

(4) Tolerances are established for residues of the isomer, beta-cyfluthrin, cyano(4-fluoro-3-phenoxyphenyl)methyl-3-(2,2-dichloroethenyl)-2,2-dimethylcyclopropanecarboxylate [mixture comprising the enantiomeric pair (*R*)- $\alpha$ -cyano-4-fluoro-3-phenoxybenzyl (1*S*,3*S*)-3-(2,2-dichlorovinyl)-2,2-dimethylcyclopropanecarboxylate and (*S*)- $\alpha$ -cyano-4-fluoro-3-phenoxybenzyl (1*R*,3*R*)-3-(2,2-dichlorovinyl)-2,2-dimethylcyclopropanecarboxylate with the enantiomeric pair (*R*)- $\alpha$ -cyano-4-fluoro-3-phenoxybenzyl (1*S*,3*R*)-3-(2,2-dichlorovinyl)-2,2-dimethylcyclopropanecarboxylate and (*S*)- $\alpha$ -cyano-4-fluoro-3-phenoxybenzyl (1*R*,3*S*)-3-(2,2-dichlorovinyl)-2,2-dimethylcyclopropanecarboxylate], in or on the following raw agricultural commodities:

Commodity	Parts per million
Alfalfa .....	5.0
Alfalfa, forage .....	5.0
Alfalfa, hay .....	13
Almond, hulls .....	0.5
Barley, bran .....	0.5
Barley, grain .....	0.15
Beet, sugar, dried pulp ...	1.0
Beet, sugar, roots .....	0.10
Brassica, head and stem, subgroup 5A .....	2.5
Brassica, leafy greens, subgroup 5B .....	7.0
Buckwheat, grain .....	0.15
Carrot, roots .....	0.20
Cattle, fat .....	2.0
Cattle, meat .....	0.10
Cattle, meat byproducts ..	0.10
Citrus, dried pulp .....	0.3
Citrus, oil .....	0.3
Corn, field, grain .....	0.05
Corn, pop, grain .....	0.05
Corn, sweet, kernel plus cob with husks removed .....	0.05
Cotton, hulls .....	2.0
Cotton, refined oil .....	2.0
Cotton, undelinted seed ..	1.0
Egg .....	0.01
Fruit, citrus, group 10 ....	0.2
Fruit, pome, group 11 ....	0.5
Fruit, stone, group 12 ....	0.3
Goat, fat .....	2.0
Goat, meat .....	0.05
Goat, meat byproducts ...	0.05
Grain, aspirated fractions ..	150
Grain, cereal, forage, fodder and hay, group 16, forage, except rice ..	25
Grain, cereal, forage, fodder and hay, group 16, hay, except rice ....	6.0
Grain, cereal, forage, fodder and hay, group 16, stover, except rice ..	30
Grain, cereal, forage, fodder and hay, group 16, straw, except rice ..	7.0
Grape .....	1.0

