

particles in the finished product is approximately 50 microns after rolling.” Use of language such as “average” and “approximately” is imprecise, and no ranges or statistical variations are specified. The NRC will publish a revised direct final rule along with its companion proposed rule after the necessary revisions to the TS are made.

**DATES:** The proposed rule published May 7, 2010 (75 FR 25120), is withdrawn.

**FOR FURTHER INFORMATION CONTACT:**

Jayne M. McCausland, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone (301) 415-6219, e-mail

*Jayne.McCausland@nrc.gov*.

**SUPPLEMENTARY INFORMATION:** On May 7, 2010 (75 FR 25120), the NRC published in the **Federal Register** a proposed rule that would have amended its regulations in 10 CFR 72.214 to revise the NUHOMS® HD System listing within the “List of Approved Spent Fuel Storage Casks” to include Amendment No. 1 to the CoC. Amendment No. 1 would modify the present cask system by adding Combustion Engineering 16 × 16 class fuel assemblies as authorized contents, reducing the minimum off-normal ambient temperature from –20°F to –21°F, expanding the authorized contents of the NUHOMS® HD System to include pressurized water reactor fuel assemblies with control components, reducing the minimum initial enrichment of fuel assemblies from 1.5 weight percent uranium-235 to 0.2 weight percent uranium-235, clarifying the requirements of reconstituted fuel assemblies, adding the requirements to qualify metal matrix composite neutron absorbers with integral aluminum cladding, deleting the use of nitrogen for draining the water from the dry shielded canister (DSC) and allowing only helium as a cover gas during DSC cavity water removal operations, and making corresponding changes to the technical specifications. The NRC also published a direct final rule on May 6, 2010 (75 FR 24786), that would have become effective on July 20, 2010. A correction notice was published on May 17, 2010 (75 FR 24786), to correctly specify an effective date of July 21, 2010. The direct final rulemaking and the companion notice of proposed rulemaking were published in the **Federal Register** on different dates instead of being published concurrently on the same date.

The rulemaking is being withdrawn because the applicant identified that a

certain TS for Boral characterization was not written precisely and in a manner that could be readily and demonstrably implemented. Specifically, the requirements for meeting TS 4.3.1, “Neutron Absorber Tests,” which references Section 9.1.7.3 of the SAR, are not precisely quantified in that it requires that “the average size of the boron carbide particles in the finished product is approximately 50 microns after rolling.” Use of language such as “average” and “approximately” is imprecise, and no ranges or statistical variations are specified. The NRC will publish a revised direct final rule along with its companion proposed rule after the necessary revisions to the TS are made.

Dated at Rockville, Maryland, this 8th day of July, 2010.

For the Nuclear Regulatory Commission.

**R.W. Borchardt,**

*Executive Director for Operations.*

[FR Doc. 2010-17424 Filed 7-15-10; 8:45 am]

**BILLING CODE 7590-01-P**

## DEPARTMENT OF ENERGY

### 10 CFR Part 217

#### RIN 1901-AB28

#### Energy Priorities and Allocations System Regulations

**AGENCY:** Department of Energy.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would establish standards and procedures by which the U.S. Department of Energy (DOE) may require that certain contracts or orders that promote the national defense be given priority over other contracts or orders. This rule also sets new standards and procedures by which DOE may allocate materials, services and facilities to promote the national defense. DOE is publishing this rule to comply with a requirement of the Defense Production Act Reauthorization of 2009 (Pub. L. 111-67) to publish regulations providing standards and procedures for prioritization of contracts and orders and for allocation of materials, services and facilities to promote the national defense.

**DATES:** Comments must be received by August 16, 2010.

**ADDRESSES:** You may submit comments, identified by RIN 1901-AB28, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- By e-mail directly to *GC-76EPAS@hq.doe.gov*. Include RIN 1901-AB28 in the subject line.

- By mail or delivery to Dr. Kenneth Friedman, Office of Infrastructure Security and Energy Restoration, U.S. Department of Energy, Room 1E-256, 1000 Independence Avenue, SW., Washington, DC 20585.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted to Dr. Kenneth Friedman (*see ADDRESSES*) and by e-mail to *Christine\_J.\_Kymn@omb.eop.gov*.

**FOR FURTHER INFORMATION CONTACT:** Dr.

Kenneth Friedman, Office of Infrastructure Security and Energy Restoration, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585; (202) 536-0379 (*GC-76EPAS@hq.doe.gov*). Ms. S. Becca Smith, Office of the General Counsel (GC-76), U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585; (202) 586-9788 (*GC-76EPAS@hq.doe.gov*).

**SUPPLEMENTARY INFORMATION:**

#### Background

This rule expands upon Title 10 of the Code of Federal Regulations (10 CFR) part 216, DOE Energy Priorities and Allocations System (EPAS) regulations.

10 CFR part 216 implements DOE's administration of priorities and allocations actions in order to maximize domestic energy supplies pursuant to its authority under Section 101(c) of the Defense Production Act (50 U.S.C. app. § 2071 *et seq.*) (DPA) as delegated by Executive Order 12919 (June 3, 1994). These proposed regulations, to be codified at 10 CFR part 217, would implement DOE's administration of priorities and allocations in order to promote the national defense pursuant to its DPA authorities other than section 101(c). The EPAS has two principal components: priorities and allocations. Under the priorities component, certain contracts between the government and private parties or between private parties for the production or delivery of industrial resources are required to be given priority over other contracts to facilitate expedited delivery in promotion of the U.S. national defense. Under the allocations component, materials, services, and facilities may be allocated to promote the national defense. For both components, the term “national defense” is defined broadly and can include critical infrastructure protection and restoration, emergency preparedness, and recovery from natural disasters.

On September 30, 2009, the Defense Production Act Reauthorization of 2009 (Pub. L. 111–67, 123 Stat. 2006, September 30, 2009) (DPAR) was enacted. That act requires that within 270 days of its enactment (that is, by June 20, 2010), all agencies to which the President has delegated priorities and allocations authority under Title I of the DPA must publish final rules establishing standards and procedures by which that authority will be used to promote the national defense in both emergency and nonemergency situations. That act also required all such agencies to consult “as appropriate and to the extent practicable to develop a consistent and unified Federal priorities and allocations system.” (123 Stat. 2006, at 2009). This rule is one of several rules to be published to implement the provisions of the DPAR. The final rules of the agencies with DPAR authorities, which are the Departments of Commerce, Energy, Transportation, Health and Human Services, Defense, and Agriculture, will comprise the Federal Priorities and Allocations System.

DOE is publishing this proposed rule as the initial rulemaking stage in compliance with the provision of the DPAR noted above. DOE believes that its existing rules at 10 CFR part 216 satisfy the DPAR’s requirement that agencies have standards and procedures in place to implement the DPA’s 101(c) authorities. However, in the interest of promoting a unified priorities and allocations system, and to implement DOE’s DPA authorities other than those set forth in section 101(c), DOE is setting forth the proposed EPAS rule. DOE’s proposed EPAS provisions are consistent with the Federal Priorities and Allocations System regulations being issued by other agencies. The specific proposals in this rule are more fully described below.

### **Analysis of the Proposed Priorities and Allocations System**

#### *Subpart A*

Proposed Subpart A would set forth the purpose of the regulation.

Proposed § 217.1 would state the purpose of the EPAS in general terms, as providing guidance and procedures for use of the Defense Production Act Section priorities and allocations authority (other than the authorities set forth in section 101(c)) with respect to all forms of energy necessary or appropriate to promote the national defense.

Proposed § 217.2 would provide an overview of the EPAS program. This section would describe briefly all

aspects of the EPAS, including the resource jurisdiction of other agencies delegated priorities and allocations authority under the DPA.

#### *Subpart B*

The “Definitions” section would appear in proposed § 217.20 in Subpart B and provide definitions for the relevant regulatory terms.

#### *Subpart C*

Proposed Subpart C would be titled “Placement of Rated Orders,” reflecting the fact that the subpart will address only DOE’s priorities authorities; allocations authorities will be addressed in Subpart E.

Proposed § 217.30, “Delegation of Authority,” would describe fully the President’s delegations to the Department of Energy. It would also describe, in general terms, the items subject to DOE’s jurisdiction and note that the Department of Commerce has delegated certain authorities to DOE. DOE is proposing this provision to facilitate public understanding of the role that each delegate agency plays in the overall priorities and allocations system.

Proposed § 217.31, “Priority ratings,” describes the different levels of priority and program symbols used when rating an order.

Proposed § 217.32, “Elements of a rated order,” describes in detail what each rated order must include, consisting of the appropriate priority rating, delivery date information, signatures and required language. DOE seeks comment specifically on the text of this provision.

Language in proposed § 217.33, “Acceptance and rejection of rated orders,” details when orders placed by DOE may or must be accepted or rejected, and what the procedures are for both, including customer notification requirements and certain exceptions for emergency preparedness conditions. Specifically, persons must accept or reject rated orders for emergency response-related approved programs within five days (or two days, depending on the circumstance). DOE is proposing the shorter time limit in which the recipient must respond to a rated order issued in connection with an emergency response related program because such programs would involve disaster assistance, emergency response or similar activities. DOE believes that the exigent circumstances inherent in such activities justify requiring a shorter response time.

Proposed § 217.34, “Preferential scheduling,” details procedures in cases where a person receives two or more

conflicting rated orders. If a person is unable to resolve such a conflict, this section refers them to special priorities assistance as provided in §§ 217.40 through 217.44. Language in proposed § 217.35, “Extension of priority ratings,” requires a person to use rated orders with suppliers to obtain items or services needed to fill a rated order. This allows the priority rating to “extend” from contractor to subcontractor to supplier throughout the entire procurement chain.

Proposed § 217.36, “Changes or cancellations of priority ratings and rated orders,” provides procedures for changing or cancelling a rated order, both by DOE or other persons who placed the order.

Proposed § 217.37, “Use of rated orders,” lists what items must be rated. It also introduces the use of certain program identification symbols used when rated orders may be combined, and details the procedures for combining two or more rated orders, as well as rated and unrated orders.

Proposed § 217.38, “Limitations on placing rated orders,” prohibits the use of rated orders in a list of specific circumstances. This section also specifically excludes the use of rated orders for resources within the resource jurisdiction of agencies other than DOE with DPA priorities and allocations authority.

#### *Subpart D*

Proposed Subpart D “Special Priorities Assistance” describes instances in which DOE would provide assistance in resolving matters related to priority rated contracts and orders.

Proposed § 217.40 “General provisions” illustrates when and how DOE can provide special priorities assistance, and provides specific DOE points of contact and the form to be used for requesting such assistance. Special priorities assistance may generally be requested for any reason.

Proposed § 217.41, “Requests for priority rating authority,” directs persons to the Department of Commerce to request rating authority for production or construction equipment. This section also identifies circumstances in which DOE may authorize a person to place a priority rating on an order to a supplier in advance of the issuance of a rated prime contract, and lists factors DOE will consider in deciding whether to grant this authority.

