

# Rules and Regulations

Federal Register

Vol. 75, No. 132

Monday, July 12, 2010

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## DEFENSE NUCLEAR FACILITIES SAFETY BOARD

### 10 CFR Part 1703

#### FOIA Fee Schedule Update

**AGENCY:** Defense Nuclear Facilities Safety Board.

**ACTION:** Establishment of FOIA Fee Schedule.

**SUMMARY:** The Defense Nuclear Facilities Safety Board is publishing its Freedom of Information Act (FOIA) Fee Schedule Update pursuant to 10 CFR 1703.107(b)(6) of the Board's regulations.

**DATES:** *Effective Date:* June 15, 2010.

**FOR FURTHER INFORMATION CONTACT:** Brian Grosner, General Manager, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004-2901, (202) 694-7060.

**SUPPLEMENTARY INFORMATION:** The FOIA requires each Federal agency covered by the Act to specify a schedule of fees applicable to processing of requests for

agency records. 5 U.S.C. 552(a)(4)(i). On May 14, 2010 the Board published for comment in the **Federal Register** its Proposed FOIA Fee Schedule, 75 FR 27228. No comments were received in response to that notice, and the Board is now establishing the Fee Schedule.

Pursuant to 10 CFR 1703.107(b)(6) of the Board's regulations, the Board's General Manager will update the FOIA Fee Schedule once every 12 months. The previous Fee Schedule Update was published in the **Federal Register** and went into effect on May 1, 2009, 74 FR 20934.

#### Board Action

Accordingly, the Board issues the following schedule of updated fees for services performed in response to FOIA requests:

### DEFENSE NUCLEAR FACILITIES SAFETY BOARD SCHEDULE OF FEES FOR FOIA SERVICES [Implementing 10 CFR 1703.107(b)(6)]

Search or Review Charge .....	\$77.00 per hour.
Copy Charge (paper) .....	\$.12 per page, if done in-house, or generally available commercial rate (approximately \$.10 per page).
Electronic Media .....	\$5.00.
Copy Charge (audio cassette) .....	\$3.00 per cassette.
Duplication of DVD .....	\$25.00 for each individual DVD; \$16.50 for each additional individual DVD.
Copy Charge for large documents (e.g., maps, diagrams).	Actual commercial rates.

Dated: July 2, 2010.  
**Brian Grosner,**  
*General Manager.*  
[FR Doc. 2010-16919 Filed 7-9-10; 8:45 am]  
**BILLING CODE 3670-01-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 121

[Docket No.: FAA-2009-1059; SFAR 106]

RIN 2120-AJ77

#### Use of One Additional Portable Oxygen Concentrator Device on Board Aircraft

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This action amends Special Federal Aviation Regulation 106 (SFAR 106), Rules for Use of Portable Oxygen Concentrator Systems on Board Aircraft, to allow for the use of one additional

portable oxygen concentrator (POC) device on board aircraft, provided certain conditions in the SFAR are met. This action is necessary to allow all POC devices deemed acceptable by the FAA for use in air commerce to be available to the traveling public in need of oxygen therapy. When this rule becomes effective, there will be 12 different POC devices the FAA finds acceptable for use on board aircraft. Passengers will be able to carry these devices on board the aircraft and use them with the approval of the aircraft operator.

**DATES:** This amendment becomes effective July 12, 2010.

**FOR FURTHER INFORMATION CONTACT:** DK Deaderick, Air Transportation Division, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591. Telephone: 202-267-8166.

**SUPPLEMENTARY INFORMATION:**

#### Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code (49 U.S.C.). Subtitle I, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

The FAA is authorized to issue this final rule pursuant to 49 U.S.C. 44701. Under that section, the FAA is authorized to establish regulations and minimum standards for other practices, methods, and procedures the Administrator finds necessary for air commerce and national security.