Commodity	Parts per million
Grape, raisin .....	3.5
Grass, forage, fodder and hay, group 17, forage .....	12
Grass, forage, fodder and hay, group 17, hay ..	50
Hog, fat .....	0.5
Hog, meat .....	0.01
Hog, meat byproducts ....	0.01
Hop, dried cones .....	20.0
Hop, vines .....	4.0
Horse, fat .....	2.0
Horse, meat .....	0.05
Horse, meat byproducts ..	0.05
Lettuce, head .....	2.0
Lettuce, leaf .....	3.0
Milk .....	0.2
Milk, fat .....	5.0
Millet, grain .....	0.15
Mustard greens .....	7.0
Nut, tree, group 14 .....	0.01
Oat, bran .....	0.5
Oat, grain .....	0.15
Pea and bean, dried shelled, except soybean, subgroup 6C ....	0.15
Pea, dry, seed .....	0.15
Pea, southern, succulent ..	0.25
Peanut .....	0.01
Peanut, hay .....	6.0
Pepper .....	0.50
Pistachio .....	0.01
Poultry, fat .....	0.01
Poultry, meat .....	0.01
Poultry, meat byproducts ..	0.01
Radish, roots .....	1.0
Rye, bran .....	0.5
Rye, grain .....	0.15
Sheep, fat .....	2.0
Sheep, meat .....	0.05
Sheep, meat byproducts ..	0.05
Sorghum, grain, grain ....	3.5
Soybean, forage .....	8.0
Soybean, hay .....	4.0
Soybean, seed .....	0.03
Sugarcane, cane .....	0.05
Sugarcane, molasses ....	0.20
Sunflower, forage .....	5.0
Sunflower, seed .....	0.02
Teosinte, grain .....	0.05
Tomato .....	0.20
Tomato, paste .....	0.5
Tomato, pomace .....	5.0
Triticale, grain .....	0.15
Turnip, greens .....	7.0
Vegetable, cucurbit, group 9 .....	0.1
Vegetable, fruiting, group 8 .....	0.5
Vegetable, leafy greens, except Brassica, group 4 .....	6.0
Vegetable, tuberous and corm, subgroup 1C ....	0.01
Wheat, bran .....	0.5
Wheat, grain .....	0.15
Wheat, shorts .....	0.5

\* \* \* \* \*

[FR Doc. E8-22477 Filed 9-23-08; 8:45 am]

BILLING CODE 6560-50-S

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 180**

[EPA-HQ-OPP-2006-0175; FRL-8382-3]

**Pesticides; Food Packaging Treated with a Pesticide****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

**SUMMARY:** This final rule excepts food packaging materials (e.g. paper and paperboard, coatings, adhesives, and polymers) from the definitions of “pesticide chemical” and “pesticide chemical residue” under the Federal Food Drug and Cosmetic Act (FFDCA) section 201(q), when such food packaging materials have been treated with a pesticide regulated under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). This final rule expands the scope of the current exception which applies only to food packaging impregnated with an insect repellent – one type of pesticide. This final rule, as with the rule it amends, only applies to the food packaging materials themselves; it does not otherwise limit EPA’s FFDCA jurisdiction over the pesticidal substances in or on such products or limit FDA’s jurisdiction over substances subject to FDA regulation as food additives. This rule eliminates duplicative FFDCA jurisdiction and economizes federal government resources while continuing to protect human health and the environment. It is important to note that under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), EPA will continue to regulate the food packaging as an inert ingredient of the pesticide product and regulate the pesticide active ingredient in the treated food packaging under both FIFRA and the FFDCA (except as otherwise provided by statute). The text of this final rule is identical to a direct final rule EPA issued on December 6, 2006. EPA received several comments opposing that direct final rule and therefore withdrew the rule on February 2, 2007, consistent with EPA policy. EPA issued a subsequent proposed rule on April 6, 2007 for additional public comment.

**DATES:** This final rule is effective September 24, 2008.**ADDRESSES:** EPA has established a docket for this action under docket identification (ID) number EPA-HQ-OPP-2006-0175. All documents in the docket are listed in the docket index available at <http://www.regulations.gov>.

Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at <http://www.regulations.gov>, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S-4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305-5805.

#### FOR FURTHER INFORMATION CONTACT:

Cheryl Greene, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 308-0352; fax number: (703) 308-7026; e-mail address: [greenec.cheryl@epa.gov](mailto:greenec.cheryl@epa.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Does this Action Apply to Me?

You may be potentially affected by this action if you are a manufacturer/wholesaler of sanitary food packaging products or are a pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Pesticide manufacturing (NAICS 32532).
- Food packaging manufacturers (NAICS 32222).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. To determine whether you or your business may be affected by this action, you should carefully examine the applicability provisions in 40 CFR 180.4. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

## II. Background

### A. What Action is the Agency Taking?

EPA has received applications for the registration of pesticides under FIFRA that, as proposed, will be applied to food packaging materials. These pesticides are generally intended to function as alternatives to more costly and more toxic applications of insecticides in food storage and retail establishments. The regulatory framework for this use of pesticides raises a number of complex jurisdictional issues for EPA and FDA<sup>1</sup>.

