Regulatory Impact Analysis is therefore not required. Although a notice of proposed rulemaking which solicited public comments was issued, the Internal Revenue Service concluded when the notice was issued that the regulations are interpretative and that the notice and public procedure requirement of 5 U.S.C. 533 did not apply. Accordingly, the final regulations do not constitute regulations subject to the Regulatory Flexibility Act (5 U.S.C. chapter 6).

Drafting Information

The principal author of these proposed regulations was Jane E. Wilson of the Interpretative Division of the Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and the Treasury Department participated in developing the regulations, both on matters of substance and style.

List of Subjects in 26 CFR Part 48

Agriculture, Arms and munitions, Coal, Excise taxes, Gasohol, Gasoline, Motor vehicles, Petroleum, Sporting goods, Tires.

Adoption of amendments to the regulations.

Accordingly, 26 CFR Part 48 is amended as follows:

Paragraph 1. The authority citation for Part 48 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 2. Section 48.4071–1(d) is revised to read as set forth below:

§ 48.4071–1 Imposition and rates of tax.

* * * * *

(d) *Recapped or retreaded tires.* The recapping or retreading of a tire, whether from shoulder-to-shoulder or bead-to-bead, does not constitute manufacture of a taxable tire. The tax on tires imposed by section 4071 does not apply to the sale of a recapped or retreaded tire, except that a used tire or tire carcass not previously sold in the United States that is recapped or retreaded from shoulder-to-shoulder or bead-to-bead in a foreign country and imported into the United States is subject to the tax imposed by section 4071 when such tire is sold or used by the importer. This paragraph (d) is effective for recapped and retreaded tires sold on or after January 1, 1984.

* * * * *

This Treasury decision is issued under the authority contained in section 7805 of the Internal Revenue Code of 1954 (68A Stat. 917; 26 U.S.C. 7805).

Approved: September 24, 1985.

Roscoe L. Egger, Jr.,

Commissioner of Internal Revenue.

Ronald A. Pearlman,

Assistant Secretary of the Treasury.

[FR Doc. 85–24444 Filed 10–10–85; 8:45 am]

BILLING CODE 4830-01-M

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

Occupational Exposure to Ethylene Oxide; Labeling Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Final rule.

SUMMARY: This document amends OSHA's final ethylene oxide (EtO) standard (29 CFR 1910.1047) to provide an exception (new paragraph (i)(1)(iii)) from the labeling requirements of paragraph (j)(i)(ii) of that section, for EtO containers which have been labeled pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). This amendment is believed to be necessary to avoid legal and substantive conflict with FIFRA and regulations issued pursuant to FIFRA by the Environmental Protection Agency (EPA). In addition, this notice amends paragraph (i)(1)(i)(A) by modifying the signal word of OSHA's EtO label from "Caution" to "Danger" to conform both to that required for EtO signs by paragraph (j)(1)(i) of the OSHA standard and with the signal word on the FIFRA label, and by revising the hazard language on the label.

DATES: New paragraphs (j)(1)(iii) and (m)(3) are effective October 11, 1985.

Revised paragraph (j)(1)(i)(A) is effective January 9, 1986.

FOR FURTHER INFORMATION CONTACT: Mr. James Foster, OSHA, U.S. Department of Labor, Office of Public Affairs, Room N–3641, 200 Constitution Avenue NW., Washington, DC 20210, Telephone (202) 523–8151.

SUPPLEMENTARY INFORMATION:

1. Events Leading to this Action

OSHA promulgated a revised standard for EtO on June 22, 1984 (49 FR 25796). One provision of that standard requires employers to "ensure that precautionary labels are affixed to all containers of EtO whose contents are capable of causing employee exposure at or above the action level" (29 CFR 1910.1047(j)(1)(ii)). The label to be affixed is required to include the word "Caution." OSHA's proposed rule for EtO (48 FR 17248) has also provided for a similar container labeling requirement but included the following exemption as proposed paragraph (k)(2)(iii):

> The labeling requirements under this section do not apply where EtO is used as a pesticide, as such term is defined in the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 et seq.), when it is labeled pursuant to that Act and regulations issued under that Act by the Environmental Protection Agency;