#### Background

On July 12, 2005, the FAA published Special Federal Aviation Regulation 106 (SFAR 106) entitled, "Use of Certain Portable Oxygen Concentrator Devices Onboard Aircraft" (70 FR 40156). SFAR 106 is the result of a notice the FAA published in July 2004 (69 FR 42324) to address the needs of passengers who

must travel with medical oxygen. Before publication of SFAR 106, passengers in need of medical oxygen during air transportation faced many obstacles when requesting service. Many aircraft operators did not provide medical oxygen service aboard flights, and those that did often provided service at a price that travelers could not afford. Coordinating service between operators and suppliers at airports was also difficult, and passengers frequently chose not to fly because of these difficulties.

New medical oxygen technologies approved by the Food and Drug Administration (FDA) reduce the risks typically associated with compressed oxygen and provide a safe alternative for passengers who need oxygen therapy. Several manufacturers have developed small portable oxygen concentrators (POC) that work by separating oxygen from nitrogen and other gases contained in ambient air and dispensing it in concentrated form to the user with an oxygen concentration of about 90%. The POCs operate using either rechargeable batteries or, if the aircraft operator obtains approval from the FAA, aircraft electrical power.

In addition, the Pipeline and Hazardous Materials Safety Administration (PHMSA) has determined that the POC covered by this amendment is not a hazardous material. Thus, it does not require the same level of special handling as compressed oxygen, and is safe for use on board aircraft, provided certain conditions for its use are met.

SFAR 106 permits passengers to carry on and use certain POCs on board aircraft if the aircraft operator ensures that the conditions specified in the SFAR for their use are met. The devices initially determined acceptable for use in SFAR 106, published July 12, 2005, were the *AirSep Corporation's LifeStyle* and the *Inogen, Inc.'s Inogen One* POCs. SFAR 106 was amended on September 12, 2006, (71 FR 53954) to add three additional POC devices, *AirSep Corporation's FreeStyle*, *SeQual Technologies' Eclipse*, and *Respironics Inc.'s EverGo*, to the original SFAR. SFAR 106 was amended on January 15, 2009, (74 FR 2351) in a similar manner to add two more POC devices, *Delphi Medical Systems' RS-00400* and *Invacare Corporation's XPO2*, to the original SFAR. The FAA again amended SFAR 106 on January 6, 2010 (75 FR 739) to add four more POC devices, *DeVilbiss Healthcare Inc.'s iGo*, *International Biophysics Corporation's LifeChoice*, *Inogen Inc.'s Inogen One G2*, and *Oxlife LLC's Oxlife Independence Oxygen Concentrator*, that may be

carried on and used by a passenger on board an aircraft. This final rule adds one more POC device, *Invacare SOLO<sub>2</sub>*, that may be carried on and used by a passenger on board an aircraft.

Aircraft operators can now offer medical oxygen service as they did before SFAR 106 was enacted, or they can meet certain conditions and allow passengers to carry on and use one of the POC devices covered in SFAR 106. SFAR 106 is an enabling rule, which means that no aircraft operator is required to allow passengers to operate these POC devices on board its aircraft, but it may allow them to be operated on board. If one of these devices is allowed by the aircraft operator to be carried on board, the conditions in the SFAR must be met.

When SFAR 106 was published, the FAA committed to establishing a single standard for all POCs so the regulations wouldn't apply to specific manufacturers and models of device. Whenever possible, the FAA tries to regulate by creating performance-based standards rather than approving by manufacturer. In the case of SFAR 106, the most efficient way to serve both the passenger and the aircraft operator was to allow the use of the devices determined to be acceptable by the FAA in SFAR 106 in a special, temporary regulation. As the FAA stated in the preamble discussion of the final rule that established SFAR 106, "while we are committed to developing a performance-based standard for all future POC devices, we do not want to prematurely develop standards that have the effect of stifling new technology of which we are unaware." The FAA developed and published SFAR 106 so passengers who otherwise could not fly could do so with an affordable alternative to what existed before SFAR 106 was published.