Proposed § 217.42, “Examples of assistance,” provides a number of examples of when special priorities assistance may be provided, although it

may generally be provided for any reason.

Proposed § 217.43 lists the criteria for granting assistance, and proposed § 217.44 lists instances in which assistance may not be provided (i.e., to secure a price advantage).

#### *Subpart E*

Proposed Subpart E, "Allocation Actions," would provide the public with detailed information on the procedures governing allocations actions.

Allocations actions would most likely be used in extreme circumstances, such as in response to a national emergency.

Proposed §§ 217.50 through 217.52 describe allocations and when and how allocation orders would be used.

Specifically, allocation orders would be used only if priorities authority would not provide a sufficient supply of material, services or facilities for national defense requirements, or when use of priorities authority would cause a severe and prolonged disruption in the supply of resources available to support normal U.S. economic activities.

Allocation orders would not be used to ration materials or services at the retail level. Allocation orders would be distributed equitably among the suppliers of the resource(s) being allocated and would not require any person to relinquish a disproportionate share of the civilian market. DOE is proposing the standards set forth in proposed §§ 217.50 through 217.52 to provide reasonable assurance that allocation orders will be used only in situations where the circumstances justify such orders.

Proposed § 217.53 describes the three types of allocation orders that DOE might issue, which are a set-aside, an allocation directive, and an allotment. A set-aside is an official action that would require a person to reserve resource capacity in anticipation of receipt of rated orders. An allocation directive is an official action that would require a person to take or refrain from taking certain actions in accordance with its provisions (an allocation directive can require a person to stop or reduce production of an item, prohibit the use of selected items, divert supply of one type of product to another, or to supply a specific quantity, size, shape, and type of an item within a specific time period). An allotment is an official action that would specify the maximum quantity of an item authorized for use in a specific program or application. DOE is proposing these three types of allocation orders because it believes that, collectively they describe the types of actions that might be taken in any situation in which allocation is justified.

Proposed § 217.54, "Elements of an allocation order," sets forth the minimum elements of an allocation order. Those elements are:

(a) A detailed description of the required allocation action(s);

(b) Specific start and end calendar dates for each required allocation action;

(c) The written signature on a manually placed order, or the digital signature or name on an electronically placed order, of the Secretary of Energy. The signature or use of the name certifies that the order is authorized under this regulation and that the requirements of this regulation are being followed;

(d) A statement that reads in substance: "This is an allocation order certified for national defense use. [Insert the legal name of the person receiving the order] is required to comply with this order, in accordance with the provisions of the Energy Priorities and Allocations System regulation (10 CFR 217), which is part of the Federal Priorities and Allocations System"; and

(e) A current copy of the Energy Priorities and Allocations System (10 CFR part 217).

DOE is proposing these elements because it believes that they provide a proper balance between the need for standards to permit the public to recognize and understand an allocation order if one is issued, and the expectation that any actual allocation orders will have to be tailored to meet unforeseeable circumstances. The language of proposed § 217.54 would not preclude DOE from including additional information in an allocation order if circumstances warrant doing so.

Proposed § 217.55, "Mandatory acceptance of allocation orders," would require that an allocation order must be accepted if a person is capable of fulfilling the order. If a person is unable to comply fully with the required actions specific in an allocation order, the person must notify DOE immediately, explain the extent to which compliance is possible, and give reasons why full compliance is not possible. This section also states that a person may not discriminate against an allocation order in any manner, such as by charging higher prices or imposing terms and conditions different than what the person imposed on contracts or orders for the same resource(s) that were received prior to receiving the allocation order. DOE is proposing § 217.55 to make it clear to the public that the limited circumstances and emergency situations that trigger issuance of an allocation order require immediate response from the public in

order to address the situation in an expedient fashion.

Proposed § 217.56, "Changes or cancellations of an allocation order" provides that an allocation order may be changed or cancelled by the Department of Energy.

#### *Subpart F*

Proposed Subpart F, "Official Actions," provides the specific official actions the DOE may take to implement the provisions of this regulation. These official actions include Rating Authorizations, Directives, and Memoranda of Understanding.

Proposed § 217.61, "Rating Authorizations," defines a rating authorization as an official action granting specific priority rating authority, and refers persons to § 217.21 to request such priority rating authority.

Proposed § 217.62, "Directives," defines a directive as an official action that requires a person to take or refrain from taking certain actions in accordance with its provisions. This section details directive compliance for the public.

Proposed § 217.63, "Letters and Memoranda of Understanding," defines a letter or memorandum of understanding as an official action that may be issued in resolving special priorities assistance cases to reflect an agreement reached by all parties, and explains its use.

#### *Subpart G*

Proposed Subpart G, "Compliance," provides DOE authority to enforce the administration of the DPA and other applicable statutes, this regulation, or an official action. This subpart provides that willful violations of the provisions of title I or section 705 of the DPA, this regulation, or a DOE official action, are criminal acts, punishable as provided in the DPA, and as set forth below in § 217.74.

Proposed § 217.71, "Audits and investigations," details the procedures for official examinations of books, records, documents, and other writings and information to ensure that the provisions of the DPA and other applicable statutes, this regulation, and official actions have been properly followed. An audit or investigation may also include interviews and a systems evaluation to detect problems or failures in the implementation of this regulation.

Proposed § 217.72, "Compulsory process," provides that if a person refuses to permit a duly authorized DOE representative to have access to necessary information, DOE may seek the institution of appropriate legal action, including ex parte application

for an inspection warrant, in any forum of appropriate jurisdiction.

Proposed §§ 217.73 and 217.74 both provide procedures for notification of failure to comply with the DPA, these regulations, or DOE official actions, and the violations, penalties and remedies that may result.

Proposed § 217.75, "Compliance Conflicts," requires that persons immediately contact DOE should compliance with the DPA, these regulations, or an official action prevent a person from filing a rated order or from complying with another provision of the DPA and other applicable statutes, this regulation, or an official action.

#### Subpart H

Proposed § 217.80, "Adjustments, Exceptions, and Appeals," would reflect the procedures necessary to request an adjustment or exception to the provisions of these regulations on the grounds of exceptional hardship or compliance would be contrary to the intent of the DPA. These requests must be written and submitted to the DOE contact provided in this section.

Proposed § 217.81, "Appeals," provides the procedures, timing and contact information for appealing a decision made on a request for relief in the previous section.

#### Subpart I

Proposed Subpart I, "Miscellaneous Provisions," addresses a number of remaining issues, including protection against claims, records and reports, applicability issues, and communications.

Proposed § 217.90, "Protection against claims," provides that a person shall not be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with any part of this regulation, or an official action.

Proposed § 217.91, "Records and reports," would require that persons are required to make and preserve for at least three years, accurate and complete records of any transaction covered by this regulation or an official action. Various requirements and procedures regarding such records are provided in this section. The confidentiality provisions of the DPA governing the submission of information pursuant to the DPA and these regulations are also set forth.

Proposed § 217.92, "Applicability of this regulation and official actions," would provide the jurisdictional applicability of this regulation and official actions.

Proposed § 217.93, "Communications," would provide a DOE point of contact for all communications regarding this regulation.

#### A. Review Under Executive Order 12866

This rule has been determined to be significant for purposes of Executive Order 12866.

#### B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's Web site, <http://www.gc.doe.gov>.

DOE reviewed today's final rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003.

#### Number of Small Entities

Small entities include small businesses, small organizations and small governmental jurisdictions. For purposes of assessing the impacts of this proposed rule on small entities, a small business, as described in the Small Business Administration's Table of Small Business Size Standards Matched to North American Industry Classification System Codes (August 2008 Edition), has a maximum annual revenue of \$33.5 million and a maximum of 1,500 employees (for some business categories, these number are lower). A small governmental jurisdiction is a government of a city, town, school district or special district with a population of less than 50,000. A small organization is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

This rule sets criteria under which DOE (or agencies to which DOE delegates authority) will authorize prioritization of certain orders or

contracts as well as criteria under which DOE would issue orders allocating resources or production facilities. Because the rule affects commercial transactions, DOE believes that small organizations and small governmental jurisdictions are unlikely to be affected by this rule. To date, DOE has not exercised its existing allocations authority. As such, DOE has no basis on which to estimate the number of small businesses that may be affected by this rule.

#### Impact

The proposed rule has two principle components: prioritization and allocation. Under prioritization, DOE or its Delegate Agency designates certain orders as one of two possible priority levels. Once so designated, such orders are referred to as "rated orders." The recipient of a rated order must give it priority over an unrated order or an order with a lower priority rating. A recipient of a rated order may place orders at the same priority level with suppliers and subcontractors for supplies and services necessary to fulfill the recipient's rated order and the suppliers and subcontractors must treat the request from the rated order recipient as a rated order with the same priority level as the original rated order. The rule does not require recipients to fulfill rated orders if the price or terms of sale are not consistent with the price or terms of sale of similar non-rated orders. The rule provides a defense from any liability for damages or penalties for actions taken in, or inactions required for, compliance with the rule.

Although rated orders could require a firm to fill one order prior to filling another, they would not necessarily require a reduction in the total volume of orders. The regulations would also not require the recipient of a rated order to reduce prices or provide rated orders with more favorable terms than a similar non-rated order. Under these circumstances, the economic effects on the rated order recipient of substituting one order for another are likely to be mutually offsetting, resulting in no net economic impact.

Allocations could be used to control the general distribution of materials or services in the civilian market. Specific allocation actions that DOE might take are as follows:

Set-aside: an official action that requires a person to reserve resource capacity in anticipation of receipt of rated orders.

Allocations directive: an official action that requires a person to take or refrain from taking certain actions in accordance with its provisions. An allocation directive can require a person to stop or reduce production

of an item, prohibit the use of selected items, or divert supply of one type of product to another, or to supply a specific quantity, size, shape, and type of an item within a specific time period.

Allotment: an official action that specifies the maximum quantity of an item authorized for use in a specific program or application.

DOE has not yet taken any actions under its existing allocations authority, and any future allocations actions would be used only in extraordinary circumstances. As required by section 101(b) of the Defense Production Act of 1950, as amended, (50 U.S.C. app. § 2071), hereinafter “DPA,” and by Section 201(d) of Executive Order 12919 of June 3, 1994, as amended, DOE may implement allocations only if the Secretary of Energy makes, and the President approves, a finding “(1) that the material [or service] is a scarce and critical material [or service] essential to the national defense, and (2) that the requirements of the national defense for such material [or service] cannot otherwise be met without creating a significant dislocation of the normal distribution of such material [or service] in the civilian market to such a degree as to create appreciable hardship.” The term “national defense” is defined to mean “programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any related activity. Such term includes emergency preparedness activities conducted pursuant to title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5195 *et seq.*) and critical infrastructure protection and restoration.