Because the treated packaging materials will be sold to food distributors for the purpose of controlling pest infestations, as well as for packaging food, the pesticide-treated food packaging materials will be subject to the pesticide product registration requirements of section 3 of FIFRA. Under FIFRA, the components of pesticides are either active ingredients or inert ingredients. Active ingredients are those which, among other things, will “prevent, destroy, repel or mitigate any pest.” (FIFRA section 2(a)) Inert ingredients are ingredients “which [are] not active.” (FIFRA section 2(m)). Thus, the components of food packaging (paperboards, coatings, etc.) become inert ingredients of a pesticide product under FIFRA whenever the food packaging is treated with a pesticide active ingredient and is distributed or sold with the purpose of controlling pests<sup>2</sup>.

Such inert ingredients are not used for a pesticidal purpose in the production,

<sup>1</sup> This final rule does not include within its scope substances which may be regulated as pesticides under FIFRA that are used to prevent, destroy, repel or mitigate microorganisms when such substances are included for such use in or are applied for such use on food packaging (without regard to whether the substances are intended to have an ongoing effect on any portion of the packaging) (see FFDCA section 201(q)(1)(B)(ii) which excludes such substances from the definition of “pesticide chemical”). Because such substances are already excluded from the definition of pesticide chemical residue, it is unnecessary to address these substances in this rule.

<sup>2</sup> It is important to understand that this final rule only applies to a very small subset of food packaging materials: pesticide-treated food packaging that is distributed or sold with the purpose of controlling pests. Food packaging that is not distributed or sold to control pests is not a pesticide and is not subject to this rule. For example, packaged products that are simply treated with pesticides by food distributors, retailers or homeowners solely to control pests on site do not themselves become pesticides simply as a result of such applications. Rather, the product itself must be distributed with the purpose of providing pest control to become a pesticide. The treated packaging materials addressed in this proposed rule are those that are sold for the express purpose of providing ongoing protection from pests that may contaminate the products made with the treated packaging.

storage, processing, or transportation of food. However, as inert ingredients, these components of food packaging are also subject to regulation as “pesticide chemical residues” under FFDCA section 408.

Under section 408 of the FFDCA, any pesticide chemical residue in or on food is deemed unsafe, unless EPA has established a tolerance or tolerance exemption that covers the pesticide chemical residue. This is true even though FDA may have previously issued regulations under section 409 of FFDCA permitting the use of these materials in food packaging that has not been treated with a pesticide. As a result, the same food packaging materials would be subject to regulation under FFDCA by both Agencies. EPA is today to giving FDA sole jurisdiction under section 409 FFDCA over the packaging components (ingredients) of food packaging materials that have been treated with a pesticide by excepting these materials from the definition of “pesticide chemical” and “pesticide chemical residue.” Given FDA’s expertise and experience in regulating the components of food packaging, EPA and FDA believe this rule will eliminate the duplicative FFDCA jurisdiction and economize Federal government resources while continuing to protect human health and the environment without additional regulatory oversight by EPA.

In 1998, EPA consciously limited the exception at 40 CFR 180.4 to food packaging materials impregnated with an insect repellent, since at the time of promulgation EPA had only received an application for a pesticide product containing an insect repellent. EPA has now received applications for other treated food packaging products that contain active ingredients that are not insect repellents and will not be applied through impregnation of the materials. EPA and FDA believe it is appropriate to extend the 1998 rule to give FDA sole jurisdiction under the FFDCA over the inert ingredients in such food packaging products without regard to the application technique and mode of action of the active ingredients in such products. Again, this rule will not affect EPA’s jurisdiction under section 408 over ingredients other than the packaging materials in such products (including the pesticide active ingredient), nor does it affect EPA’s jurisdiction under FIFRA to regulate such products.