The FAA continues to pursue the performance-based standard for all POCs. This process is time-consuming, and the FAA intends to publish a notice in the Federal Register and offer the public a chance to comment on the proposal when it is complete. In the meantime, manufacturers continue to create new and better POCs, and one has requested that its product also be included as an acceptable device in SFAR 106. This manufacturer is Invacare Corporation, which has formally petitioned the FAA for inclusion in SFAR 106 by submitting documentation of the device to the Department of Transportation's Docket Management System. That documentation is available at <http://www.regulations.gov> under docket number: FAA-2009-1059.

As stated in Section 2 of SFAR 106, no covered device may contain hazardous materials as determined by PHMSA (written documentation necessary), and each device must also be regulated by the FDA. Invacare Corporation included technical specifications for the devices in its request for approval and the required documentation from PHMSA and the FDA. Invacare Corporation provided the FAA with the required documentation for the *Invacare SOLO<sub>2</sub>* device.

#### The Rule

This amendment to SFAR 106 will include the *Invacare SOLO<sub>2</sub>* device in the list of POC devices authorized for use in air commerce. The FAA has reviewed the device and accepted the documentation provided by the manufacturer. That documentation includes letters provided to the manufacturer by PHMSA and the FDA affirming the status of the device as it applies to the requirements stated in SFAR 106. After reviewing the applicable FDA safety standards and the PHMSA findings, the device was determined by the FAA to be acceptable for use in air commerce.

Additionally, the FAA inadvertently included an incorrect model number reference for one POC device in SFAR 106 that was added on January 15, 2009 (74 FR 2351). Therefore, the FAA is changing the reference from "Invacare XPO100" to "Invacare XP02."

#### Good Cause for Adoption of This Final Rule Without Notice and Comment

SFAR 106 was published on July 12, 2005. The FAA stated in the preamble of that final rule that the *AirSep LifeStyle* and *Inogen One* POC devices were the only known acceptable devices when the rule was published. The FAA also stated in that final rule that "we cannot predict how future products may be developed and work." The FAA initiated a notice and comment period for the use of POC devices on board aircraft on July 14, 2004, (69 FR 42324) and responded to the comments received in response to that NPRM in the final rule published in 2005. Therefore, it is unnecessary to publish a notice to request comments on this amendment because all issues related to the use of POC devices on board aircraft have already been discussed. Further notice and comment would also delay the acceptance of the *Invacare SOLO<sub>2</sub>* POC device as authorized for use on board aircraft, which would delay its availability for passengers in need of oxygen therapy.

Therefore, I find that notice and public comment under 5 U.S.C. 553(b)

is unnecessary and contrary to the public interest. Further, I find that good cause exists for making this rule effective immediately upon publication.

#### **Paperwork Reduction Act**

Information collection requirements associated with this final rule have been approved previously by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) and have been assigned OMB Control Number 2120-0702. This final rule requires that if a passenger carries a POC device on board the aircraft with the intent to use it during the flight, he or she must inform the pilot in command of that flight. Additionally, the passenger who plans to use the device must provide a written statement signed by a licensed physician that verifies the passenger's ability to operate the device, respond to any alarms, the extent to which the passenger must use the POC (all or a portion of the flight), and prescribes the maximum oxygen flow rate. The Paperwork Reduction Act paragraph in the final rule that established SFAR 106 still applies to this amendment. The availability of a new POC device will likely increase the availability and options for a passenger in need of oxygen therapy, but the paperwork burden discussed in the original final rule is unchanged. Therefore, the OMB Control Number associated with this collection remains 2120-0702.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

#### **International Compatibility**

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has determined that there are no ICAO Standards and Recommended Practices that correspond to these regulations.

#### **Regulatory Evaluation, Regulatory Flexibility Determination, International Trade Impact Assessment, and Unfunded Mandates Assessment**

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act

of 1980 (Pub. L. 96-354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96-39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impacts of this final rule.

Department of Transportation Order DOT 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If the expected cost impact is so minimal that a proposed or final rule does not warrant a full evaluation, this order permits that a statement to that effect and the basis for it be included in the preamble if a full regulatory evaluation of the cost and benefits is not prepared. Such a determination has been made for this final rule. The reasoning for this determination follows:

This action amends SFAR 106 to allow for the use of the *Invacare SOLO<sub>2</sub>* POC device on board aircraft, provided certain conditions in the SFAR are met. This action is necessary to allow an additional POC device deemed acceptable by the FAA to be available to the traveling public in need of oxygen therapy, for use in air commerce. When this rule becomes effective, there will be a total of 12 different POC devices the FAA finds acceptable for use on board aircraft, and passengers will be able to carry these devices on board the aircraft and use them with the approval of the aircraft operator. As the rule increases acceptable POC devices on board aircraft, the rule does not increase costs and provides additional benefits. The FAA has, therefore, determined that this final rule is not a "significant regulatory action" as defined in section 3(f) of Executive Order 12866, and is not "significant" as defined in DOT's Regulatory Policies and Procedures.

#### **Regulatory Flexibility Determination**

The Regulatory Flexibility Act of 1980 (Pub. L. 96-354) (RFA) establishes "as a

principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration." The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

This final rule adds *Invacare SOLO<sub>2</sub>* device to the list of authorized POC devices in SFAR 106. This economic impact is minimal. Therefore, as the FAA Administrator, I certify that this action will not have a significant economic impact on a substantial number of small entities.

#### **Unfunded Mandates Reform Act**

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of \$100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a "significant regulatory action." The FAA currently uses an inflation-adjusted value of \$143.1 million in lieu of \$100 million.

This final rule does not contain such a mandate; therefore, the requirements of Title II of the Act do not apply.

#### **Executive Order 13132, Federalism**

The FAA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. The FAA determined that this action will

not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, the FAA has determined that this final rule does not have federalism implications.

#### Environmental Analysis

FAA Order 1050.1E identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in paragraph 312f and involves no extraordinary circumstances.

#### Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA analyzed this final rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). The FAA has determined that it is not a "significant energy action" under the executive order because it is not a "significant regulatory action" and it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

#### Availability of Rulemaking Documents

You can get an electronic copy using the Internet by:

- (1) Searching the Federal eRulemaking Portal at <http://www.regulations.gov>;
- (2) Visiting the FAA's Regulations and Policies Web page at [http://www.faa.gov/regulations\\_policies/](http://www.faa.gov/regulations_policies/); or
- (3) Accessing the Government Printing Office's Web page at <http://www.gpoaccess.gov/fr/index.html>.

You can also get a copy by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM-1, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267-9680. Make sure to identify the amendment number or docket number of this rulemaking.

#### Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. Therefore, any small entity that has a question regarding this document may

contact its local FAA official, or the person listed under **FOR FURTHER INFORMATION CONTACT**. You can find out more about SBREFA on the Internet at [http://www.faa.gov/regulations\\_policies/rulemaking/sbre\\_act/](http://www.faa.gov/regulations_policies/rulemaking/sbre_act/).

#### List of Subjects in 14 CFR Part 121

Air carriers, Aircraft, Airmen, Reporting and recordkeeping requirements.

#### The Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends SFAR No. 106 to Chapter II of Title 14, Code of Federal Regulations, as follows:

#### PART 121—OPERATING REQUIREMENTS: DOMESTIC, FLAG, AND SUPPLEMENTAL OPERATIONS

■ 1. The authority citation for part 121 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 1153, 40101, 40102, 40103, 40113, 41721, 44105, 44106, 44111, 44701-44717, 44722, 44901, 44903, 44904, 44906, 44912, 44914, 44936, 44938, 46103, 46105.

■ 2. Amend SFAR 106 by revising sections 2 and 3(a) introductory text to read as follows:

#### Special Federal Aviation Regulation 106—Rules for use of Portable Oxygen Concentrator Systems on Board Aircraft

\* \* \* \* \*

Section 2. *Definitions*—For the purposes of this SFAR the following definitions apply: Portable Oxygen Concentrator: means the *AirSep FreeStyle*, *AirSep LifeStyle*, *Delphi RS-00400*, *DeVilbiss Healthcare iGo*, *Inogen One*, *Inogen One G2*, *International Biophysics LifeChoice*, *Invacare XPO2*, *Invacare Solo2*, *Oxlife Independence Oxygen Concentrator*, *Respironics EverGo*, and *SeQual Eclipse* Portable Oxygen Concentrator medical device units as long as those medical device units: (1) Do not contain hazardous materials as determined by the Pipeline and Hazardous Materials Safety Administration; (2) are also regulated by the Food and Drug Administration; and (3) assist a user of medical oxygen under a doctor's care. These units perform by separating oxygen from nitrogen and other gases contained in ambient air and dispensing it in concentrated form to the user.

Section 3. Operating Requirements—  
(a) No person may use and no aircraft operator may allow the use of any portable oxygen concentrator device, except the *AirSep FreeStyle*, *AirSep LifeStyle*, *Delphi RS-00400*, *DeVilbiss Healthcare iGo*, *Inogen One*, *Inogen One G2*, *International Biophysics LifeChoice*, *Invacare XPO2*, *Invacare Solo2*, *Oxlife Independence Oxygen Concentrator*, *Respironics EverGo*, and *SeQual Eclipse* Portable Oxygen Concentrator units. These units may be carried on and used by a passenger on board an aircraft

provided the aircraft operator ensures that the following conditions are satisfied:

\* \* \* \* \*

Issued in Washington, DC, on July 1, 2010.

**J. Randolph Babbitt**,  
Administrator.

[FR Doc. 2010-16925 Filed 7-9-10; 8:45 am]

BILLING CODE 4910-13-P

#### DEPARTMENT OF HOMELAND SECURITY

#### Coast Guard

#### 33 CFR Part 165

[Docket No. USCG-2009-0139]

RIN 1625-AA11

#### Regulated Navigation Area; Gulf Intracoastal Waterway, Inner Harbor Navigation Canal, Harvey Canal, Algiers Canal, New Orleans, LA; Correction

**ACTION:** Interim rule; Correction.

**SUMMARY:** In the *Federal Register* published on June 8, 2010, the Coast Guard placed the Interim Rule for the Regulated Navigation Area; Gulf Intracoastal Waterway, Inner Harbor Navigation Canal, Harvey Canal, Algiers Canal, New Orleans, LA into the Code of Federal Regulations. That publication contained an error in the **DATES** section, stating an incorrect May 21, 2010 effective date. This error does not impact the Interim Rule's correct May 24, 2010 effective date because the rule is to be enforced only 24 hours in advance of, and during the duration of specified predicted weather conditions. In fact, the conditions to enforce this rule between the published effective date and the correct effective date did not occur. But, this error may cause confusion among members of the public.

**DATES:** This correction is effective July 12, 2010.

**FOR FURTHER INFORMATION CONTACT:** For information about this correction, contact Kevin d'Eustachio, Office of Regulations and Administrative Law, telephone (202) 372-3854, e-mail [kevin.m.deustachio@uscg.mil](mailto:kevin.m.deustachio@uscg.mil). For information about the original regulation, contact Lieutenant Commander (LCDR) Marty Daniels, Coast Guard; telephone (504) 565-5044, e-mail [William.M.Daniels@uscg.mil](mailto:William.M.Daniels@uscg.mil).

#### SUPPLEMENTARY INFORMATION:

In FR Vol. 75, No. 109, USCG 2010-0139, appearing on page 32275 in the issue of Tuesday, June 8, 2010, the following correction is made: