agency-sponsored program (e.g., the EPA and DOE ENERGY STAR® product labeling program);

(2) Verification by an independent organization that specializes in certifying such claims; or

(3) Possession of competent and reliable evidence. For any test, analysis, research,

study, or other evidence to be "competent and reliable," it must have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

(End of clause)

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BILLING CODE 6820-BR-P

## DEPARTMENT OF ENERGY

### 48 CFR Parts 923 and 970

RIN 1991-AB59

#### Acquisition Regulation: Motor Vehicle Fleet Fuel Efficiency

AGENCY: Department of Energy.

ACTION: Final rule.

**SUMMARY:** The Department of Energy (DOE) is amending its acquisition regulation to implement Executive Order 13149, dated April 21, 2000, entitled *Greening the Government Through Federal Fleet and Transportation Efficiency*. Specifically, the Department is addressing the requirements relating to Procurement of Environmentally Preferable Motor Vehicle Products and Government-Owned Contractor Operated Vehicles, as they relate to the Department's acquisition program, including its management contracts with motor vehicle fleet responsibilities.

**EFFECTIVE DATE:** October 2, 2003.

**FOR FURTHER INFORMATION CONTACT:**

Richard Langston at (202) 586-8247 or [richard.langston@pr.doe.gov](mailto:richard.langston@pr.doe.gov).

**SUPPLEMENTARY INFORMATION**

I. Background

II. Section-by-Section Analysis

III. Procedural Requirements

A. Review Under Executive Order 12866

B. Review Under Executive Order 12988

C. Review Under the Regulatory Flexibility Act

D. Review Under the Paperwork Reduction Act

E. Review Under the National Environmental Policy Act

F. Review Under Executive Order 13132

G. Review Under the Unfunded Mandates Reform Act of 1995

H. Review Under the Treasury and General Government Appropriations Act, 1999

I. Congressional Review

J. Review Under Executive Order 13211

K. Review Under the Treasury and General Government Appropriations Act, 2001

L. Approval by the Office of the Secretary of Energy

#### I. Background

The purpose of this rulemaking is to implement the goals and requirements of Executive Order 13149, dated April

21, 2000 (65 FR 24593), entitled *Greening the Government Through Federal Fleet and Transportation Efficiency*.

The purpose of the Executive Order is to ensure that the Federal Government exercises leadership in the reduction of petroleum consumption through improvements in fleet fuel efficiency and the use of alternative fuel vehicles and alternative fuels. The specific provisions affecting the Department's acquisition program including its management contracts with motor vehicle fleet responsibilities are as follows. Part 2 of the Executive Order establishes goals for the reduction of petroleum consumption in the Federal Government motor vehicle fleet and requires the development of strategies for the increased use of alternative fuel vehicles, increased use of alternative fuels accompanied by improved alternative fuel infrastructure, and the acquisition of higher fuel economy vehicles. In addition, section 403 of the Executive Order encourages the acquisition by Federal agencies of environmentally preferable motor vehicle products, including the use of biobased motor vehicle products. Section 403.a emphasizes the current restriction on the use of other than re-refined motor vehicle lubricating oils (found in section 507 of Executive Order 13101, and implemented by 48 CFR (FAR) 23.404) by restating that restriction as a prohibition on the acquisition of virgin petroleum motor vehicle lubricating oils. That restriction and the requirements of Sections 403.b and 403.c are addressed by the Department's Affirmative Procurement Program. An Affirmative Procurement Program is required of Federal agencies by 48 CFR (FAR) 23.404, Agency affirmative procurement programs, and is implemented in DOE by 48 CFR (DEAR) 923.405, Procedures [DOE supplemental coverage—paragraph (e)]. The Department's Affirmative Procurement Program extends to its management contractors pursuant to 48 CFR (DEAR) 970.2304, Use of recovered/recycled materials. Section 505 of the Executive Order requires agencies to ensure that the goals and requirements of the Executive Order are incorporated into management contracts which involve management of Federal fleet motor vehicles. Finally, Section 506 of the Executive Order exempts military tactical, law enforcement and emergency vehicles from the requirements of the Executive Order.

The clause specified by this rule is a mandatory clause for use in management and operating contracts involving motor vehicle fleet operations.

Contracting officers are strongly encouraged to add the clause at the next fee negotiation following the effective date of this rule. The clause should be included in new management and operating contracts.

## II. Section-by-Section Analysis

The Department of Energy amends the regulation as follows:

1. A new subpart 923.7, Contracting For Environmentally Preferable and Energy-Efficient Products and Services, is added. It contains § 923.703, Policy.

2. A new § 970.2307, Contracting for environmentally preferable and energy-efficient products and services, is added. It includes Subsections 970.2307-1, Motor vehicle fleet operations, and 970.2307-2, Contract clause.

3. A new clause, DOE Motor Vehicle Fleet Fuel Efficiency, is added as § 970.5223-5.

## III. Procedural Requirements

### A. Review Under Executive Order 12866

Today's regulatory action has been determined not to be a "significant regulatory action" under Executive Order 12866, "Regulatory Planning and Review," (58 FR 51735, October 4, 1993). Accordingly, this rule is not subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB).

### B. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and, (6) addresses other important issues affecting clarity and general

draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, these regulations meet the relevant standards of Executive Order 12988.

### C. Review Under the Regulatory Flexibility Act

This rule has been reviewed under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, which requires preparation of an initial regulatory flexibility analysis for any rule that must be proposed for public comment and that is likely to have significant economic impact on a substantial number of small entities. DOE is not required by the Administrative Procedure Act (5 U.S.C. 553) or any other law to propose this procurement rule for public comment. Accordingly, the Regulatory Flexibility Act requirements do not apply to this rulemaking, and no regulatory flexibility analysis has been prepared.

### D. Review Under the Paperwork Reduction Act

There are no new information collection or record keeping requirements associated with this action.

### E. Review Under the National Environmental Policy Act

DOE has concluded that promulgation of this rule falls into a class of actions which would not individually or cumulatively have significant impact on the human environment, as determined by DOE's regulations (10 CFR part 1021, subpart D) implementing the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, this rule is categorically excluded from NEPA review because the rule establishes internal procedures and a DEAR contract clause and is considered to be strictly procedural (categorical exclusion A6); therefore, this rule does not require an environmental impact statement or environmental assessment pursuant to NEPA.

### F. Review Under Executive Order 13132

Executive Order 13132 (64 FR 43255, August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications.

Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined today's rule and has determined that it does not preempt State law and does not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

### G. Review Under the Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) generally requires a Federal agency to perform a detailed assessment of costs and benefits of any rule imposing a Federal mandate with costs to State, local or tribal governments, or to the private sector, of \$100 million or more. This rulemaking would only affect private sector entities, and the impact is less than \$100 million.

### H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277), requires Federal agencies to issue a Family Policymaking Assessment for any rule or policy that may affect family well-being. This rulemaking will have no impact on family well-being.

### I. Congressional Review

As required by 5 U.S.C. 801, the Department of Energy will report to Congress promulgation of this rule prior to its effective date. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 804(3).

### J. Review Under Executive Order 13211

Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use, (66 FR 28355, May 22, 2001) requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, a Statement of Energy Effects for any significant energy action. A "significant energy action" is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have

a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

Today's rule is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

#### *K. Review Under the Treasury and General Government Appropriations Act, 2001*

The Treasury and General Government Appropriations Act, 2001, 44 U.S.C. 3516, *note*, provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's notice under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in these guidelines.

#### *L. Approval by the Office of the Secretary of Energy*

Issuance of this final rule has been approved by the Office of the Secretary of Energy.

#### **List of Subjects in 48 CFR Parts 923 and 970**

Government procurement.

Issued in Washington, DC, on August 26, 2003.

#### **Stephen D. Mournighan,**

*Acting Director, Office of Procurement and Assistance Management, Office of Management, Budget and Evaluation, Department of Energy.*

#### **Robert C. Braden, Jr.,**

*Director, Office of Procurement and Assistance Management, National Nuclear Security Administration.*

■ For the reasons set out in the preamble, Chapter 9 of Title 48 of the Code of Federal Regulations is amended as follows.

#### **PART 923—ENVIRONMENT, CONSERVATION, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE**

■ 1. The authority citation for part 923 continues to read:

**Authority:** 42 U.S.C. 7101 *et seq.*; 41 U.S.C. 418b; 50 U.S.C. 2401 *et seq.*

■ 2. Subpart 923.7 is added to read as follows:

#### **Subpart 923.7—Contracting for Environmentally Preferable and Energy-efficient Products and Services**

##### **§ 923.703 Policy.**

Executive Order 13149, dated April 21, 2000, entitled *Greening the Government Through Federal Fleet and Transportation Efficiency*, provides that the Federal Government exercise leadership in the reduction of petroleum consumption through improvements in its motor fleet fuel efficiency and increases in its use of alternative fuel vehicles and alternative fuels. The specific provisions affecting the Department's acquisition program are as follows. Part 2 of the Executive Order establishes goals for the reduction of petroleum consumption in the motor vehicle fleet and requires the development of strategies for the increased use of alternative fuel vehicles, increased use of alternative fuels accompanied by improved alternative fuel infrastructure, and the acquisition of higher fuel economy vehicles. Procurement personnel involved in the acquisition of motor vehicles, including lease, and motor vehicle products should familiarize themselves with these requirements and assist their fleet management personnel in acquiring vehicles and products which comply with the requirements of the Executive Order and the Department's compliance strategy. In addition, section 403 of the Executive Order provides for the acquisition of environmentally preferable motor vehicle products, including the use of biobased motor vehicle products. Environmentally preferable motor vehicle products include re-refined motor vehicle lubricating oils, retread tires, recycled engine coolants, and bio-based motor vehicle products. Use of these products is addressed by the Department's Affirmative Procurement Program required by 48 CFR (FAR) 23.404, Agency affirmative procurement programs, as implemented by 48 CFR (DEAR) 923.405, Procedures [DOE supplemental coverage—paragraph (e)]. Environmentally preferable motor vehicle products are among the items designated in the Comprehensive Procurement Guidelines, which lists products with recovered content that Federal agencies and their contractors are to buy. That list is published by the Environmental Protection Agency pursuant to the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6962, and regulations published at 40 CFR part 247.

#### **PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS**

■ 3. The authority citation for part 970 continues to read as follows:

**Authority:** 42 U.S.C. 2201; 42 U.S.C. 7101 *et seq.*; 50 U.S.C. 2401 *et seq.*

#### **Subpart 970.23—Environmental, Conservation, and Occupational Safety Programs**

■ 4. Sections 970.2307, 970.2307–1, and 970.2307–2 are added to read as follows:

##### **§ 970.2307 Contracting for Environmentally Preferable and Energy-efficient Products and Services.**

##### **§ 970.2307–1 Motor vehicle fleet operations.**

Executive Order 13149 provides that the Federal motor vehicle fleet will serve as an example and provide a leadership role in the reduction of petroleum consumption through improvements in fleet fuel efficiency and the use of alternative fuel vehicles and alternative fuels. Part 2 of the Order establishes goals for Federal Government fleet efficiency and requires the development of strategies to accomplish the goals. Section 403 of the Order provides that environmentally preferable motor vehicle products, including biobased motor vehicle products, will be used in the maintenance of Federal fleet motor vehicles when these products are reasonably available and meet vehicle manufacturers' recommended performance standards. Environmentally preferable motor vehicle products are among the products contained in the Comprehensive Procurement Guidelines list of products with recycled content to be procured pursuant to the clause at 48 CFR 970.5223–2. Section 505 of Executive Order 13149 requires that the goals and requirements of the Order be included in all management contracts which include Federal motor vehicle fleet operations. Section 506 of Executive Order 13149 exempts military tactical, law enforcement, and emergency vehicles from the requirements of the order.

##### **§ 970.2307–2 Contract clause.**

Include the clause at 970.5223–5, DOE Motor Vehicle Fleet Fuel Efficiency, in all management contracts providing for Contractor management of the motor vehicle fleet.

**Subpart 970.52—Contract Clauses for Management and Operating Contracts**

■ 5. Section 970.5223–5 is added to read as follows:

**§ 970.5223–5 DOE motor vehicle fleet fuel efficiency.**

As prescribed in 48 CFR 970.2307–2, insert the following clause in contracts providing for Contractor management of the motor vehicle fleet.

**DOE MOTOR VEHICLE FLEET FUEL EFFICIENCY****(Oct 2003)**

When managing Government-owned vehicles for the Department of Energy, the Contractor will conduct operations relating to such vehicles in accordance with the goals and requirements of *Executive Order 13149, Greening the Government Through Federal Fleet and Transportation Efficiency*, and implementing guidance contained in the document entitled *U.S. Department of Energy Compliance Strategy for Executive Order 13149* (April 2001) and future revisions of this compliance strategy that are identified in writing by the Contracting Officer. Section 506 of Executive Order 13149 exempts military tactical, law enforcement, and emergency vehicles from the requirements of the order.

[FR Doc. 03–22301 Filed 8–29–03; 8:45 am]

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**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 216**

[Docket No. 030421095–3202–02; I.D. 111902C]

RIN 0648–AQ61

**Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Missile Launch Operations from San Nicolas Island, CA**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** NMFS, upon application from the U.S. Navy, is issuing regulations to govern the unintentional takings of small numbers of marine mammals incidental to missile launch operations from San Nicolas Island, CA (SNI). Issuance of regulations, and Letters of Authorization under these regulations, governing the unintentional incidental takes of marine mammals in connection with particular activities is required by the Marine Mammal Protection Act (MMPA) when the Secretary of

Commerce (Secretary), after notice and opportunity for comment, finds, as here, that such takes will have a negligible impact on the species and stocks of marine mammals and will not have an unmitigable adverse impact on the availability of them for subsistence uses. These regulations do not authorize the Navy's missile launch activities as such authorization is not within the jurisdiction of the Secretary. Rather, these regulations authorize the unintentional incidental take of marine mammals in connection with this activity and prescribe methods of taking and other means of effecting the least practicable adverse impact on marine mammal species and their habitat, and on the availability of the species for subsistence uses.

**DATES:** Effective from October 2, 2003 through October 2, 2008.

**ADDRESSES:** A copy of the Navy application which contains a list of the references used in this document may be obtained by writing to Kaja A. Brix, Acting Chief, Marine Mammal Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3226 or by telephoning the contact listed here (see **FOR FURTHER INFORMATION CONTACT**). The NMFS' Administrative Record for this action is available for viewing, by appointment during regular business hours, at the above address. Copies of letters, and documents are available, at copy cost, from this address.

Comments regarding the burden-hour estimate or any other aspect of the collection of information requirement contained in this final rule should be sent to the Acting Chief, and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: NOAA Desk Officer, Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Kenneth R. Hollingshead (301) 713–2322, ext. 128.

**SUPPLEMENTARY INFORMATION:****Background**

Section 101(a)(5)(A) of the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361 *et seq.*) directs the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and regulations are issued.

Permission may be granted for periods of 5 years or less if the Secretary finds that the total taking will have a

negligible impact on the species or stock(s) of affected marine mammals, and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses, and if regulations are prescribed setting forth the permissible methods of taking and the requirements pertaining to the monitoring and reporting of such taking. NMFS has defined "negligible impact" in 50 CFR 216.103 as:

an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Under section 18(A), the MMPA defines "harassment" as:

any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

**Summary of Request**

On October 23, 2002, NMFS received an application from the Naval Air Weapons Station, China Lake (NAWS), under section 101(a)(5)(A) of the MMPA, requesting an authorization, effective from August 26, 2003 through August 25, 2008, for the harassment of small numbers of three species of marine mammals incidental to target missile launch operations conducted by the Naval Air Warfare Center Weapons Division (NAWCWD) on SNI, one of the Channel Islands in the Southern California Bight. These regulations, if implemented, would allow NMFS to issue annual LOAs to NAWS, which would replace the process of issuance of annual Incidental Harassment Authorizations (IHAs) under section 101(a)(5)(D) of the MMPA (see 66 FR 41843, August 9, 2001; 67 FR 56271, September 3, 2002). This action is being undertaken in part based upon recommendations made by the Marine Mammal Commission, under section 202(a)(4) of the MMPA. The current IHA expires on August 20, 2003.

According to the NAWS' application, these missile launch operations may occur at any time during the year depending on test and training requirements and meteorological and logistical limitations. On occasion, two or three launches may occur in quick succession on a single day. NAWS anticipates an average of 40 launches annually of Vandal (or similar sized)