

List of Subjects in 29 CFR Part 1910

Hazardous substances, Health, Occupational safety and health, Toxic substances.

Authority and Signature

Edwin G. Foulke, Jr., Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, directed the preparation of this notice. Accordingly, the Agency issues the proposed amendment under the following authorities: Sections 4, 6(b), 8(c), and 8(g) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Section 3704 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701 et seq.); Section 41 of the Longshore and Harbor Worker's Compensation Act (33 U.S.C. 941); Secretary of Labor's Order No. 5-2007 (72 FR 31159); and 29 CFR part 1911.

Signed at Washington, DC on December 17, 2007.

Edwin G. Foulke, Jr.,

Assistant Secretary of Labor for Occupational Safety and Health.

IV. Proposed Amendment to the Standard

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

PART 1910—[AMENDED]

Subpart I—[AMENDED]

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

Authority: Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657); Section 3704 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701 et seq.); Section 41, Longshore and Harbor Worker's Compensation Act (33 U.S.C. 941); and Secretary of Labor's Order Nos. 8-76 (41 FR 25059), 9-83 (48 FR 35736), 1-90 (55 FR 9033), 6-96 (62 FR 111), 3-2000 (65 FR 50017), or 5-2007 (72 FR 31159), as applicable.

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

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

2. Amend section B.4(b)(8) of Appendix A to § 1910.134 to read as follows:

§ 1910.134 Respiratory protection.

\* \* \* \* \*

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

\* \* \* \* \*

B. \* \* \*

4. \* \* \*  
(b) \* \* \*

(8) After generating the aerosol, the employer shall:

(i) Instruct the test subject to perform the exercises specified by section I.A.14 of this appendix; and

(ii) Ensure that the test subject performs each of these test exercises for one minute; however, if the test subject is able to detect the taste of the Bitrex® sensitivity screening solution within the first 10 squeezes of the nebulizer bulb ("Level 1 sensitivity"), the employer may elect to have the test subject perform each of the test exercises for a minimum of 15 seconds.

\* \* \* \* \*

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DEPARTMENT OF EDUCATION

34 CFR Part 8

[Docket ID ED-2007-OS-0138]

Demands for Testimony or Records in Legal Proceedings

AGENCY: Office of the Secretary, Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend the Department's regulations regarding the production of information pursuant to demands in judicial or administrative proceedings. The changes are intended to promote consistency in the Department's assertion of privileges and objections, and thereby prevent harm that may result from inappropriate disclosure of confidential information or inappropriate allocation of agency resources. These changes would apply only where employees are subpoenaed in litigation to which the agency is not a party. Former Department employees would be expressly required to seek the Secretary's approval prior to responding to subpoenas that seek non-public materials and information acquired during their employment at the Department.

DATES: We must receive your comments on or before February 25, 2008.

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments by fax or by e-mail. Please submit your comments only one time, in order to ensure that we do not receive duplicate copies. In addition, please include the Docket ID at the top of your comments.

• Federal eRulemaking Portal: Go to http://www.regulations.gov Under

"Search Documents" go to "Optional Step 2" and select "Department of Education" from the agency drop-down menu; then click "Submit." In the Docket ID column, select ED-2007-OS-0138 to add or view public comments and to view supporting and related materials available electronically. Information on using www.regulations.gov, including instructions for submitting comments, accessing documents, and viewing the docket after the close of the comment period, is available through the site's "User Tips" link.

• Postal Mail, Commercial Delivery, or Hand Delivery. If you mail or deliver your comments about these proposed regulations, address them to Christine M. Rose, U.S. Department of Education, 400 Maryland Avenue, SW., Room 6C122, Washington, DC 20202-2110.

Privacy Note: The Department's policy for comments received from members of the public (including those comments submitted by mail, commercial delivery, or hand delivery) is to make these submissions available for public viewing in their entirety on the Federal eRulemaking Portal at http://www.regulations.gov. Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available on the Internet.

FOR FURTHER INFORMATION CONTACT: Christine M. Rose, Telephone: (202) 401-6700.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1-800-877-8339.

Individuals with disabilities can obtain this document in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed under FOR FURTHER INFORMATION CONTACT.

FOR FURTHER INFORMATION CONTACT.

SUPPLEMENTARY INFORMATION:

Invitation to Comment

We invite you to submit comments regarding these proposed regulations. To ensure that your comments have maximum effect in developing the final regulations, we urge you to identify clearly the specific section or sections of the proposed regulations that each of your comments addresses and to arrange your comments in the same order as the proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from these proposed regulations. Please let us know of any further opportunities we should take to reduce potential costs or

increase potential benefits while preserving the effective and efficient administration of the program.

During and after the comment period, you may inspect all public comments about these proposed regulations by accessing [www.regulations.gov](http://www.regulations.gov). You may also inspect the comments, in person, in Room 6C122, 400 Maryland Avenue, SW., Washington, DC, between the hours of 8:30 a.m. and 4 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

#### **Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record**

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

#### **Background**

The Secretary proposes to amend §§ 8.1 through 8.3 of title 34 of the Code of Federal Regulations (CFR). The regulations in 34 CFR part 8 pertain to production of information pursuant to demands in judicial or administrative proceedings. We are proposing these amendments to require that former Department employees follow the same set of prescribed instructions and procedures that are required of current employees, with respect to the production and disclosure of material or information acquired during the performance of the former employee's official duties or because of the former employee's official status when responding to judicially enforceable subpoenas or demands in judicial or administrative proceedings, except demands from the Congress or in Federal grand jury proceedings.

#### **Significant Proposed Regulations**

We do not address proposed regulatory provisions that are technical or otherwise minor in effect.

#### *Sections 8.1 Through 8.3—Production of Information Pursuant to Demands in Judicial or Administrative Proceedings*

*Statute:* 5 U.S.C. 301 allows an agency head to prescribe regulations concerning the conduct of its employees, the performance of its business and the custody and use of agency records.

*Current Regulations:* The current regulations in 34 CFR part 8 pertain to production of information pursuant to

demands in judicial or administrative proceedings. The regulations prescribe instructions and procedures to be followed by current Department employees with respect to the production and disclosure of material or information acquired as a result of performance of the person's official duties or because of the person's official status in response to judicially enforceable subpoenas or demands in judicial or administrative proceedings, except demands from the Congress or in Federal grand jury proceedings.

The current regulations also specify what requirements requestors must follow when submitting a demand for testimony or records.

*Proposed Regulations:* The proposed regulations would modify the definition of *employee* to include both current and former employees. With this change, the regulations would expressly require former employees to follow the uniform prescribed instructions and procedures that current employees must follow concerning disclosure or production of agency materials or information acquired during their employment with the Department in response to a judicially enforceable subpoena or demand. The proposed regulations also provide that a demand for testimony or records expressly include a statement of why the release of information would not be contrary to an interest of the Department or the United States.

*Reason:* The Department is proposing to amend the definition of *employee* to include both current and former employees in order to eliminate any confusion regarding whether the regulations concerning disclosure or production of agency materials or information in judicial or administrative proceedings in response to a judicially enforceable subpoena or demand apply to former employees.

These proposed regulations are intended to provide an orderly means by which both current and former employees respond to demands for material and information covered by the regulations, and to protect the interests of the United States, including the safeguarding of privileged or otherwise sensitive information. The increase in the number of subpoenas and other demands to current and former employees in judicial or administrative proceedings, particularly in cases in which neither the Department nor the United States is a party, necessitates detailed and uniform instructions to be followed by both current and former employees. Additionally, the express inclusion of former employees aligns the Department's regulations to be more consistent with those of other agencies,

including the U.S. Department of Justice.

We are proposing to amend the requirements for submitting a demand for testimony or records in order to be consistent with current regulations which identify the items the Secretary must consider when determining whether to grant the request. The Department has an interest in protecting nonpublic materials and information, which extends to subpoenas that seek information that is privileged or confidential, or both, acquired during employment at the Department. The changes are intended to promote consistency in the agency's assertion of privileges and objections, and thereby prevent harm that may result from inappropriate disclosure of confidential information.

These proposed regulations are consistent with the decision in the landmark case of *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), in which the Supreme Court upheld the ability of an agency head to issue regulations for the preservation of agency records, and determined that an agency employee, acting pursuant to such instructions, could not be held in contempt of court for declining to produce records in response to a subpoena duces tecum. We do not intend the proposed regulations to preclude disclosures or productions in compliance with Court orders except where disclosure would be inappropriate even if required by a court, e.g., where disclosure would be legally prohibited or would be contrary to a recognized privilege.

#### **Executive Order 12866**

##### *1. Potential Costs and Benefits*

Under Executive Order 12866, we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the proposed regulations are those resulting from statutory requirements and those we have determined to be necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this regulatory action, we have determined that the benefits would justify the costs.

We have also determined that this regulatory action would not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

#### **Summary of Potential Costs and Benefits**

The Secretary has assessed the potential costs and benefits of this

regulatory action and has determined that the benefits would justify the costs. These changes are intended to promote consistency in the Department's assertion of privileges and objections, and thereby prevent harm that may result from inappropriate disclosure of confidential information or inappropriate allocation of agency resources. The anticipated costs of this regulatory action would be minimal.

## 2. Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum on "Plain Language in Government Writing" require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A "section" is preceded by the symbol "\$" and a numbered heading; for example, § 8.1 What is the scope and application of this part?.)
- Could the description of the proposed regulations in the SUPPLEMENTARY INFORMATION section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

To send any comments that concern how the Department could make these proposed regulations easier to understand, see the instructions in the ADDRESSES section of this preamble.

## Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities.

## Paperwork Reduction Act of 1995

These proposed regulations do not contain any information collection requirements.

## Intergovernmental Review

These proposed regulations are not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

## Electronic Access to This Document

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: <http://www.ed.gov/news/fedregister>.

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1-888-293-6498; or in the Washington, DC, area at (202) 512-1530.

**Note:** The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: <http://www.gpoaccess.gov/nara/index.html>.

(Catalog of Federal Domestic Assistance Number does not apply.)

## List of Subjects in 34 CFR Part 8

Courts, Government employees, Reporting and recordkeeping requirements.

Dated: December 18, 2007.

## Margaret Spellings,

*Secretary of Education.*

For the reasons discussed in the preamble, the Secretary of Education proposes to amend part 8 of title 34 of the Code of Federal Regulations as follows:

## PART 8—DEMANDS FOR TESTIMONY OR RECORDS IN LEGAL PROCEEDINGS

1. The authority citation for part 8 continues to read as follows:

**Authority:** 5 U.S.C. 301; 5 U.S.C. 552; 20 U.S.C. 3474, unless otherwise noted.

### § 8.1 [Amended]

2. The introductory text of § 8.1(a) is amended by removing the words "if the Department or any departmental employee" and adding, in their place, the words "when the Department or any employee of the Department".

### § 8.2 [Amended]

3. The definition of "Employee" in § 8.2 is amended by adding the words "or former" between the words "current" and "employee".

### § 8.3 [Amended]

4. Section 8.3 is amended by:

- A. In the introductory text of paragraph (a), removing the words "or former employee,".
- B. In paragraph (a)(2), removing the words "and why the information sought is unavailable by any other means" and

adding, in their place, the words " , why the information sought is unavailable by any other means, and the reason why the release of the information would not be contrary to an interest of the Department or the United States".

C. In paragraph (b), removing the words "or former employee" each time they appear.

D. In paragraph (b), removing the words "room 4083, FOB-6," and adding, in their place, the words "room 6E300, Lyndon Baines Johnson Building,".

E. In paragraph (c), removing the words "or former employee".

F. In paragraph (c), removing the words "Records Management Branch Chief, Office of Information Resources Management, U.S. Department of Education, 7th and D Streets, SW., ROB-3" and adding, in their place, the words "Records Officer, Information Policy and Standards Team, Regulatory Information Management Services, Office of Management, U.S. Department of Education, 400 Maryland Avenue, SW., room 9161, PCP".

[FR Doc. E7-24966 Filed 12-21-07; 8:45 am]

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 62

[EPA-R07-OAR-2007-1143; FRL-8510-7]

## Approval and Promulgation of State Plans for Designated Facilities and Pollutants; Kansas; Clean Air Mercury Rule

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve the State Plan submitted by Kansas on June 19, 2007. The plan addresses the requirements of EPA's Clean Air Mercury Rule (CAMR), promulgated on May 18, 2005, and subsequently revised on June 9, 2006. EPA is proposing to determine that the submitted State Plan fully meets the CAMR requirements for Kansas.

CAMR requires States to regulate emissions of mercury (Hg) from large coal-fired electric generating units (EGUs). CAMR establishes State budgets for annual EGU Hg emissions and requires States to submit State Plans to ensure that annual EGU Hg emissions will not exceed the applicable State budget. States have the flexibility to choose which control measures to adopt to achieve the budgets, including