### B. What is the Agency’s Authority for Taking this Action?

Section 201(q)(3) of FFDCA, as amended by the Food Quality Protection

Act (FQPA), allows the Administrator, under specified conditions, to except certain substances from the definition of “pesticide chemical” or “pesticide chemical residue” if—

(A) Its occurrence as a residue on or in a raw agricultural commodity or processed food is attributable primarily to natural causes or human activities not involving the use of any substance for a pesticidal purpose in the production, storage, processing, or transportation of any raw agricultural commodity or processed food; and

(B) The Administrator, after consultation with the Secretary, determines that the substance more appropriately should be regulated under one or more provisions of this Act other than sections 402(a)(2)(B) and 408.

With today’s action, EPA excepts from the definition of “pesticide chemical” substances that are inert ingredients in food packaging treated with a pesticide, when such ingredients are the components of the food packaging (e.g. paper and paperboard, coatings, adhesives and polymers).

As previously explained, this final rule will not affect EPA’s regulation of such substances as inert ingredients under FIFRA. EPA will continue to exercise jurisdiction under FIFRA over these substances when they are used as inert ingredients in food packaging that is intended to produce a pesticidal effect. The materials that make up food packaging treated with a pesticide may serve one of two purposes:

1. To control pests, or
2. To be one of the materials that make up the container for food.

As a result of this rule, EPA will continue to regulate the materials that control pests and FDA will regulate the substances that make up the food packaging material. Consistent with EPA’s pesticide registration regulations, EPA will not issue a registration under FIFRA for pesticide products containing food packaging inert ingredients if the presence of these ingredients in or on food is not authorized or permitted by FFDCA and the implementing regulations.

EPA, in consultation with FDA, believes that section 201(q)(3) is applicable to inert ingredients in pesticide treated food packaging materials that are the components of the food packaging (paperboard, coatings, etc). When such inert ingredients are the components of the food packaging itself, EPA believes the occurrence of these substances as residues in or on food would be appropriately excepted from the definition of “pesticide chemical” or “pesticide chemical residue” because such substances are not attributable primarily to the use of the substances for a pesticidal purpose in the

production, storage, processing or transportation of food. Rather, the presence of such substances as residues in food is primarily attributable to their use for purposes of packaging food. For this reason, and because of FDA’s considerable experience in regulating such substances found in food packaging, EPA and FDA believe it is appropriate for FDA to regulate these inert ingredients under section 409 of FFDCA.

As noted, this regulation will except from the definition of “pesticide chemical” and “pesticide chemical residue” any inert ingredient that is a component of food packaging material treated with a pesticide. EPA, in consultation with FDA, believes the identity of the pesticide in or on the packaging material is not relevant to a determination under section 201(q)(3) regarding whether it is appropriate to except an inert ingredient from the definition of pesticide chemical or pesticide chemical residue. As noted in this unit, that determination turns only on whether:

1. The occurrence of the residues of the substance in or on food is attributable primarily to the use of substances for a pesticidal purpose in the production, storage, processing or transportation of food; and
2. Whether it is more appropriate to regulate such substances under another provision of FFDCA other than sections 402(a)(2)(B) and 408.

Thus, EPA has determined that inert ingredients that are the components of the food packaging material in pesticide treated food packaging are more appropriately regulated by FDA under FFDCA. This final rule will therefore amend 40 CFR 180.4 to extend the exception contained therein to any food packaging materials treated with a pesticide.

### III. Response to Comments

EPA received comments both on the rule when it was published as a direct final rule on December 6, 2006 (71 FR 70667) (FRL–8084–2), and again, following withdrawal of the direct final (February 2, 2007 (72 FR 4963) (FRL–8111–3), when the rule was published for comment as a proposed rule on April 6, 2007 (72 FR 17068) (FRL–8119–8).

The majority of the comments opposed finalizing today’s rule. However, most of these comments did not address the substance of the rule itself – i.e., the transfer of authority under the FFDCA from EPA to FDA only for the purposes of regulating the actual packaging materials in food packaging products treated with pesticides. Rather, these comments

objected to the inclusion of pesticides in treated packaging as a general matter – which is a matter beyond the scope of this rule. As discussed in Unit II, in this preamble, this rule does not alter the regulatory scheme under either FIFRA or the FFDCA for pesticidally active substances in food packaging or the products they are contained in. Any such products, including all the ingredients in such products, must be evaluated under FIFRA on a case-by-case basis. Additionally, subject to the limited exception for certain antimicrobial pesticides provided in FFDCA section 201(q)(1)(B)(ii) (see footnote 1 in Unit II.A.), the active ingredients in such products (as well as those inert ingredients that are not part of the food packaging itself) will continue to be subject to EPA regulation under section 408 of the FFDCA.

EPA understands from the comments that there is some concern about the risks that may exist from the inclusion of pesticides in treated food packaging. As noted, EPA will continue to evaluate any applications it receives for such products under the stringent health and safety standards of both FIFRA and the FFDCA (except as provided by section 201(q)(1)(B)(ii)). These laws require EPA to find that residues of pesticides in food are safe and to determine whether pesticide products cause unreasonable risk to human health or the environment. Further, it should be noted that the applications for registration of treated packaging materials EPA has received to date are for products that may serve to limit the need for food storage establishments to use riskier pesticides that are currently used to control pests in such establishments. To be clear, however, the fact that these products may serve to replace more risky pesticides does not alter EPA’s obligation to ensure that such products meet stringent food safety standards.

EPA also received a comment that the rule would eliminate protections for infants and children and affect EPA’s jurisdiction to regulate pesticidal substances for which no pesticidal claims are made. EPA disagrees with this comment. EPA believes the commenter has incorrectly interpreted the import of today’s action. As noted in Unit II., this action does not alter EPA’s regulation of pesticidally active ingredients under the FFDCA – or of those inert ingredients that do not constitute food packaging materials. Further, under FIFRA, EPA must still evaluate the entire pesticide product (including all active and inert ingredients) before making a registration determination. And as noted, before

EPA can register a pesticide product under FIFRA, it must determine that the product will not present unreasonable risk to human health or the environment. The only materials that are excepted from EPA regulation under FFDCA section 408 by this rule are those materials regulated by the FDA as food packaging — that is, materials that are now found in food packaging on store shelves irrespective of whether those products are treated with a pesticide. These materials include the paper, cardboard, adhesives and coatings that are found in thousands of food packaging products across America today that are currently subject to FDA regulation. Accordingly, this rule does not eliminate protections for infants and children. Also, as explained in Unit II., this rule will have no impact on the regulation of substances under either the FFDCA or FIFRA that are not themselves food packaging materials. Finally, this rule does not, as the commenter suggests, alter EPA's jurisdiction over certain pesticidal substances for which no pesticidal claims are made. Substances or mixtures of substances are subject to regulation as pesticides under FIFRA if, among other things, they are intended for "preventing, destroying, repelling, or mitigating any pest" (FIFRA section 2(u)). EPA has developed regulations at 40 CFR 152.15 to implement this standard. Nothing in today's action alters EPA's interpretation in that regulation of the section 2(u) "intent" test.

EPA received two comments seeking clarification regarding certain aspects of the rule. One commenter sought clarification that:

1. The rule only excepts components of packaging that exhibit no pesticidal properties;

2. EPA will continue to regulate the active ingredients in such products under the FFDCA; and

3. The entire treated packaging product as sold or distributed will be regulated under FIFRA. This is correct. As noted, this rule does not relieve EPA of its obligation under the FFDCA to evaluate active ingredients in treated packaging products — or for that matter, inert ingredients in such products that are not part of the packaging materials of such products. Further, the rule does not alter EPA's regulation of the entire product under FIFRA. It simply eliminates duplicative federal regulation of the actual packaging materials in treated packaging products; materials already subject to FDA regulation under the FFDCA.

Finally, to be clear, the rule only exempts such inert ingredients when found in treated packaging products. To the extent that these same materials can be expected to result in residues on food from use of pesticide products that are not treated packaging products, a tolerance or a tolerance exemption under section 408 of the FFDCA would still be required.

The second commenter, who apparently sells treated paper wrap products, asked for clarification as to whether the rule alters EPA regulation of the actual products they sell. As noted in Unit II., today's rule does not affect EPA's regulation of the actual treated product under FIFRA.

#### **IV. Statutory and Executive Order Reviews**

As an exception, this action does not impose any regulatory obligations. Under Executive Order 12866 entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993), it has been determined that this rule is not "significant" and is not subject to OMB review. This rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4). This rule has no federalism or tribal implications, because it will not have substantial direct effects on States or Indian tribes, on the relationship between the Federal Government and the States or Indian tribes, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes, as specified in Executive Orders 13132 (entitled *Federalism*, 64 FR 43255, August 10, 1999) and 13175 (entitled *Consultation and Coordination with Indian Tribal Governments*, 65 FR 67249, November 6, 2000). Nor does this rule raise issues that require special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994), or require OMB review in accordance with Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This rule is also not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use* (66 FR 28355, May 22, 2001), because this action is not

expected to affect energy supply, distribution, or use. In addition, this action does not involve any standards that would require Agency consideration pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (Pub. L. 104-113).

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agency hereby certifies that this regulatory action will not have a significant economic impact on a substantial number of small entities, because this regulatory action is an exemption and imposes no regulatory obligations. EPA will provide this information to the Small Business Administration's office of Advocacy upon request.

#### **V. Congressional Review Act**

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the Agency promulgating the rule must submit a rule report to each House of the Congress and 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**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

#### **List of Subjects in 40 CFR Part 180**

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: September 11, 2008.

**Janet L. Andersen,**

*Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.*

■ Therefore, 40 CFR chapter I is amended as follows:

#### **PART 180—[AMENDED]**

■ 1. The authority citation for part 180 continues to read as follows:

**Authority:** 21 U.S.C. 321(q), and 371.

■ 2. Section 180.4 is amended by revising paragraph (a) to read as follows:

#### **§ 180.4 Exceptions.**

\* \* \* \* \*

(a) Inert ingredients in food packaging treated with a pesticide, when such inert ingredients are the components of the food packaging material (e.g. paper

and paperboard, coatings, adhesives, and polymers).

\* \* \* \* \*

[FR Doc. E8-21958 Filed 9-23-08; 8:45 am]

BILLING CODE 6560-50-S

## DEPARTMENT OF THE INTERIOR

### Bureau of Reclamation

#### 43 CFR Part 423

RIN 1006-AA55

#### Public Conduct on Bureau of Reclamation Facilities, Lands, and Waterbodies

**AGENCY:** Bureau of Reclamation, Interior.

**ACTION:** Interim final rule.

**SUMMARY:** This final rule will amend the regulations that govern public access to and conduct on Bureau of Reclamation (Reclamation) facilities, lands, and waterbodies. This action is necessary to clarify rules that are intended to maintain law and order and protect persons and property on Reclamation facilities, lands, and waterbodies. This action will help the public better understand their rights and responsibilities.

**DATES:** This interim final rule is effective on September 24, 2008. Reclamation must receive any comments on this interim final rulemaking no later than November 24, 2008.

**ADDRESSES:** You may submit comments, identified by the number 1006-AA55, by one of the following methods:

—*Federal Rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. This rule has been assigned Docket Identification Number BOR-2008-0003.

—*Mail:* Director, Security, Safety, and Law Enforcement, Bureau of Reclamation, 6th and Kipling, Building 67, Denver, CO 80225.

**FOR FURTHER INFORMATION CONTACT:** David Achterberg, Director, Security, Safety, and Law Enforcement, Bureau of Reclamation, PO Box 25007, Denver, Colorado 80225, telephone 303-445-3737.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On November 12, 2001, Congress enacted Public Law 107-69, which provides for law enforcement authority within Reclamation projects and on Reclamation lands. Section 1(a) of this

law requires the Secretary of the Interior to “issue regulations necessary to maintain law and order and protect persons and property within Reclamation projects and on Reclamation lands.” The Secretary of the Interior delegated this authority to the Commissioner of Reclamation.

On April 17, 2002, Reclamation published 43 CFR part 423, Public Conduct on Bureau of Reclamation Lands and Projects (67 FR 19092, Apr. 17, 2002) as an interim final rule. In the preamble to that rule, Reclamation stated its intent to replace the interim final rule with a more comprehensive public conduct rule and set April 17, 2003, as the interim final rule’s expiration date. In order to provide more time to develop the comprehensive public conduct rule, Reclamation later extended the expiration of the interim final rule to April 17, 2005 (68 FR 16214, Apr. 3, 2003), and again to April 17, 2006 (70 FR 15778, Mar. 29, 2005).

On September 13, 2005, Reclamation published a proposed public conduct rule (70 FR 54214, Sep. 13, 2005) and asked the public to comment on that proposed rule. The Final Rule, 43 CFR Part 423, was published in the **Federal Register** on April 17, 2006 (71 FR 19790, Apr. 17, 2006).

Since that time, some members of the public and other entities have found certain provisions of the public conduct rule to be unclear. The purpose of this interim final rule is to amend the public conduct rule to clarify these provisions. A detailed discussion of these amendments follows.

The definitions of the terms “Disorderly conduct” and “Trespass” are being removed, and the language from those definitions is being added to §§ 423.22 and 423.24, respectively, because these are criminal acts and their detailed descriptions should be explained in the applicable sections of Subpart C of this rule. This change will facilitate reference to specific acts when law enforcement officers issue citations for disorderly conduct and trespassing.

The definition of “Vessel” is being revised to remove the statement that seaplanes, when on the water, are considered “vessels” under this part. This change will make Reclamation consistent with the U.S. Coast Guard and the majority of western States, which do not consider a seaplane a vessel when on the water.

A definition of the term “Closed” is being added to help resolve confusion concerning the use of closures under Subpart B as opposed to special use areas under Subpart E of this rule. This definition will clarify the distinction

that closures are to be used only when all public access to a particular area or location is to be prohibited. When only a specific activity such as camping is to be prohibited in a certain area, but other public access to that area is to be allowed, a special use area should be established.

Section 423.3(a) is being revised to clarify that persons on Reclamation facilities, lands, and waterbodies must comply with Federal as well as State and local laws.

Section 423.3(b)(2) is being revised to clarify that the restrictions of part 423 do not apply to State and local employees and agents when they are carrying out their official duties.

In section 423.3(d), we are replacing the word “right” with “authority” because this passage refers to an authority which derives from Public Law 107-69.

New § 423.18 is being added to coincide with the new definition of closure, and to clarify that closures are to be used only where all public access is to be prohibited in a given area.

Section 423.21(a) is being revised to clarify that the public is responsible for awareness of all applicable laws as well as closures and special use areas when on Reclamation facilities, lands, and waterbodies.

In § 423.21(b), the words “limitations, restrictions, closures, or special use areas” are being added to ensure public understanding that the government’s ability to issue citations must not be interpreted too narrowly.

Section 423.29(b) is being revised to clarify that Reclamation will not issue permits under Subpart D of this rule to introduce plant or animal species into Reclamation lands and waterbodies. Governmental entities may, with proper authority, introduce plant or animal species to Reclamation lands and waterbodies, but these activities are not restricted by part 423, pursuant to § 423.3(b)(3), and therefore no permits are needed. Furthermore, Reclamation has no intent to issue permits to the public for the introduction of plant or animal species. Therefore, the process of obtaining permits for these activities is inapplicable to either governmental entities or to the public.

Section 423.34(c) is being reworded to clarify that under no circumstances can a latrine or toilet be placed or constructed at a level lower than the high water mark of a Reclamation waterbody, and to reduce the horizontal restriction from 200 yards to 150 feet from the high water mark. The 200-yard restriction was considered excessive.

Sections 423.36 and 423.37 are being revised to clarify that posted restrictions