The rationale for this exemption was described in the proposed rule as follows:

> A number of EtO products which are utilized as sterilants are registered by the EPA as pesticides, in accordance with FIFRA. EPA must establish terms and conditions for the registration of such products sufficient to ensure that use of the products "will not generally cause unreasonable adverse effects on the environment." These terms and conditions may include restrictions and limitations on use which all users are obligated by law to comply with. For these reasons OSHA is proposing that the labeling requirements under this paragraph not apply to any EtO product registered as a pesticide, as such term is defined under FIFRA, for which labeling is required by EPA under FIFRA and regulations issued pursuant thereto. OSHA feels that this provision is appropriate to mitigate any dual regulatory requirements pesticide registrants may face with regard to container labeling. It is OSHA's understanding, however, that EPA is presently developing EtO labeling requirements that will provide health warnings similar to those on the OSHA label (e.g., cancer and reproductive hazard). 48 FR at 17306.

The final labeling rule adopted by OSHA for EtO did not include the proposed exemption because the Agency "determined that the label required by the final EtO standard does not conflict with EPA labels under FIFRA." (49 FR at 25790). EPA, however, subsequently informed OSHA that the content of OSHA's label for EtO is inconsistent with the label which EPA requires under FIFRA and the regulations issued under FIFRA. It is EPA's view, based upon that Agency's analysis of FIFRA and EPA regulations, that OSHA labeling requirements would impose conflicting statutory and regulatory obligations on employers who also are subject to labeling requirements under FIFRA. The nature of the conflict was set forth concisely in an October 19, 1984 letter from Stephen Schatzow, Director of EPA's Office of Pesticide Programs, to Gary Strobel, Director of OSHA's Regulatory Review Committee (Ex. 195, OSHA Docket No. H–200) as follows:

[T]he OSHA final standard requires that further labeling be added to registered pesticide products containing EtO which currently bear labeling approved by EPA under FIFRA. Such a requirement poses both legal and substantive concerns.

To the extent that § 1910.1047(j)(1)(ii) contemplates that the employer will be responsible for affixing additional labeling not included in the approved FIFRA labeling to individual pesticide containers, EPA believes that this provision is inconsistent with an existing statutory provision. Section 12(a)(2)(A) of FIFRA, 7 U.S.C. 136j(a)(2)(A), states, "It shall be unlawful for any person to detach, alter, deface, or destroy, in whole or in part, any labeling required under this Act." We believe that any employer or other user who affixes additional labeling to the container of a registered pesticide product would be violating this provision. While EPA could as a matter of prosecutorial discretion decline to apply this provision to user labeling when it is required by other Federal agencies, it is our view that permitting any alteration or amendment by a user of approved labeling for a registered pesticide product could have pernicious consequences. Label language is the principal mechanism by which EPA requires users of pesticide products to conform to the terms and conditions of registration.

In addition to this basic legal problem, EPA has additional substantive concern about the specific label language which the OSHA EtO standard requires. Section 1910.1047(j)(1)(ii) requires that precautionary labeling for each affected product must, among other things, include the word "CAUTION". EPA regulations, 40 CFR § 162.10(h), establish specific requirements concerning the warnings and precautionary statements which must appear on pesticide labeling. A particular "human hazard signal word" is assigned to each pesticide depending on how it is classified with respect to toxicity. Ethylene oxide products fall within Toxicity Category I, the most stringent category, and must therefore state on the front panel of the label the signal word "Danger". In contrast, the signal word "Caution" is utilized for products which fall within Toxicity Categories III and IV. In our experience, the human hazard signal word is one of the elements of the label with which applicators and users are most familiar. Because the human hazard signal word describes the intrinsic toxicity of a pesticide and thereby gives general guidance concerning the measure of care reguired in handling and using that pesticide, it is critical to avoid using signal words in a confusing manner. Indeed, 40 CFR § 162.10(h)(1)(i)(E) expressly states that, "In no case shall more than one human hazard signal word appear on the front panel of a label."

For the reasons stated above, I hope OSHA will consider amending its final standard for EtO to include the exception to label requirements for registered pesticide products which was previously included in its proposed standard.

OSHA believed that there was merit in EPA's concern that both legal and substantive conflict exist under OSHA's present labeling requirement. The Agency felt that it was necessary and appropriate to amend the final EtO labeling provision to include the exception for EtO products which are subject to labeling under FIFRA, as originally proposed. The amendment would prevent a statutory and regulatory conflict between OSHA's EtO standard and EPA's labeling requirement under FIFRA, and would relieve employers of the burden of complying with such conflicting requirements. This action was proposed in a **Federal Register** notice published on April 1, 1985 (50 FR 12882), and public comment was invited on the appropriateness of the amendment.

II. Summary of Public Comment

OSHA received eight comments in response to the April 1, 1985 FR Notice. Those in opposition to adoption of this amendment, Public Citizen (Ex. 200–2) and NIOSH (Ex. 200–7), expressed concern that employee protection would be diminished by this action. They argued that EPA's current EtO warning label under FIFRA is not as effective as OSHA's because it does not require inclusion of a specific health hazard statement that EtO present a "Cancer and Reproductive Hazard", as does OSHA's label. In addition, Public Citizen stated that they do not agree with EPA's interpretation that there is a legal conflict between OSHA and FIFRA. Public Citizen argued that the FIFRA provision that states that "It shall be unlawful to detach, alter, deface, or destroy, in whole or in part, any labeling required under the [FIFRA] Act", does not expressly prohibit the affixing of supplementary information, such as the warning statement required by the OSHA label (Ex. 200–2).

Proponents of adoption of the proposed amendment agreed with EPA and OSHA that this action is necessary to avoid legal and substantive conflict with EtO regulations issued under FIFRA (Exs. 200–1, 200–2, 200–3, 200–4, 200–5, 200–6). The Association of Ethylene Oxide Users pointed out that without this amendment ". . . any employer who changed any lable registered with EPA in an attempt to comply with OSHA's labeling requirement would be in violation of FIFRA. In other words, compliance with OSHA's requirements could force employers to violate federal law "(Ex. 200–5). The State of Washington, Department of Labor and Industries, stated that "we agree that the labeling requirement of the Ethylene Oxide (EtO) standard should not apply to EtO where it is used as a pesticide and is labeled pursuant to . . . FIFRA . . ." (Ex. 200–6). 3M Company agreed that that there was ". . . inconsistency between the OSHA and EPA regulations with regard to labeling requirements for ethylene oxide . . ." and that they ". . . go on record as supporting the proposed labeling change . . ." (Ex. 200–4). Linde Division of Union Carbide (Linde) also commented . . . that EPA should have responsibility for the labeling requirements for pesticide ethylene oxide . . ." (Ex. 200–1).

In addressing the inconsistency in the OSHA label signal word (CAUTION) and the EPA signal word (Danger), Linde recommended the following:

> We believe that the precautionary warnings and the signal word on labels should be the same for both industrial ethylene oxide and pesticide ethylene oxide. In fact, the sign warnings under paragraph (j)(1)(iii) should be the same as the label warnings under paragraph (j)(1)(ii). For example, paragraph (j)(1)(i) states: "Danger, Ethylene Oxide, Cancer Hazard and Reproductive Hazard" (plus the "authorized personnel" statement) on the sign. However, paragraph (j)(1)(ii) states: "Caution, contains Ethylene Oxide, Cancer and Reproductive Hazards." If this latter label statement is retained in Part 1910.1047, the OSHA label for industrial ethylene oxide will read differently than the EPA label for pesticide ethylene oxide. Users of ethylene oxide will be confronted with two different signal words depending upon whether the ethylene oxide is used for industrial purposes or pesticide purposes. Packagers of ethylene oxide will need to have two different labels for the same product, depending upon its use for industrial applications or pesticide applications.

Linde also agreed that, based upon paragraph (j)(1)(i) and Appendix B6 of ANSI standard Z129.1–1982, the signal word for signs and for labels should be "Danger" for ethylene oxide and its mixtures. They contended, however, that the statement of hazard on OSHA labels should read "Cancer Hazard and Reproductive Hazard" instead of "Cancer and Reproductive Hazard", similar to the signs, because these are separate and distinct hazards. (Ex. 200–1)

NIOSH concurred with EPA's view that the hazard signal word for EtO should be "Danger" instead of "Caution", based on the hazard criteria established for substances, such as EtO, that are assigned by EPA to Toxicity Category I (Ex. 200–7).

III. OSHA's Conclusions

After review of the positions and arguments set forth by EPA and public comments, OSHA has determined that amendment of the ETO labeling requirement is necessary and appropriate to avoid legal and

substantive conflict with FIFRA and regulations issued under FIFRA by EPA. OSHA agrees with EPA that this conflict is a ". . . basic legal problem" (Ex. 195) that centers on the question as to whether it is a violation of FIFRA if employees or other users affix additional labeling (OSHA's label) to the container of a registered pesticide product. EPA and other commentors point to section 12(a)(2)(A) of FIFRA, 7 U.S.C. 136(a)(2)(A), which states that "It shall be unlawful for any person to detach, alter, deface, or destroy, in whole or in part, any labeling required under this Act." EPA stated that ". . . any employer . . . who affixes additional labeling [to the EPA label] would be violating this provision." (Ex. 195). OSHA agrees with EPA and with the Association of Ethylene Oxide Users argument that ". . . any employer who changed any label registered with EPA in an attempt to comply with OSHA's labeling requirement would be in violation of FIFRA" (Ex. 200–5). There were no substantive legal discussions provided to the record to refute EPA's interpretation that including an OSHA label on the same container required to carry an EPA label is a violation of FIFRA. Thus, OSHA believes that amending the EtO labeling requirement, as proposed, is appropriate.

As noted earlier, Public Citizen and NIOSH contend that the OSHA label for EtO is more effective than that currently prescribed for pesticides by EPA. OSHA acknowledges that the OSHA label is more detailed as to its discussion of the hazards of EtO exposure. However, under the preemption provision of the OSH Act (section 4(b)(1)) 29 U.S.C. 653(b)(1)), the important consideration is simply whether the working conditions in question have been regulated by another Federal agency having statutory authority over those conditions. The comparative efficacy of the OSHA label as compared to the EPA label is not appropriate for consideration in the preemption calculus. In this case, the EPA labeling requirements under FIFRA are clearly an exercise of statutory authority over working conditions, and would therefore preempt the OSHA label for those conditions.

OSHA also defers to EPA's interpretation of its own statute, FIFRA, as to the legal effect of adding OSHA's supplemental labeling information to the FIFRA label. Since the additional information on the OSHA label would be an alteration of the approved FIFRA label, section 12(a)(2)(A) of FIFRA would not allow the supplemental OSHA information to be added to the product's approved labeling under FIFRA.

In addition to the legal arguments on the preemption issue, OSHA is convinced that there is a compelling policy argument for recognition of the FIFRA label by OSHA. Prudent regulatory policy dictates that duplicative and conflicting regulation by agencies with overlapping statutory mandates be avoided wherever possible. In the context of EtO regulation, the labeling requirements imposed by EPA under FIFRA are not bound by the limitations of employer-employee relationships, but extend to *any* misuse or mislabeling by *any* EtO applicator. Thus, the provisions of EPA's EtO label, together with the sanctions imposed for violation of the label extend to all pesticide uses of EtO and go far beyond workplace exposures. OSHA believes that the potential for conflict between the OSHA label and the FIFRA label, and the resulting confusion for the regulated parties as to which requirements are applicable, can be avoided through OSHA acceptance of the FIFRA label for products already required to be labeled under FIFRA. This will make it unnecessary for manufacturers and formulators of EtO pesticides to place different safety and health labels on their products depending on where and by whom they are to be used.

Employers who use EtO as a pesticide will not need to be concerned about conflicting EPA and OSHA labeling requirements and the risk of complying with one statute at the expense of possibly violating the other.

OSHA also believes that allowing the FIFRA label in lieu of the label specified in § 1910.1047(j)(1)(ii) will not result in a significant reduction in the protection provided by the EtO standard. All other provisions of the standard continue to apply, including the sign posting requirements of paragraph (j)(1)(i), the requirements for material safety data sheets (j)(2), and the information and training provisions (i)–(j)(3). These requirements and either the OSHA or FIFRA label will continue to assure that employees who are potentially exposed to EtO in the workplace are informed about the hazards of EtO exposure and the steps necessary to provide protection from those hazards.

In addition, OSHA has determined that the signal word "Caution" on OSHA's EtO label should be changed to "Danger" to be consistent with both its own EtO signs and with EPA's signal word on EtO pesticide labeling. OSHA agrees with Linde (Ex. 200–1) that if the signal words are not identical, there is potential for confusion among users of ethylene oxide. It does not make sense for the signal word on industrial EtO to read "Caution", while that for pesticide EtO reads "Danger", when the same health hazards are involved with exposure to either product. In addition, as noted by EPA (Ex. 195) and NIOSH (Ex. 200–7), EtO is a substance in EPA Toxicity Category I, and thus is more appropriately labeled "Danger".

Therefore, in addition to adoption of the amendment to the EtO labeling requirement as proposed, OSHA amends its label legend to conform to both the OSHA sign requirement and the FIFRA label by deleting the signal word "Caution" from the existing requirements and adding in its place the signal word "Danger". To further conform to EtO's sign legend that states that EtO presents a "Cancer Hazard and Reproductive Hazard", as suggested by Union Carbide, OSHA is administratively changing the label legend that reads "Cancer and Reproductive Hazard" to read as does the sign legend.

IV. Summary of Regulatory Impact

Executive Order 12291 (46 FR 13197, February 19, 1981) requires that a regulatory analysis be conducted for any rule having major economic consequences on the national economy, individual industries, geographical regions, or levels of government. The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires the Occupational Safety and Health Administration to consider the impact of the final rule on small entities.

The Secretary has determined that this is not a "major" action as defined by section 1(b) of Executive Order 12291. The Secretary also certifies that this action will not have a significant impact on a substantial number of small entities as defined by the Regulatory Flexibility Act.

Effective Dates

New paragraph (j)(1)(iii), which allows FIFRA labeling in lieu of the OSHA label for EtO pesticides, prevents a statutory and regulatory conflict between OSHA's EtO standard and EPA's labeling requirement under FIFRA, and relieves employers of the burden of complying with such conflicting requirements. For this reason, pursuant to 5 U.S.C. 553(d)(1), this amendment is made effective immediately upon publication.

Revised paragraph (i)(1)(i)(A) changes the signal word and hazard language on OSHA labels for EtO. In order to allow employers sufficient time to make the

necessary label changes, OSHA is making this amendment effective January 9, 1986. Between October 11, 1985 and January 9, 1986, either the current or revised labeling will be acceptable.

Authority

This document was prepared under the direction of Patrick R. Tyson, Acting Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue NW., Washington, DC 20210.

Pursuant to sections 4(b)(1), 6(b) and 8 of the Occupational Safety and Health Act (29 U.S.C. 653, 655, 657), and 5 U.S.C. 553, 29 CFR 1910.1047 is amended as set forth below.

List of Subjects in 29 CFR Part 1910

Ethylene oxide, Occupational safety and health, Chemicals, Cancer, Health, Risk assessment.

Signed at Washington, D.C., this 1st day of October 1985.

Patrick R. Tyson,

Acting Assistant Secretary of Labor.

PART 1910—[AMENDED]

Part 1910 of Title 29 of the Code of Federal Regulations is therefore amended as follows:

1. The authority for Part 1910 continues to read as follows:

Authority: Secs. 4, 6 and 8 of the Occupational Safety and Health Act of 1970. (29 U.S.C. 653, 655, 657); 5 U.S.C. 553; Secretary of Labor's Order 9–83 (48 FR 35736); 29 CFR Part 1911.

2. By revising paragraph (j)(1)(i)(A) of § 1910.1047 to read as follows:

§ 1910.1047 Ethylene oxide.

* * * * *

(j) * * *

(1) * * *

(i) * * *

(A) Danger
Contains Ethylene Oxide
Cancer Hazard and Reproductive Hazard; and

* * * * *

3. By adding a new paragraph (j)(1)(iii) to § 1910.1047 to read as follows:

§ 1910.1047 Ethylene oxide.

* * * * *

(j) * * *

(1) * * *

(iii) The labeling requirements under this section do not apply where EtO is used as a pesticide, as such term is defined in the Federal Insecticide. Fungicide, and Rodenticide Act (7 U.S.C. 136 et seq.), when it is labeled pursuant to that Act and regulations issued under that Act by the Environmental Protection Agency.

* * * * *

4. By adding a new paragraph (m)(3) to § 1910.1047 to read as follows:

§ 1910.1047 Ethylene oxide.

* * * * *

(m) *Dates.*

* * * * *

(3) Labeling. (i) Paragraph (j)(1)(i)(A) of this section as amended is effective January 9, 1986.

(ii) Paragraph (j)(1)(iii) of this is effective October 11, 1985.

* * * * *

[FR Doc. 85–23844 Filed 10–10–85; 8:45 am]

BILLING CODE 4510–26–M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 51

[CGD 81–104]

Discharge Review Board (DRB) Regulations

AGENCY: Department of Transportation.

ACTION: Final rule.

SUMMARY: The Department of Transportation (DOT) is revising the regulations governing the establishment and operation of the Coast Guard Discharge Review Board. The existing regulations in Part 51 of Title 33 Code of Federal Regulations (CFR) were promulgated in 1947 and provided for a Board for Review of Discharges and Dismissals. Since that time, Congress enacted Pub. L. 85–857, (10 U.S.C. 1553) which provided a new statutory basis for discharge review boards. These regulations will update the existing regulations and establish the Coast Guard Discharge Review Board to more accurately reflect current law and policy.

EFFECTIVE DATE: November 12, 1985.

FOR FURTHER INFORMATION CONTACT: LT Dave Shippert, Office of Chief Counsel, Room 3314, Coast Guard Headquarters, Washington, D.C. 20593, (202) 426–1534.

SUPPLEMENTARY INFORMATION: A Notice of Proposed Rulemaking (NPRM) concerning these regulations was published on January 29, 1985 (50 FR 3922). The public comment period closed on March 15, 1985. No comments were received and these regulations are identical in substance to those proposed in the NPRM. Minor editorial changes were made to § 51.3 to clarify that applications must be received by the DRB within 15 years of the date of discharge as provided in § 51.9(b).

Discussion

The Secretary of Transportation is responsible for the establishment of the Coast Guard Discharge Review Board (DRB) to review the administrative discharge of any former member. (10 U.S.C. 1553). These regulations supplant the existing regulations in Part 51 of Title 33, Code of Federal Regulations (CFR) which had operated in conjunction with Department of Defense DRB Regulations. The result of this revision is to completely sever the Coast Guard DRB from the Department of Defense regulations to emphasize its operation under the Secretary of Transportation.

These regulations are also promulgated in consideration of laws and regulations governing the Veterans Administration. Since October 8, 1977, actions by DRBs cannot remove any of a number of statutory bars to eligibility for benefits administered by the VA. (38 U.S.C. 3103(a)). However, DRB actions upgrading discharges to "honorable" or "general under honorable conditions" may otherwise give rise to eligibility that did not previously exist (38 CFR 3.12(a)(g)). This revision of the Coast Guard's DRB regulations is consistent with law and regulations governing eligibility for veterans' benefits.

Section-By-Section Analysis

Section 51.1 Basis and Purpose. This part provides an overview and description of the Coast Guard DRB.

Section 51.2 Authority. This section states the statutory authority for the establishment of the Coast Guard DRB and outlines the authority of the Secretary and the delegations to the Commandant of the Coast Guard.

Section 51.3 Applicability and Scope. This section provides that any former member, administratively discharged from the Coast Guard, may initiate DRB review of the discharge. In accordance with the Military Justice Act of 1983, discharges resulting from the sentence of a court-martial cannot be reviewed by the DRB except for purposes of clemency. (Pub. L. 98–209, 97 Stat. 1407, 10 U.S.C. 1553(a)). A former member may apply to the DRB for clemency only after exhausting all appellate remedies.

Section 51.4 Definitions. This section defines the operative terms within the proposed rule to provide a clear