Any allocation actions taken by DOE would also have to comply with Section 701(e) of the DPA (50 U.S.C. app. § 2151(e)), which provides that “small business concerns shall be accorded, to the extent practicable, a fair share of the such material [including services] in proportion to the share received by such business concerns under normal conditions, giving such special consideration as may be possible to emerging business concerns.” Such a provision may even provide an economic benefit to small businesses.

#### Conclusion

Although DOE cannot determine precisely the number of small entities that would be affected by this rule, DOE believes that the overall impact on such entities would not be significant. In most instances, rated contracts would be fulfilled in addition to other (unrated) contracts and could actually increase

the total amount of business of the firm that receives a rated contract.

Because allocations can be imposed only after an agency determination confirmed by the President, and because DOE has not yet used its allocations authority that has existed since passage of the Defense Production Act in 1950, one can expect allocations will be ordered only in particular circumstances. However, DOE believes that the requirement for a Presidential determination and the provisions of section 701 of the DPA indicate that any impact on small business will not be significant.

Therefore, for the reasons set forth above, the Assistant General Counsel for Legislation, Regulation, and Energy Efficiency certifies that this proposed rule, if implemented, would not have a significant economic impact on a substantial number of small entities.

#### C. Review Under the Paperwork Reduction Act

This proposed rule contains a collection-of-information requirement subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been submitted to OMB for approval. Public reporting burden for submission of Form DOE-XXX is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Public comment is sought regarding: whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to Dr. Kenneth Friedman (*see ADDRESSES*), and e-mail to [Christine.J.\\_Kymn@omb.eop.gov](mailto:Christine.J._Kymn@omb.eop.gov).

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

#### D. 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) a Statement of Energy Effects for any proposed significant energy action. DOE determined that today’s proposed rule, which sets forth procedures for compliance with the Defense Production Act (separate from the procedures set forth at 10 CFR part 216), is not a “significant energy action” within the meaning of Executive Order 13211. The Administrator of the Office of Information and Regulatory Affairs at OMB also did not designate this action as a significant energy action. Therefore, DOE has tentatively concluded that today’s proposed rule is not a significant energy action within the meaning of Executive Order 13211 and has not prepared a Statement of Energy Effects.

#### E. Review Under Executive Order 13132

DOE reviewed this rule pursuant to Executive Order 13132, “Federalism,” 64 FR 43255 (August 4, 1999), which imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. DOE also reviewed this rule pursuant to DOE’s statement of policy describing the intergovernmental consultation process it will follow in the development of regulations that have federalism implications, 65 FR 13735 (March 14, 2000). DOE determined that the rule would 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.

#### F. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this notice of proposed rulemaking.

#### List of Subjects in 10 CFR Part 217

Administrative practice and procedure, Business and industry, Government contracts, National defense, Reporting and recordkeeping requirements, Strategic and critical materials.

Issued in Washington, DC on June 3, 2010.

**Patricia Hoffman,**

*Principal Deputy Assistant Secretary,  
Electricity Delivery and Energy Reliability.*

For the reasons stated in the preamble, DOE proposes to add a new part 217 to chapter II of title 10 of the Code of Federal Regulations, to read as set forth below:

## **PART 217—ENERGY PRIORITIES AND ALLOCATIONS SYSTEM**

### **Subpart A—General**

Sec.

- 217.1 Purpose of this part.
- 217.2 Priorities and allocations authority.
- 217.3 Program eligibility.

### **Subpart B—Definitions**

- 217.20 Definitions.

### **Subpart C—Placement of Rated Orders**

- 217.30 Delegations of authority.
- 217.31 Priority ratings.
- 217.32 Elements of a rated order.
- 217.33 Acceptance and rejection of rated orders.
- 217.34 Preferential scheduling.
- 217.35 Extension of priority ratings.
- 217.36 Changes or cancellations of priority ratings and rated orders.
- 217.37 Use of rated orders.
- 217.38 Limitations on placing rated orders.

### **Subpart D—Special Priorities Assistance**

- 217.40 General provisions.
- 217.41 Requests for priority rating authority.
- 217.42 Examples of assistance.
- 217.43 Criteria for assistance.
- 217.44 Instances where assistance may not be provided.

### **Subpart E—Allocation Actions**

- 217.50 Policy.
- 217.51 General procedures.
- 217.52 Controlling the general distribution of a material in the civilian market.
- 217.53 Types of allocation orders.
- 217.54 Elements of an allocation order.
- 217.55 Mandatory acceptance of an allocation order.
- 217.56 Changes or cancellations of an allocation order.

### **Subpart F—Official Actions**

- 217.60 General provisions.
- 217.61 Rating Authorizations.
- 217.62 Directives.
- 217.63 Letters and Memoranda of Understanding.

### **Subpart G—Compliance**

- 217.70 General provisions.
- 217.71 Audits and investigations.
- 217.72 Compulsory process.
- 217.73 Notification of failure to comply.
- 217.74 Violations, penalties, and remedies.
- 217.75 Compliance conflicts.

### **Subpart H—Adjustments, Exceptions, and Appeals**

- 217.80 Adjustments or exceptions.
- 217.81 Appeals.

### **Subpart I—Miscellaneous Provisions**

- 217.90 Protection against claims.
- 217.91 Records and reports.
- 217.92 Applicability of this part and official actions.
- 217.93 Communications.
- Appendix I to Part 217—Sample Form DOE—XXX

**Authority:** Defense Production Act of 1950, as amended, 50 U.S.C. App. 2061–2171; E. O. 12919, as amended, (59 FR 29525, June 7, 1994)

### **Subpart A—General**

#### **§ 217.1 Purpose of this part.**

This part provides guidance and procedures for use of the Defense Production Act section 101(a) priorities and allocations authority with respect to all forms of energy necessary or appropriate to promote the national defense. (The guidance and procedures in this part are consistent with the guidance and procedures provided in other regulations that, as a whole, form the Federal Priorities and Allocations System. Guidance and procedures for use of the Defense Production Act priorities and allocations authority with respect to other types of resources are provided for: food resources, food resource facilities, and the domestic distribution of farm equipment and commercial fertilizer in [*CFR citation to be inserted in final rule*]; health resources in [*CFR citation to be inserted in final rule*]; all forms of civil transportation in [*CFR citation to be inserted in final rule*]; water resources in [*CFR citation to be inserted in final rule*]; and all other materials, services, and facilities, including construction materials in the Defense Priorities and Allocations System (DPAS) regulation (15 CFR part 700).) DOE regulations at 10 CFR Part 216 describe and establish the procedures to be used by DOE in considering and making certain findings required by section 101(c)(2)(A) of the Defense Production Act of 1950, as amended.

#### **§ 217.2 Priorities and allocations authority.**

(a) Section 201 of E. O. 12919 [59 FR 29525] delegates the President's authority under section 101 of the Defense Production Act to require acceptance and priority performance of contracts and orders (other than contracts of employment) to promote the national defense over performance of any other contracts or orders, and to allocate materials, services, and facilities as deemed necessary or appropriate to promote the national defense to:

(1) The Secretary of Agriculture with respect to food resources, food resource facilities, and the domestic distribution

of farm equipment and commercial fertilizer;

(2) The Secretary of Energy with respect to all forms of energy;

(3) The Secretary of Health and Human Services with respect to health resources;

(4) The Secretary of Transportation with respect to all forms of civil transportation;

(5) The Secretary of Defense with respect to water resources; and

(6) The Secretary of Commerce for all other materials, services, and facilities, including construction materials.

(b) Section 202 of E.O. 12919 states that the priorities and allocations authority delegated in section 201 of this order may be used only to support programs that have been determined in writing as necessary or appropriate to promote the national defense:

(1) By the Secretary of Defense with respect to military production and construction, military assistance to foreign nations, stockpiling, outer space, and directly related activities;

(2) By the Secretary of Energy with respect to energy production and construction, distribution and use, and directly related activities; and

(3) By the Secretary of Homeland Security with respect to essential civilian needs supporting national defense, including civil defense and continuity of government and directly related activities.

#### **§ 217.3 Program eligibility.**

Certain programs to promote the national defense are eligible for priorities and allocations support. These include programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, deploying and sustaining military forces, homeland security, stockpiling, space, and any directly related activity. Other eligible programs include emergency preparedness activities conducted pursuant to title VI of the Robert T. Stafford Disaster Relief and Emergency Assistance Act [42 U.S.C. 5195 *et seq.*] and critical infrastructure protection and restoration.

### **Subpart B—Definitions**

#### **§ 217.20 Definitions.**

The following definitions pertain to all sections of this part:

*Allocation order* means an official action to control the distribution of materials, services, or facilities for a purpose deemed necessary or appropriate to promote the national defense.

*Allotment* means an official action that specifies the maximum quantity or

use of a material, service, or facility authorized for a specific use to promote the national defense.

*Approved program* means a program determined by the Secretary of Defense, the Secretary of Energy, or the Secretary of Homeland Security to be necessary or appropriate to promote the national defense, in accordance with section 202 of E.O. 12919.

*Civil transportation* includes movement of persons and property by all modes of transportation in interstate, intrastate, or foreign commerce within the United States, its territories and possessions, and the District of Columbia, and, without limitation, related public storage and warehousing, ports, services, equipment and facilities, such as transportation carrier shop and repair facilities. However, "civil transportation" shall not include transportation owned or controlled by the Department of Defense, use of petroleum and gas pipelines, and coal slurry pipelines used only to supply energy production facilities directly. As applied herein, "civil transportation" shall include direction, control, and coordination of civil transportation capacity regardless of ownership.

*Construction* means the erection, addition, extension, or alteration of any building, structure, or project, using materials or products which are to be an integral and permanent part of the building, structure, or project. Construction does not include maintenance and repair.

*Critical infrastructure* means any systems and assets, whether physical or cyber-based, so vital to the United States that the degradation or destruction of such systems and assets would have a debilitating impact on national security, including, but not limited to, national economic security and national public health or safety.

*Defense Production Act* means the Defense Production Act of 1950, as amended (50 U.S.C. App. 2061 *et seq.*).

*Delegate Agency* means a Federal government agency authorized by delegation from the Department of Energy to place priority ratings on contracts or orders needed to support approved programs.

*Directive* means an official action that requires a person to take or refrain from taking certain actions in accordance with its provisions.

*Emergency preparedness* means all those activities and measures designed or undertaken to prepare for or minimize the effects of a hazard upon the civilian population, to deal with the immediate emergency conditions which would be created by the hazard, and to effectuate emergency repairs to, or the

emergency restoration of, vital utilities and facilities destroyed or damaged by the hazard. Such term includes the following:

(1) Measures to be undertaken in preparation for anticipated hazards (including the establishment of appropriate organizations, operational plans, and supporting agreements, the recruitment and training of personnel, the conduct of research, the procurement and stockpiling of necessary materials and supplies, the provision of suitable warning systems, the construction or preparation of shelters, shelter areas, and control centers, and, when appropriate, the nonmilitary evacuation of the civilian population).

(2) Measures to be undertaken during a hazard (including the enforcement of passive defense regulations prescribed by duly established military or civil authorities, the evacuation of personnel to shelter areas, the control of traffic and panic, and the control and use of lighting and civil communications).

(3) Measures to be undertaken following a hazard (including activities for fire fighting, rescue, emergency medical, health and sanitation services, monitoring for specific dangers of special weapons, unexploded bomb reconnaissance, essential debris clearance, emergency welfare measures, and immediately essential emergency repair or restoration of damaged vital facilities).

*Energy* means all forms of energy including petroleum, gas (both natural and manufactured), electricity, solid fuels (including all forms of coal, coke, coal chemicals, coal liquification, and coal gasification), and atomic energy, and the production, conservation, use, control, and distribution (including pipelines) of all of these forms of energy.

*Facilities* includes all types of buildings, structures, or other improvements to real property (but excluding farms, churches or other places of worship, and private dwelling houses), and services relating to the use of any such building, structure, or other improvement.

*Farm equipment* means equipment, machinery, and repair parts manufactured for use on farms in connection with the production or preparation for market use of food resources.

*Fertilizer* means any product or combination of products that contain one or more of the elements—nitrogen, phosphorus, and potassium—for use as a plant nutrient.

*Food resources* means all commodities and products, simple,

mixed, or compound, or complements to such commodities or products, that are capable of being ingested by either human beings or animals, irrespective of other uses to which such commodities or products may be put, at all stages of processing from the raw commodity to the products thereof in vendible form for human or animal consumption.

"Food resources" also means all starches, sugars, vegetable and animal or marine fats and oils, cotton, tobacco, wool, mohair, hemp, flax fiber, and naval stores, but does not mean any such material after it loses its identity as an agricultural commodity or agricultural product.

*Food resource facilities* means plants, machinery, vehicles (including on-farm), and other facilities required for the production, processing, distribution, and storage (including cold storage) of food resources, livestock and poultry feed and seed, and for the domestic distribution of farm equipment and fertilizer (excluding transportation thereof).

*Hazard* means an emergency or disaster resulting from:

(1) A natural disaster; or

(2) An accidental or human-caused event.

*Health resources* means materials, facilities, health supplies, and equipment (including pharmaceutical, blood collecting and dispensing supplies, biological, surgical textiles, and emergency surgical instruments and supplies) required to prevent the impairment of, improve, or restore the physical and mental health conditions of the population.

*Homeland security* includes efforts—

(1) To prevent terrorist attacks within the United States;

(2) To reduce the vulnerability of the United States to terrorism;

(3) To minimize damage from a terrorist attack in the United States; and

(4) To recover from a terrorist attack in the United States.

*Industrial resources* means all materials, services, and facilities, including construction materials, but not including: food resources, food resource facilities, and the domestic distribution of farm equipment and commercial fertilizer; all forms of energy; health resources; all forms of civil transportation; and water resources.

*Item* means any raw, in process, or manufactured material, article, commodity, supply, equipment, component, accessory, part, assembly, or product of any kind, technical information, process, or service.

*Maintenance and repair and operating supplies or MRO*—



(1) "Maintenance" is the upkeep necessary to continue any plant, facility, or equipment in working condition.

(2) "Repair" is the restoration of any plant, facility, or equipment to working condition when it has been rendered unsafe or unfit for service by wear and tear, damage, or failure of parts.

(3) "Operating supplies" are any resources carried as operating supplies according to a person's established accounting practice. Operating supplies may include hand tools and expendable tools, jigs, dies, fixtures used on production equipment, lubricants, cleaners, chemicals and other expendable items.

(4) MRO does not include items produced or obtained for sale to other persons or for installation upon or attachment to the property of another person, or items required for the production of such items; items needed for the replacement of any plant, facility, or equipment; or items for the improvement of any plant, facility, or equipment by replacing items which are still in working condition with items of a new or different kind, quality, or design.

*Materials* includes—

(1) Any raw materials (including minerals, metals, and advanced processed materials), commodities, articles, components (including critical components), products, and items of supply; and

(2) Any technical information or services ancillary to the use of any such materials, commodities, articles, components, products, or items.

(3) Natural resources such as oil and gas.

*National defense* means programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity. Such term includes emergency preparedness activities conducted pursuant to title VI of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5195, *et seq.*) and critical infrastructure protection and restoration.

*Official action* means an action taken by the Department of Energy or another resource agency under the authority of the Defense Production Act, E.O. 12919, and this part or another regulation under the Federal Priorities and Allocations System. Such actions include the issuance of Rating Authorizations, Directives, Set Asides, Allotments, Letters of Understanding, Memoranda of Understanding, Demands for Information, Inspection

Authorizations, and Administrative Subpoenas.

*Person* includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative thereof, or any State or local government or agency thereof.

*Rated order* means a prime contract, a subcontract, or a purchase order in support of an approved program issued in accordance with the provisions of this part.

*Resource agency* means any agency delegated priorities and allocations authority as specified in § 217.2.

*Secretary* means the Secretary of Energy.

*Services* includes any effort that is needed for or incidental to—

(1) The development, production, processing, distribution, delivery, or use of an industrial resource or a critical technology item;

(2) The construction of facilities;

(3) The movement of individuals and property by all modes of civil transportation; or

(4) Other national defense programs and activities.

*Set-aside* means an official action that requires a person to reserve materials, services, or facilities capacity in anticipation of the receipt of rated orders.

*Stafford Act* means title VI (Emergency Preparedness) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (42 U.S.C. 5195–5197g).

*Water resources* means all usable water, from all sources, within the jurisdiction of the United States, which can be managed, controlled, and allocated to meet emergency requirements.

## Subpart C—Placement of Rated Orders

### § 217.30 Delegations of authority.

(a) The priorities and allocations authorities of the President under Title I of the Defense Production Act with respect to all forms of energy have been delegated to the Secretary of Energy under E.O. 12919 of June 3, 1994 (59 FR 29525).

(b) The Department of Commerce has delegated authority to the Department of Energy to provide for extension of priority ratings for "industrial resources," as provided in § 261.35 of this part, to support rated orders for all forms of energy.

### § 217.31 Priority ratings.

(a) *Levels of priority.*

(1) There are two levels of priority established by Federal Priorities and

Allocations System regulations, identified by the rating symbols "DO" and "DX".

(2) All DO-rated orders have equal priority with each other and take precedence over unrated orders. All DX-rated orders have equal priority with each other and take precedence over DO-rated orders and unrated orders.

(For resolution of conflicts among rated orders of equal priority, see § 217.34(c).)

(3) In addition, a Directive regarding priority treatment for a given item issued by the Department of Energy for that item takes precedence over any DX-rated order, DO-rated order, or unrated order, as stipulated in the Directive. (For a full discussion of Directives, see § 217.62.)

(b) *Program identification symbols.*

Program identification symbols indicate which approved program is being supported by a rated order. The list of currently approved programs and their identification symbols are listed in Schedule 1, set forth as an Appendix to 15 CFR Part 700. For example, DO-E-F3 identifies a domestic energy construction program. Additional programs may be approved under the procedures of E.O. 12919 at any time. Program identification symbols do not connote any priority.

(c) *Priority ratings.* A priority rating consists of the rating symbol—DO or DX—and the program identification symbol, such as DO-E or DX-E. Thus, a contract for a domestic energy construction program will contain a DO-E-F3 or DX-E-F3 priority rating.

### § 217.32 Elements of a rated order.

Each rated order must include:

(a) The appropriate priority rating (e.g. DO-E or DX-E)

(b) A required delivery date or dates. The words "immediately" or "as soon as possible" do not constitute a delivery date. A "requirements contract", "basic ordering agreement", "prime vendor contract", or similar procurement document bearing a priority rating may contain no specific delivery date or dates and may provide for the furnishing of items or service from time-to-time or within a stated period against specific purchase orders, such as "calls", "requisitions", and "delivery orders". These purchase orders must specify a required delivery date or dates and are to be considered as rated as of the date of their receipt by the supplier and not as of the date of the original procurement document;

(c) The written signature on a manually placed order, or the digital signature or name on an electronically placed order, of an individual authorized to sign rated orders for the



person placing the order. The signature or use of the name certifies that the rated order is authorized under this part and that the requirements of this part are being followed; and

(d) (1) A statement that reads in substance:

This is a rated order certified for national defense use, and you are required to follow all the provisions of the Energy Priorities and Allocations System regulation at 10 CFR part 217.

(2) If the rated order is placed in support of emergency preparedness requirements and expedited action is necessary and appropriate to meet these requirements, the following sentences should be added following the statement set forth in paragraph (d)(1) of this section:

This rated order is placed for the purpose of emergency preparedness. It must be accepted or rejected within 2 days after receipt of the order if (1) The order is issued in response to a hazard that has occurred; or (2) If the order is issued to prepare for an imminent hazard, as specified in EPAS Section 217.33(e), 10 CFR 217.33(e).

#### **§ 217.33 Acceptance and rejection of rated orders.**

(a) *Mandatory acceptance.* (1) Except as otherwise specified in this section, a person shall accept every rated order received and must fill such orders regardless of any other rated or unrated orders that have been accepted.

(2) A person shall not discriminate against rated orders in any manner such as by charging higher prices or by imposing different terms and conditions than for comparable unrated orders.

(b) *Mandatory rejection.* Unless otherwise directed by the Department of Energy for a rated order involving all forms of energy:

(1) A person shall not accept a rated order for delivery on a specific date if unable to fill the order by that date. However, the person must inform the customer of the earliest date on which delivery can be made and offer to accept the order on the basis of that date. Scheduling conflicts with previously accepted lower rated or unrated orders are not sufficient reason for rejection under this section.

(2) A person shall not accept a DO-rated order for delivery on a date which would interfere with delivery of any previously accepted DO- or DX-rated orders. However, the person must offer to accept the order based on the earliest delivery date otherwise possible.

(3) A person shall not accept a DX-rated order for delivery on a date which would interfere with delivery of any previously accepted DX-rated orders, but must offer to accept the order based

on the earliest delivery date otherwise possible.

(4) If a person is unable to fill all of the rated orders of equal priority status received on the same day, the person must accept, based upon the earliest delivery dates, only those orders which can be filled, and reject the other orders. For example, a person must accept order A requiring delivery on December 15 before accepting order B requiring delivery on December 31. However, the person must offer to accept the rejected orders based on the earliest delivery dates otherwise possible.

(c) *Optional rejection.* Unless otherwise directed by the Department of Energy for a rated order involving all forms of energy, rated orders may be rejected in any of the following cases as long as a supplier does not discriminate among customers:

(1) If the person placing the order is unwilling or unable to meet regularly established terms of sale or payment;

(2) If the order is for an item not supplied or for a service not capable of being performed;

(3) If the order is for an item or service produced, acquired, or provided only for the supplier's own use for which no orders have been filled for two years prior to the date of receipt of the rated order. If, however, a supplier has sold some of these items or provided similar services, the supplier is obligated to accept rated orders up to that quantity or portion of production or service, whichever is greater, sold or provided within the past two years;

(4) If the person placing the rated order, other than the U.S. Government, makes the item or performs the service being ordered;

(5) If acceptance of a rated order or performance against a rated order would violate any other regulation, official action, or order of the Department of Energy, issued under the authority of the Defense Production Act or another relevant statute.

(d) *Customer notification requirements.* (1) Except as provided in this paragraph, a person must accept or reject a rated order in writing or electronically within fifteen (15) working days after receipt of a DO-rated order and within ten (10) working days after receipt of a DX-rated order. If the order is rejected, the person must give reasons in writing or electronically for the rejection.

(2) If a person has accepted a rated order and subsequently finds that shipment or performance will be delayed, the person must notify the customer immediately, give the reasons for the delay, and advise of a new shipment or performance date. If

notification is given verbally, written or electronic confirmation must be provided within five (5) working days.

(e) *Exception for emergency preparedness conditions.* If the rated order is placed for the purpose of emergency preparedness, a person must accept or reject a rated order and transmit the acceptance or rejection in writing or in an electronic format within 2 days after receipt of the order if:

(1) The order is issued in response to a hazard that has occurred; or

(2) The order is issued to prepare for an imminent hazard.

#### **§ 217.34 Preferential scheduling.**

(a) A person must schedule operations, including the acquisition of all needed production items or services, in a timely manner to satisfy the delivery requirements of each rated order. Modifying production or delivery schedules is necessary only when required delivery dates for rated orders cannot otherwise be met.

(b) DO-rated orders must be given production preference over unrated orders, if necessary to meet required delivery dates, even if this requires the diversion of items being processed or ready for delivery or services being performed against unrated orders. Similarly, DX-rated orders must be given preference over DO-rated orders and unrated orders. (Examples: If a person receives a DO-rated order with a delivery date of June 3 and if meeting that date would mean delaying production or delivery of an item for an unrated order, the unrated order must be delayed. If a DX-rated order is received calling for delivery on July 15 and a person has a DO-rated order requiring delivery on June 2 and operations can be scheduled to meet both deliveries, there is no need to alter production schedules to give any additional preference to the DX-rated order.)

(c) *Conflicting rated orders.*

(1) If a person finds that delivery or performance against any accepted rated orders conflicts with the delivery or performance against other accepted rated orders of equal priority status, the person shall give precedence to the conflicting orders in the sequence in which they are to be delivered or performed (not to the receipt dates). If the conflicting orders are scheduled to be delivered or performed on the same day, the person shall give precedence to those orders that have the earliest receipt dates.

(2) If a person is unable to resolve rated order delivery or performance conflicts under this section, the person should promptly seek special priorities

assistance as provided in §§ 217.40 through 217.44. If the person's customer objects to the rescheduling of delivery or performance of a rated order, the customer should promptly seek special priorities assistance as provided in §§ 217.40 through 217.44. For any rated order against which delivery or performance will be delayed, the person must notify the customer as provided in § 217.33.

(d) If a person is unable to purchase needed production items in time to fill a rated order by its required delivery date, the person must fill the rated order by using inventoried production items. A person who uses inventoried items to fill a rated order may replace those items with the use of a rated order as provided in § 217.37(b).

#### **§ 217.35 Extension of priority ratings.**

(a) A person must use rated orders with suppliers to obtain items or services needed to fill a rated order. The person must use the priority rating indicated on the customer's rated order, except as otherwise provided in this part or as directed by the Department of Energy. For example, if a person is in receipt of a DO-E-F1 rated order for an electric power sub-station, and needs to purchase a transformer for its manufacture, that person must use a DO-E-F1 rated order to obtain the needed transformer.

(b) The priority rating must be included on each successive order placed to obtain items or services needed to fill a customer's rated order. This continues from contractor to subcontractor to supplier throughout the entire procurement chain.

#### **§ 217.36 Changes or cancellations of priority ratings and rated orders.**

(a) The priority rating on a rated order may be changed or canceled by:

(1) An official action of the Department of Energy; or

(2) Written notification from the person who placed the rated order.

(b) If an unrated order is amended so as to make it a rated order, or a DO rating is changed to a DX rating, the supplier must give the appropriate preferential treatment to the order as of the date the change is received by the supplier.

(c) An amendment to a rated order that significantly alters a supplier's original production or delivery schedule shall constitute a new rated order as of the date of its receipt. The supplier must accept or reject the amended order according to the provisions of § 217.33.

(d) The following amendments do not constitute a new rated order: a change in shipping destination; a reduction in

the total amount of the order; an increase in the total amount of the order which has negligible impact upon deliveries; a minor variation in size or design; or a change which is agreed upon between the supplier and the customer.

(e) If a person no longer needs items or services to fill a rated order, any rated orders placed with suppliers for the items or services, or the priority rating on those orders, must be canceled.

(f) When a priority rating is added to an unrated order, or is changed or canceled, all suppliers must be promptly notified in writing.

#### **§ 217.37 Use of rated orders.**

(a) A person must use rated orders to obtain:

(1) Items which will be physically incorporated into other items to fill rated orders, including that portion of such items normally consumed or converted into scrap or by-products in the course of processing;

(2) Containers or other packaging materials required to make delivery of the finished items against rated orders;

(3) Services, other than contracts of employment, needed to fill rated orders; and

(4) MRO needed to produce the finished items to fill rated orders.

(b) A person may use a rated order to replace inventoried items (including finished items) if such items were used to fill rated orders, as follows:

(1) The order must be placed within 90 days of the date of use of the inventory.

(2) A DO rating and the program identification symbol indicated on the customer's rated order must be used on the order. A DX rating may not be used even if the inventory was used to fill a DX-rated order.

(3) If the priority ratings on rated orders from one customer or several customers contain different program identification symbols, the rated orders may be combined. In this case, the program identification symbol "H1" must be used (i.e., DO-H1).

(c) A person may combine DX- and DO-rated orders from one customer or several customers if the items or services covered by each level of priority are identified separately and clearly. If different program identification symbols are indicated on those rated orders of equal priority, the person must use the program identification symbol "H1" (i.e., DO-H1 or DX-H1).

(d) *Combining rated and unrated orders.*

(1) A person may combine rated and unrated order quantities on one purchase order provided that:

(i) The rated quantities are separately and clearly identified; and

(ii) The four elements of a rated order, as required by § 217.32, are included on the order with the statement required in § 217.32(d) modified to read in substance:

This purchase order contains rated order quantities certified for national defense use, and you are required to follow all applicable provisions of the Energy Priorities and Allocations System regulations at 10 CFR part 217 only as it pertains to the rated quantities.

(2) A supplier must accept or reject the rated portion of the purchase order as provided in § 217.33 and give preferential treatment only to the rated quantities as required by this part. This part may not be used to require preferential treatment for the unrated portion of the order.

(3) Any supplier who believes that rated and unrated orders are being combined in a manner contrary to the intent of this part or in a fashion that causes undue or exceptional hardship may submit a request for adjustment or exception under § 217.80.

(e) A person may place a rated order for the minimum commercially procurable quantity even if the quantity needed to fill a rated order is less than that minimum. However, a person must combine rated orders as provided in paragraph (c) of this section, if possible, to obtain minimum procurable quantities.

(f) A person is not required to place a priority rating on an order for less than \$50,000, or one-half of the Simplified Acquisition Threshold (as established in the Federal Acquisition Regulation (FAR) (see FAR section 2.101) or in other authorized acquisition regulatory or management systems) whichever amount is greater, provided that delivery can be obtained in a timely fashion without the use of the priority rating.

#### **§ 217.38 Limitations on placing rated orders.**

(a) *General limitations.*

(1) A person may not place a DO- or DX-rated order unless entitled to do so under this part.

(2) Rated orders may not be used to obtain:

(i) Delivery on a date earlier than needed;

(ii) A greater quantity of the item or services than needed, except to obtain a minimum procurable quantity. Separate rated orders may not be placed solely for the purpose of obtaining minimum procurable quantities on each order;

(iii) Items or services in advance of the receipt of a rated order, except as

specifically authorized by the Department of Energy (see § 217.41(c) for information on obtaining authorization for a priority rating in advance of a rated order);

(iv) Items that are not needed to fill a rated order, except as specifically authorized by the Department of Energy, or as otherwise permitted by this part; or

(v) Any of the following items unless specific priority rating authority has been obtained from the Department of Energy, a Delegate Agency, or the Department of Commerce, as appropriate:

(A) Items for plant improvement, expansion, or construction, unless they will be physically incorporated into a construction project covered by a rated order; and

(B) Production or construction equipment or items to be used for the manufacture of production equipment. [For information on requesting priority rating authority, see § 217.21.]

(vi) Any items related to the development of chemical or biological warfare capabilities or the production of chemical or biological weapons, unless such development or production has been authorized by the President or the Secretary of Defense.

(b) *Jurisdictional limitations.* Unless authorized by the resource agency with jurisdiction, the provisions of this part are not applicable to the following resources:

(1) Food resources, food resource facilities, and the domestic distribution of farm equipment and commercial fertilizer (Resource agency with jurisdiction—Department of Agriculture);

(2) Health resources (Resource agency with jurisdiction—Department of Health and Human Services);

(3) All forms of civil transportation (Resource agency with jurisdiction—Department of Transportation);

(4) Water resources (Resource agency with jurisdiction—Department of Defense/U.S. Army Corps of Engineers); and

(5) Communications services (Resource agency with jurisdiction—National Communications System under E. O. 12472 of April 3, 1984).

#### **Subpart D—Special Priorities Assistance**

##### **§ 217.40 General provisions.**

(a) The six regulations that comprise the Federal Priorities and Allocations System are designed to be largely self-executing. However, from time-to-time production or delivery problems will arise. In this event, a person should

immediately contact the Office of Infrastructure Security and Energy Restoration, for guidance or assistance (Contact the Senior Policy Advisor for the Office of Electricity Delivery and Energy Reliability, as listed in § 217.93). If the problem(s) cannot otherwise be resolved, special priorities assistance should be sought from the Department of Energy through the Office of Infrastructure Security and Energy Restoration (Contact the Senior Policy Advisor for the Office of Electricity Delivery and Energy Reliability, as listed in § 217.93). If the Department of Energy is unable to resolve the problem or to authorize the use of a priority rating and believes additional assistance is warranted, the Department of Energy may forward the request to another agency with resource jurisdiction, as appropriate, for action. Special priorities assistance is provided to alleviate problems that do arise.

(b) Special priorities assistance is available for any reason consistent with this part. Generally, special priorities assistance is provided to expedite deliveries, resolve delivery conflicts, place rated orders, locate suppliers, or to verify information supplied by customers and vendors. Special priorities assistance may also be used to request rating authority for items that are not normally eligible for priority treatment.

(c) A request for special priorities assistance or priority rating authority must be submitted on Form DOE-XXX [OMB control number to be inserted in the final rule] to the Senior Policy Advisor for the Office of Electricity Delivery and Energy Reliability, as listed in § 217.93. Form DOE-999 may be obtained from the Department of Energy or a Delegate Agency. A sample Form DOE-999 is attached at Appendix I to this part.

##### **§ 217.41 Requests for priority rating authority.**

(a) If a rated order is likely to be delayed because a person is unable to obtain items or services not normally rated under this part, the person may request the authority to use a priority rating in ordering the needed items or services.

(b) *Rating authority for production or construction equipment.*

(1) A request for priority rating authority for production or construction equipment must be submitted to the U.S. Department of Commerce on Form BIS-999.

(2) When the use of a priority rating is authorized for the procurement of production or construction equipment, a rated order may be used either to

purchase or to lease such equipment. However, in the latter case, the equipment may be leased only from a person engaged in the business of leasing such equipment or from a person willing to lease rather than sell.

(c) *Rating authority in advance of a rated prime contract.* (1) In certain cases and upon specific request, the Department of Energy, in order to promote the national defense, may authorize a person to place a priority rating on an order to a supplier in advance of the issuance of a rated prime contract. In these instances, the person requesting advance rating authority must obtain sponsorship of the request from the Department of Energy or the appropriate Delegate Agency. The person shall also assume any business risk associated with the placing of rated orders in the event the rated prime contract is not issued.

(2) The person must state the following in the request:

It is understood that the authorization of a priority rating in advance of our receiving a rated prime contract from the Department of Energy and our use of that priority rating with our suppliers in no way commits the Department of Energy or any other government agency to enter into a contract or order or to expend funds. Further, we understand that the Federal Government shall not be liable for any cancellation charges, termination costs, or other damages that may accrue if a rated prime contract is not eventually placed and, as a result, we must subsequently cancel orders placed with the use of the priority rating authorized as a result of this request.

(3) In reviewing requests for rating authority in advance of a rated prime contract, the Department of Energy will consider, among other things, the following criteria:

(i) The probability that the prime contract will be awarded;

(ii) The impact of the resulting rated orders on suppliers and on other authorized programs;

(iii) Whether the contractor is the sole source;

(iv) Whether the item being produced has a long lead time;

(v) The time period for which the rating is being requested.

(4) The Department of Energy may require periodic reports on the use of the rating authority granted under paragraph (c) of this section.

(5) If a rated prime contract is not issued, the person shall promptly notify all suppliers who have received rated orders pursuant to the advanced rating authority that the priority rating on those orders is cancelled.

**§ 217.42 Examples of assistance.**

(a) While special priorities assistance may be provided for any reason in support of this part, it is usually provided in situations where:

(1) A person is experiencing difficulty in obtaining delivery against a rated order by the required delivery date; or

(2) A person cannot locate a supplier for an item or service needed to fill a rated order.

(b) Other examples of special priorities assistance include:

(1) Ensuring that rated orders receive preferential treatment by suppliers;

(2) Resolving production or delivery conflicts between various rated orders;

(3) Assisting in placing rated orders with suppliers;

(4) Verifying the urgency of rated orders; and

(5) Determining the validity of rated orders.

**§ 217.43 Criteria for assistance.**

Requests for special priorities assistance should be timely, *i.e.*, the request has been submitted promptly and enough time exists for the Department of Energy, the Delegate Agency, or the Department of Commerce for industrial resources to effect a meaningful resolution to the problem, and must establish that:

(a) There is an urgent need for the item; and

(b) The applicant has made a reasonable effort to resolve the problem.

**§ 217.44 Instances where assistance may not be provided.**

Special priorities assistance is provided at the discretion of the Department of Energy, the Delegate Agencies, or the Department of Commerce when it is determined that such assistance is warranted to meet the objectives of this part. Examples where assistance may not be provided include situations when a person is attempting to:

(a) Secure a price advantage;

(b) Obtain delivery prior to the time required to fill a rated order;

(c) Gain competitive advantage;

(d) Disrupt an industry apportionment program in a manner designed to provide a person with an unwarranted share of scarce items; or

(e) Overcome a supplier's regularly established terms of sale or conditions of doing business.

**Subpart E—Allocation Actions****§ 217.50 Policy.**

(a) It is the policy of the Federal Government that the allocations authority under title I of the Defense Production Act may:

(1) Only be used when there is insufficient supply of a material, service, or facility to satisfy national defense supply requirements through the use of the priorities authority or when the use of the priorities authority would cause a severe and prolonged disruption in the supply of materials, services, or facilities available to support normal U.S. economic activities; and

(2) Not be used to ration materials or services at the retail level.

(b) Allocation orders, when used, will be distributed equitably among the suppliers of the materials, services, or facilities being allocated and not require any person to relinquish a disproportionate share of the civilian market.

**§ 217.51 General procedures.**

When the Department of Energy plans to execute its allocations authority to address a supply problem within its resource jurisdiction, the Department shall develop a plan that includes the following information:

(a) A copy of the written determination made, in accordance with section 202 of E. O. 12919, that the program or programs that would be supported by the allocation action are necessary or appropriate to promote the national defense;

(b) A detailed description of the situation to include any unusual events or circumstances that have created the requirement for an allocation action;

(c) A statement of the specific objective(s) of the allocation action;

(d) A list of the materials, services, or facilities to be allocated;

(e) A list of the sources of the materials, services, or facilities that will be subject to the allocation action;

(f) A detailed description of the provisions that will be included in the allocation orders, including the type(s) of allocation orders, the percentages or quantity of capacity or output to be allocated for each purpose, and the duration of the allocation action (*i.e.*, anticipated start and end dates);

(g) An evaluation of the impact of the proposed allocation action on the civilian market; and

(h) Proposed actions, if any, to mitigate disruptions to civilian market operations.

**§ 217.52 Controlling the general distribution of a material in the civilian market.**

No allocation action by the Department of Energy may be used to control the general distribution of a material in the civilian market, unless the Secretary of the Department of Energy has:

(a) Made a written finding that:

(1) Such material is a scarce and critical material essential to the national defense, and

(2) The requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship;

(b) Submitted the finding for the President's approval through the Assistant to the President for National Security Affairs; and

(c) The President has approved the finding.

**§ 217.53 Types of allocation orders.**

There are three types of allocation orders available for communicating allocation actions. These are:

(a) *Set-aside*: an official action that requires a person to reserve materials, services, or facilities capacity in anticipation of the receipt of rated orders;

(b) *Directive*: an official action that requires a person to take or refrain from taking certain actions in accordance with its provisions. For example, a directive can require a person to: Stop or reduce production of an item; prohibit the use of selected materials, services, or facilities; or divert the use of materials, services, or facilities from one purpose to another; and

(c) *Allotment*: an official action that specifies the maximum quantity of a material, service, or facility authorized for a specific use.

**§ 217.54 Elements of an allocation order.**

Each allocation order must include:

(a) A detailed description of the required allocation action(s);

(b) Specific start and end calendar dates for each required allocation action;

(c) The written signature on a manually placed order, or the digital signature or name on an electronically placed order, of the Secretary of Energy. The signature or use of the name certifies that the order is authorized under this part and that the requirements of this part are being followed;

(d) A statement that reads in substance: "This is an allocation order certified for national defense use. [Insert the legal name of the person receiving the order] is required to comply with this order, in accordance with the provisions of the Energy Priorities and Allocations System regulation (10 CFR Part 217), which is part of the Federal Priorities and Allocations System"; and

(e) A current copy of the Energy Priorities and Allocations System regulation (10 CFR part 217).

**§ 217.55 Mandatory acceptance of an allocation order.**

(a) Except as otherwise specified in this section, a person shall accept and comply with every allocation order received.

(b) A person shall not discriminate against an allocation order in any manner such as by charging higher prices for materials, services, or facilities covered by the order or by imposing terms and conditions for contracts and orders involving allocated materials, services, or facilities that differ from the person's terms and conditions for contracts and orders for the materials, services, or facilities prior to receiving the allocation order.

(c) If a person is unable to comply fully with the required action(s) specified in an allocation order, the person must notify the Department of Energy immediately, explain the extent to which compliance is possible, and give the reasons why full compliance is not possible. If notification is given verbally, written or electronic confirmation must be provided within five (5) working days. Such notification does not release the person from complying with the order to the fullest extent possible, until the person is notified by the Department of Energy that the order has been changed or cancelled.

**§ 217.56 Changes or cancellations of an allocation order.**

An allocation order may be changed or canceled by an official action of the Department of Energy.

**Subpart F—Official Actions**

**§ 217.60 General provisions.**

(a) The Department of Energy may take specific official actions to implement the provisions of this part.

(b) These official actions include Rating Authorizations, Directives, and Memoranda of Understanding.

**§ 217.61 Rating Authorizations.**

(a) A Rating Authorization is an official action granting specific priority rating authority that:

(1) Permits a person to place a priority rating on an order for an item or service not normally ratable under this part; or

(2) Authorizes a person to modify a priority rating on a specific order or series of contracts or orders.

(b) To request priority rating authority, see § 217.41.

**§ 217.62 Directives.**

(a) A Directive is an official action that requires a person to take or refrain from taking certain actions in accordance with its provisions.

(b) A person must comply with each Directive issued. However, a person may not use or extend a Directive to obtain any items from a supplier, unless expressly authorized to do so in the Directive.

(c) A Priorities Directive takes precedence over all DX-rated orders, DO-rated orders, and unrated orders previously or subsequently received, unless a contrary instruction appears in the Directive.

(d) An Allocations Directive takes precedence over all Priorities Directives, DX-rated orders, DO-rated orders, and unrated orders previously or subsequently received, unless a contrary instruction appears in the Directive.

**§ 217.63 Letters and Memoranda of Understanding.**

(a) A Letter or Memorandum of Understanding is an official action that may be issued in resolving special priorities assistance cases to reflect an agreement reached by all parties (the Department of Energy, the Department of Commerce (if applicable), a Delegate Agency (if applicable), the supplier, and the customer).

(b) A Letter or Memorandum of Understanding is not used to alter scheduling between rated orders, to authorize the use of priority ratings, to impose restrictions under this part. Rather, Letters or Memoranda of Understanding are used to confirm production or shipping schedules that do not require modifications to other rated orders.

**Subpart G—Compliance**

**§ 217.70 General provisions.**

(a) The Department of Energy may take specific official actions for any reason necessary or appropriate to the enforcement or the administration of the Defense Production Act and other applicable statutes, this part, or an official action. Such actions include Administrative Subpoenas, Demands for Information, and Inspection Authorizations.

(b) Any person who places or receives a rated order or an allocation order must comply with the provisions of this part.

(c) Willful violation of the provisions of title I or section 705 of the Defense Production Act and other applicable statutes, this part, or an official action of the Department of Energy is a criminal act, punishable as provided in the Defense Production Act and other

applicable statutes, and as set forth in § 217.74 of this part.

**§ 217.71 Audits and investigations.**

(a) Audits and investigations are official examinations of books, records, documents, other writings and information to ensure that the provisions of the Defense Production Act and other applicable statutes, this part, and official actions have been properly followed. An audit or investigation may also include interviews and a systems evaluation to detect problems or failures in the implementation of this part.

(b) When undertaking an audit or investigation, the Department of Energy shall:

(1) Define the scope and purpose in the official action given to the person under investigation, and

(2) Have ascertained that the information sought or other adequate and authoritative data are not available from any Federal or other responsible agency.

(c) In administering this part, the Department of Energy may issue the following documents that constitute official actions:

(1) *Administrative Subpoenas.* An Administrative Subpoena requires a person to appear as a witness before an official designated by the Department of Energy to testify under oath on matters of which that person has knowledge relating to the enforcement or the administration of the Defense Production Act and other applicable statutes, this part, or official actions. An Administrative Subpoena may also require the production of books, papers, records, documents and physical objects or property.

(2) *Demands for Information.* A Demand for Information requires a person to furnish to a duly authorized representative of the Department of Energy any information necessary or appropriate to the enforcement or the administration of the Defense Production Act and other applicable statutes, this part, or official actions.

(3) *Inspection Authorizations.* An Inspection Authorization requires a person to permit a duly authorized representative of the Department of Energy to interview the person's employees or agents, to inspect books, records, documents, other writings, and information, including electronically-stored information, in the person's possession or control at the place where that person usually keeps them or otherwise, and to inspect a person's property when such interviews and inspections are necessary or appropriate to the enforcement or the administration

of the Defense Production Act and related statutes, this part, or official actions.

(d) The production of books, records, documents, other writings, and information will not be required at any place other than where they are usually kept if, prior to the return date specified in the Administrative Subpoena or Demand for Information, a duly authorized official of the Department of Energy is furnished with copies of such material that are certified under oath to be true copies. As an alternative, a person may enter into a stipulation with a duly authorized official of Department of Energy as to the content of the material.

(e) An Administrative Subpoena, Demand for Information, or Inspection Authorization, shall include the name, title, or official position of the person to be served, the evidence sought to be adduced, and its general relevance to the scope and purpose of the audit, investigation, or other inquiry. If employees or agents are to be interviewed; if books, records, documents, other writings, or information are to be produced; or if property is to be inspected; the Administrative Subpoena, Demand for Information, or Inspection Authorization will describe them with particularity.

(f) Service of documents shall be made in the following manner:

(1) Service of a Demand for Information or Inspection Authorization shall be made personally, or by Certified Mail-Return Receipt Requested at the person's last known address. Service of an Administrative Subpoena shall be made personally. Personal service may also be made by leaving a copy of the document with someone at least 18 years old at the person's last known dwelling or place of business.

(2) Service upon other than an individual may be made by serving a partner, corporate officer, or a managing or general agent authorized by appointment or by law to accept service of process. If an agent is served, a copy of the document shall be mailed to the person named in the document.

(3) Any individual 18 years of age or over may serve an Administrative Subpoena, Demand for Information, or Inspection Authorization. When personal service is made, the individual making the service shall prepare an affidavit as to the manner in which service was made and the identity of the person served, and return the affidavit, and in the case of subpoenas, the original document, to the issuing officer. In case of failure to make service, the

reasons for the failure shall be stated on the original document.

#### **§ 217.72 Compulsory process.**

(a) If a person refuses to permit a duly authorized representative of the Department of Energy to have access to any premises or source of information necessary to the administration or the enforcement of the Defense Production Act and other applicable statutes, this part, or official actions, the Department of Energy representative may seek compulsory process. Compulsory process means the institution of appropriate legal action, including ex parte application for an inspection warrant or its equivalent, in any forum of appropriate jurisdiction.

(b) Compulsory process may be sought in advance of an audit, investigation, or other inquiry, if, in the judgment of the Senior Policy Advisor for the Office of Electricity Delivery and Energy Reliability, as listed in § 217.93, there is reason to believe that a person will refuse to permit an audit, investigation, or other inquiry, or that other circumstances exist which make such process desirable or necessary.

#### **§ 217.73 Notification of failure to comply.**

(a) At the conclusion of an audit, investigation, or other inquiry, or at any other time, the Department of Energy may inform the person in writing where compliance with the requirements of the Defense Production Act and other applicable statutes, this part, or an official action were not met.

(b) In cases where the Department of Energy determines that failure to comply with the provisions of the Defense Production Act and other applicable statutes, this part, or an official action was inadvertent, the person may be informed in writing of the particulars involved and the corrective action to be taken. Failure to take corrective action may then be construed as a willful violation of the Defense Production Act and other applicable statutes, this part, or an official action.

#### **§ 217.74 Violations, penalties, and remedies.**

(a) Willful violation of the provisions of title I or sections 705 or 707 of the Defense Production Act, the priorities provisions of the Selective Service Act and related statutes (when applicable), this part, or an official action, is a crime and upon conviction, a person may be punished by fine or imprisonment, or both. The maximum penalties provided by the Defense Production Act are a \$10,000 fine, or one year in prison, or both. The maximum penalties provided

by the Selective Service Act and related statutes are a \$50,000 fine, or three years in prison, or both.

(b) The Government may also seek an injunction from a court of appropriate jurisdiction to prohibit the continuance of any violation of, or to enforce compliance with, the Defense Production Act, this part, or an official action.

(c) In order to secure the effective enforcement of the Defense Production Act and other applicable statutes, this part, and official actions, the following are prohibited:

(1) No person may solicit, influence or permit another person to perform any act prohibited by, or to omit any act required by, the Defense Production Act and other applicable statutes, this part, or an official action.

(2) No person may conspire or act in concert with any other person to perform any act prohibited by, or to omit any act required by, the Defense Production Act and other applicable statutes, this part, or an official action.

(3) No person shall deliver any item if the person knows or has reason to believe that the item will be accepted, redelivered, held, or used in violation of the Defense Production Act and other applicable statutes, this part, or an official action. In such instances, the person must immediately notify the Department of Energy that, in accordance with this provision, delivery has not been made.

#### **§ 217.75 Compliance conflicts.**

If compliance with any provision of the Defense Production Act and other applicable statutes, this part, or an official action would prevent a person from filling a rated order or from complying with another provision of the Defense Production Act and other applicable statutes, this part, or an official action, the person must immediately notify the Department of Energy for resolution of the conflict.

### **Subpart H—Adjustments, Exceptions, and Appeals**

#### **§ 217.80 Adjustments or exceptions.**

(a) A person may submit a request to the Senior Policy Advisor for the Office of Electricity Delivery and Energy Reliability, as listed in section 217.93, for an adjustment or exception on the ground that:

(1) A provision of this part or an official action results in an undue or exceptional hardship on that person not suffered generally by others in similar situations and circumstances; or

(2) The consequences of following a provision of this part or an official

action is contrary to the intent of the Defense Production Act and other applicable statutes, or this part.

(b) Each request for adjustment or exception must be in writing and contain a complete statement of all the facts and circumstances related to the provision of this part or official action from which adjustment is sought and a full and precise statement of the reasons why relief should be provided.

(c) The submission of a request for adjustment or exception shall not relieve any person from the obligation of complying with the provision of this part or official action in question while the request is being considered unless such interim relief is granted in writing by the Senior Policy Advisor for the Office of Electricity Delivery and Energy Reliability, as listed in § 217.93.

(d) A decision of the Senior Policy Advisor for the Office of Electricity Delivery and Energy Reliability, as listed in § 217.93, under this section may be appealed to the Office of Infrastructure Security and Energy Restoration (For information on the appeal procedure, see § 217.81.)

#### **§ 217.81 Appeals.**

(a) Any person who has had a request for adjustment or exception denied by the Senior Policy Advisor for the Office of Electricity Delivery and Energy Reliability, as listed in § 217.93, under § 217.80, may appeal to the Office of Infrastructure Security and Energy Restoration who shall review and reconsider the denial.

(b) (1) Except as provided in paragraph (b)(2) of this section, an appeal must be received by the Office of Infrastructure Security and Energy Restoration no later than 45 days after receipt of a written notice of denial from the Senior Policy Advisor for the Office of Electricity Delivery and Energy Reliability, as listed in § 217.93. After this 45-day period, an appeal may be accepted at the discretion of the Office of Infrastructure Security and Energy Restoration for good cause shown.

(2) For requests for adjustment or exception involving rated orders placed for the purpose of emergency preparedness (see § 217.14(d)), an appeal must be received by the Office of Infrastructure Security and Energy Restoration, no later than 15 days after receipt of a written notice of denial from the Senior Policy Advisor for the Office of Electricity Delivery and Energy Reliability, as listed in § 217.93. Contract performance under the order shall not be stayed pending resolution of the appeal.

(c) Each appeal must be in writing and contain a complete statement of all

the facts and circumstances related to the action appealed from and a full and precise statement of the reasons the decision should be modified or reversed.

(d) In addition to the written materials submitted in support of an appeal, an appellant may request, in writing, an opportunity for an informal hearing. This request may be granted or denied at the discretion of the Office of Infrastructure Security and Energy Restoration.

(e) When a hearing is granted, the Office of Infrastructure Security and Energy Restoration may designate an employee to conduct the hearing and to prepare a report. The hearing officer shall determine all procedural questions and impose such time or other limitations deemed reasonable. In the event that the hearing officer decides that a printed transcript is necessary, all expenses shall be borne by the appellant.

(f) When determining an appeal, the Office of Infrastructure Security and Energy Restoration may consider all information submitted during the appeal as well as any recommendations, reports, or other relevant information and documents available to the Department of Energy or consult with any other persons or groups.

(g) The submission of an appeal under this section shall not relieve any person from the obligation of complying with the provision of this part or official action in question while the appeal is being considered unless such relief is granted in writing by the Office of Infrastructure Security and Energy Restoration.

(h) The decision of the Office of Infrastructure Security and Energy Restoration shall be made within five (5) days after receipt of the appeal, or within one (1) day for appeals pertaining to emergency preparedness and shall be the final administrative action. It shall be issued to the appellant in writing with a statement of the reasons for the decision.

#### **Subpart I—Miscellaneous Provisions**

##### **§ 217.90 Protection against claims.**

A person shall not be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with any provision of this part, or an official action, notwithstanding that such provision or action shall subsequently be declared invalid by judicial or other competent authority.

##### **§ 217.91 Records and reports.**

(a) Persons are required to make and preserve for at least three years, accurate and complete records of any transaction covered by this part or an official action.

(b) Records must be maintained in sufficient detail to permit the determination, upon examination, of whether each transaction complies with the provisions of this part or any official action. However, this part does not specify any particular method or system to be used.

(c) Records required to be maintained by this part must be made available for examination on demand by duly authorized representatives of the Department of Energy as provided in § 217.71.

(d) In addition, persons must develop, maintain, and submit any other records and reports to the Department of Energy that may be required for the administration of the Defense Production Act and other applicable statutes, and this part.

(e) Section 705(d) of the Defense Production Act, as implemented by E.O. 12919, provides that information obtained under this section which the Secretary deems confidential, or with reference to which a request for confidential treatment is made by the person furnishing such information, shall not be published or disclosed unless the Secretary determines that the withholding of this information is contrary to the interest of the national defense. Information required to be submitted to the Department of Energy in connection with the enforcement or administration of the Defense Production Act, this part, or an official action, is deemed to be confidential under section 705(d) of the Defense Production Act and shall be handled in accordance with applicable Federal law.

##### **§ 217.92 Applicability of this part and official actions.**

(a) This part and all official actions, unless specifically stated otherwise, apply to transactions in any state, territory, or possession of the United States and the District of Columbia.

(b) This part and all official actions apply not only to deliveries to other persons but also include deliveries to affiliates and subsidiaries of a person and deliveries from one branch, division, or section of a single entity to another branch, division, or section under common ownership or control.

(c) This part and its schedules shall not be construed to affect any administrative actions taken by the Department of Energy, or any outstanding contracts or orders placed pursuant to any of the regulations,



orders, schedules or delegations of authority previously issued by the Department of Energy pursuant to authority granted to the President in the Defense Production Act. Such actions, contracts, or orders shall continue in full force and effect under this part unless modified or terminated by proper authority.

### § 217.93 Communications.

All communications concerning this part, including requests for copies of the part and explanatory information, requests for guidance or clarification, and requests for adjustment or exception shall be addressed to the Senior Policy Advisor for the Office of Electricity Delivery and Energy

Reliability, Office of Infrastructure Security and Energy Restoration, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585; (202) 536-0379 (GC-76EPAS@hq.doe.gov).

### Appendix I to Part 217—Sample Form DOE-XXX

|  |  |   |  |   |  |                  |  |
|--|--|---|--|---|--|------------------|--|
| FORM DOE-XXX   |  | DEPARTMENT OF ENERGY<br>OFFICE OF ELECTRICITY   |  | FOR DOE USE   |  | OMB NO.1910-XXXX |  |
| <b>REQUEST FOR SPECIAL PRIORITIES ASSISTANCE</b>   |  |   |  | CASE NO. _____  |  |                  |  |
| READ INSTRUCTIONS ON LAST PAGE<br>FILL OUT USING COMPUTER  |  |   |  | RECEIVED _____  |  |                  |  |
|  |  |   |  | ASSIGNED TO _____   |  |                  |  |
| <p>Submission of a completed application is required to request special priorities assistance. See sections 217.40-44 of the Energy Priorities and Allocations System regulations (10 CFR Part 217). It is a criminal offense under 18 U.S.C. 1001 to make a willfully false statement or representation to any U.S. Government agency as to any matter within its jurisdiction. All company information furnished related to this application will be deemed business confidential under Sec. 705(d) of the Defense Production Act of 1950 [50 U.S.C. App.2155(d) which prohibits publication or disclosure of this information unless the President determines that withholding it is contrary to the interest of the national defense. The Department of Energy will assert the appropriate Freedom of Information Act (FOIA) exemptions if such information is the subject of FOIA requests. The unauthorized publication or disclosure of such information by Government personnel is prohibited by law. Violators are subject to fine and/or imprisonment.</p> <p style="text-align: center;"><b>OMB Burden Disclosure Statement</b></p> <p>This data is being collected to implement the Department of Energy's Energy Priorities and Allocations System regulations, promulgated pursuant to the Defense Production Act of 1950, as amended (DPA). The data you supply will be used to allow you to request special priorities assistance from DOE to fill a rated order issued pursuant to the DPA and DOE's implementing regulations. DOE will also use the information to conduct audits and for enforcement purposes.</p> <p>Public reporting burden for this collection of information is estimated to average 32 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Office of the Chief Information Officer, Records Management Division, IM-23, Paperwork Reduction Project (1910-XXXX), U.S. Department of Energy, 1000 Independence Ave SW, Washington, DC, 20585-1290; and to the Office of Management and Budget (OMB), OIRA, Paperwork Reduction Project (1910-XXXX), Washington, DC 20503.</p> |  |   |  |   |  |                  |  |
| <b>1. APPLICANT INFORMATION</b>  |  |   |  |   |  |                  |  |
| <p>a. Name and complete address of Applicant (Applicant can be any person needing assistance – Government agency, contractor, or supplier. See definition of Applicant in Footnotes section on last page of this form).</p> <p>Applicant Name _____</p> <p>Address _____</p> <p>City _____ State _____ Zip _____</p> <p>Contact Name _____</p> <p>Title _____</p> <p>Telephone _____ Fax _____</p> <p>Email address _____</p>  |  |   |  | <p>b. If Applicant is not end-user Government agency, give name and complete address of Applicant's customer.</p> <p>Customer name _____</p> <p>Address _____</p> <p>City _____ State _____ Zip _____</p> <p>Contact Name _____</p> <p>Title _____</p> <p>Telephone _____ Fax _____</p> <p>Contract/purchase order no. _____</p> <p>Dated _____ Priority Rating _____</p> |  |                  |  |
| <p><b>2. APPLICANT ITEM(S).</b> If Applicant is not end-user Government agency, describe item(s) to be delivered by Applicant under its customer's contract or purchase order though the use of the item(s) listed in Block 3. If known, identify Government program and end item for which these items are required. If Applicant is end-user Government agency and Block 3 item(s) are not end-items, identify the end-item for which the Block 3 item(s) are required. See definition of "item" in Footnotes section on last page of this form.</p>   |  |   |  |   |  |                  |  |
| <b>3. ITEM(s) (including service) FOR WHICH APPLICANT REQUESTS ASSISTANCE</b>  |  |   |  |   |  |                  |  |
| <b>Quantity</b><br><i>Pieces, units</i>  |  | <b>Description</b><br><i>Include identifying information such as model or part number</i> |  |   | <b>Dollar Value</b><br><i>Each quantity listed</i> |                  |  |
|  |  |   |  |   |  |                  |  |

[FR Doc. 2010-17289 Filed 7-15-10; 8:45 am]

BILLING CODE 6450-01-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 81

[Docket: EPA-R10-OAR-2010-0432; FRL-9171-3]

#### Finding of Attainment for PM<sub>10</sub> for the Mendenhall Valley PM<sub>10</sub> Nonattainment Area, Alaska

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA finds that the Mendenhall Valley nonattainment area in Alaska attained the National Ambient Air Quality Standard (NAAQS) for particulate matter with an aerodynamic diameter of less than or equal to a nominal ten micrometers (PM<sub>10</sub>) as of December 31, 1995.

**DATES:** Comments must be received on or before August 16, 2010.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R10-OAR-2010-0432, by any of the following methods:

- <http://www.regulations.gov>: Follow the on-line instructions for submitting comments.

- *E-mail:* [body.steve@epa.gov](mailto:body.steve@epa.gov).
- *Mail:* Steve Body, U.S. EPA Region 10, Office of Air, Waste and Toxics (AWT-107), 1200 Sixth Avenue, Suite 900, Seattle, WA 98101.

- *Hand Delivery/Courier:* U.S. EPA Region 10, 1200 Sixth Avenue, Suite 900, Seattle, WA 98101. Attention: Steve Body, Office of Air, Waste and Toxics, AWT-107. Such deliveries are only accepted during normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Please see the direct final rule which is located in the Rules section of this **Federal Register** for detailed instructions on how to submit comments.

**FOR FURTHER INFORMATION CONTACT:** Steve Body at telephone number: (206) 553-0782, e-mail address: [body.steve@epa.gov](mailto:body.steve@epa.gov), or the above EPA, Region 10 address.

**SUPPLEMENTARY INFORMATION:** For further information, please see the direct final action, of the same title, which is located in the Rules section of this **Federal Register**. EPA is approving the attainment determination as a direct final rule without prior proposal because EPA views this as a

noncontroversial action and anticipates no adverse comments. A detailed rationale for the approval is set forth in the preamble to the direct final rule. If EPA receives no adverse comments, EPA will not take further action on this proposed rule.

If EPA receives adverse comments, EPA will withdraw the direct final rule and it will not take effect. EPA will address all public comments in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time. Please note that if we receive adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

Dated: June 22, 2010.

**Dennis J. McLerran,**

*Regional Administrator, EPA, Region 10.*

[FR Doc. 2010-17416 Filed 7-15-10; 8:45 am]

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Parts 191 and 194

[EPA-HQ-OAR-2009-0330; FRL-9175-6]

#### Notification of Completeness of the Department of Energy's Compliance Recertification Application for the Waste Isolation Pilot Plant

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

**ACTION:** Notice of determination and close of public comment period.

**SUMMARY:** The Environmental Protection Agency (EPA, "we" or "the Agency") has determined that the Department of Energy's (DOE) Compliance Recertification Application (CRA or "application") for the Waste Isolation Pilot Plant (WIPP) is complete. EPA provided written notice of the completeness decision to the Secretary of Energy on June 29, 2010. The text of the letter is contained in the

**SUPPLEMENTARY INFORMATION.** The Agency has determined that the application is complete, in accordance with 40 CFR part 194, "Criteria for the Certification and Recertification of the WIPP's Compliance with the 40 CFR part 191 Disposal Regulations" (Compliance Certification Criteria). The completeness determination is an administrative step that is required by

regulation, and it does not imply in any way that the CRA demonstrates compliance with the Compliance Criteria and/or the disposal regulations. EPA is now engaged in the full technical review that will determine if WIPP remains in compliance with the disposal regulations. As required by the 1992 WIPP Land Withdrawal Act and our implementing regulations, EPA will make a final recertification decision within six months of issuing the completeness letter to the Secretary of Energy.

**DATES:** EPA opened the public comment period upon receipt of the 2009 CRA (74 FR 28468, June 16, 2009). Comments must be received on or before August 16, 2010.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2009-0330, by one of the following methods:

- <http://www.regulations.gov>: Follow the on-line instructions for submitting comments.

- *E-mail:* to [a-and-r-docket@epa.gov](mailto:a-and-r-docket@epa.gov).
- *Fax:* 202-566-1741.
- *Mail:* Air and Radiation Docket and Information Center, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

*Instructions:* Direct your comments to Attn: Docket ID No. EPA-HQ-OAR-2009-0330. The Agency's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov> your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact