provision in the by-laws, State law would require approval by 80 percent of the voting interests to liquidate X. D transfers the stock to a trust for the benefit of D's child, A, during the 10-year period. The 10-year restriction is an applicable restriction and is disregarded. Therefore, the value of the stock is determined as if the transferred block could currently liquidate X.

Example 4. D and D's children, A and B, are partners in limited partnership Y. Each has a 3.33 percent general partnership interest and a 30 percent limited partnership interest. Any general partner has the right to liquidate the partnership at any time. As part of a loan agreement with a lender who is related to D, each of the partners agreed that the partnership would not be liquidated without the lender's consent while any portion of the loan remains outstanding. During the term of the loan agreement, D transfers one-half of both D's partnership interests to each of A and B. Because the lender is a related party, the requirement that the lender consent to liquidation is an applicable restriction and the transfers of D's interests are valued as if such consent were not required.

Example 5. D owns all the preferred and common stock in corporation X. The preferred stock carries a right to liquidate X that cannot be exercised until 1999. In 1995, D transfers the common stock to D's child in a transfer that is subject to section 2701. The restriction on D's right to liquidate is an applicable restriction that is disregarded in determining the amount of the gift under section 2701.

§ 25.2704-3 Interaction of sections 2701(a) and 2704(a).

If sections 2701(a) and 2704(a) would apply simultaneously to the same transfer, the application of chapter 14 to such transfer is determined under the section that provides the greater increase in taxable transfers.

Fred T. Goldberg, Jr.,

Commissioner of Internal Revenue.

[FR Doc. 91-21681 Filed 9-10-91; 8:45 am]

BILLING CODE 4830-01-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 61

(FRL-3988-7)

National Emission Standards for Hazardous Air Pollutants; Polonium-210 Emissions From Elemental Phosphorus Plants

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed rule.

SUMMARY: In this notice, EPA is proposing to modify 40 CFR part 61, subpart K, the National Emission Standards for Hazardous Air Pollutants ("NESHAP") for Radionuclide Emissions from Elemental Phosphorus Plants (54 FR 51669 December 15, 1989). Under the proposal, § 61.122 would be amended to permit elemental phosphorus plants an alternative means of demonstrating compliance with the standard. Under the existing standard, an elemental phosphorus plant must insure that total emissions of polonium-210 from that facility do not exceed 2 curies per year. Under the proposed amendment, an elemental phosphorus plant will be in compliance if it limits polonium-210 emissions to 2 curies per year. However, in the alternative, the plant may demonstrate compliance by: (1) Installing a John Zink Tandem Nozzle Hydrosonic Fixed Throat Venturi Scrubber System including four scrubber units, (2) operating all four scrubber units continuously with a minimum average over any 6-hour period of 40 inches (water column) of pressure drop across each scrubber during calcining of phosphate shale, (3) scrubbing emissions from all calciners and/or nodulizing kilns at the plant, and (4) limiting total emissions of polonium-210 from the plant to no more than 4.5 curies per year. EPA decided to propose this modified standard for elemental phosphorus plants as part of settlement discussions between EPA and the FMC Corporation ("FMC") in *FMC Corporation v. U.S. Environmental Protection Agency*, Docket No. 90-1057 in the D.C. Circuit Court of Appeals, a judicial action by FMC challenging subpart K as it was originally promulgated.

DATES: Any comments concerning this proposed rule must be received by EPA at the address given below no later than October 11, 1991. In the event that a hearing is requested concerning this proposed rule, additional comments may be submitted concerning any matter discussed at the hearing and must be received by EPA at the address given below no later than October 17, 1991.

If EPA has received an oral or written request for a hearing by September 10, 1991, a hearing concerning this proposed rule will be held at 9 a.m. on September 17, 1991 in Pocatello, Idaho.

ADDRESSES: Comments must be submitted (in triplicate if possible) to: Central Docket (A-130), Environmental Protection Agency, Attention: Docket No. A-91-51, Washington, DC 20460. The docket for this action may be inspected between the hours of 8 a.m. and 3 p.m. on weekdays. A reasonable fee may be charged for document copying.

Written requests for a hearing may be submitted to: Craig Conklin, Environmental Standards Branch, Criteria and Standards Division (ANR-460W), Office of Radiation Programs, Environmental Protection Agency, Washington, DC 20460. Because any request for a hearing should have been received by EPA on or before September 10, 1991, the hearing should have been requested by transmitting a written request by fax (electronic facsimile) to Craig Conklin at (703) 308-8763, or by calling Craig Conklin at (703) 308-8755. A separate notice of the date and city for the hearing was published in the Federal Register on August 23, 1991.

If requested, the hearing will be held on the lower campus of Idaho State University in Pocatello, Idaho. It will be held in the Student Union Building theater located at 8th Avenue and East Humbolt Street beginning at 9 a.m. on September 17, 1991.

FOR FURTHER INFORMATION CONTACT: Craig Conklin, Environmental Standards Branch, Criteria and Standards Division (ANR-460), Office of Radiation Programs, Environmental Protection Agency, Washington, DC 20460, (703) 308-8755

SUPPLEMENTARY INFORMATION:

I. Background

A. Standard Setting Under Section 112

On October 31, 1989, EPA promulgated under section 112 of the Clean Air Act, 42 U.S.C. 7412, National Emission Standards for Hazardous Air Pollutants (NESHAPs) to control radionuclide emissions to the ambient air from a number of different source categories, 40 CFR part 61. This rule was published in the Federal Register on December 15, 1989 (54 FR 51654). The NESHAPS were promulgated pursuant to a voluntary remand granted by the U.S. Court of Appeals for the D.C. Circuit. The purpose of the remand was to enable EPA to implement the Court's earlier ruling in *NRDC, Inc. v. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) ("the Vinyl Chloride decision"), which articulated specific legal requirements for promulgation of standards under section 112.

The Vinyl Chloride decision set forth a decision-making framework for promulgation of NESHAPs in which the Administrator makes a determination under section 112 in two steps: First, determine a "safe" or "acceptable" level of risk considering only health-related factors, and second, set a standard that provides an "ample margin of safety," in which costs, feasibility, and other relevant factors in addition to health may be considered.

After proposing and receiving comments on several options by which

to define "safe", the Administrator selected an approach, first announced in the final NESHAPs for certain benzene source categories (54 FR 38044 September 14, 1989). Under this approach, the Administrator established a presumption of acceptability for a risk of approximately one in ten thousand to the maximally exposed individual, and a goal to protect the greatest number of persons possible to a lifetime risk level no higher than approximately one in one million. After evaluating existing emissions against this benchmark, other risk information is then considered and a final decision is made about what risk is acceptable. The Agency then considers other information, including economic costs and technical feasibility, along with all of the health-related factors previously used to determine the "safe" level, to set a standard which protects public health with an ample margin of safety.

B. The NESHAP for Elemental Phosphorus Plants

One of the source categories governed by 40 CFR part 61 is Elemental Phosphorus Plants. Subpart K of 40 CFR part 61 ("subpart K") establishes a 2 curies/year standard for emissions of polonium-210 from such facilities.

Polonium-210 and lead-210 are vaporous waste byproducts that result from the high temperature calcination of phosphate ore at elemental phosphorus plants. Because phosphate ore contains relatively high concentrations of uranium and radium, it also contains significant quantities of polonium-210 and lead-210. The high calcining temperature (1,300 °C) volatilizes the lead-210 and polonium-210 from the phosphate rock, resulting in the release of much greater quantities of these radionuclides than of the uranium, thorium, and radium radionuclides. Analyses of doses and risks from these emissions show that emissions of polonium-210 and lead-210 are the major contributors to the risk from radionuclide emissions from elemental phosphorus plants.

During the rulemaking that resulted in promulgation of the current subpart K, EPA performed a plant-by-plant risk assessment of polonium-210 releases from all eight U.S. elemental phosphorus plants. In that analysis, EPA estimated that the lifetime fatal cancer risk to the maximally exposed individual associated with radionuclide emissions from elemental phosphorus plants was approximately 5.7×10^{-4}, and that this risk could be reduced to an acceptable level by controlling emissions of polonium-210. Because a reduction in the polonium-210 emissions also results in a reduction in lead-210 emissions, it was not necessary to establish an emission limit for lead-210.

In applying the Vinyl Chloride decision methodology, EPA selected an acceptable level for emissions of polonium-210 of 2 curies per year, which corresponds to an estimated maximum lifetime risk for any individual of 1×10^{-4}. When it promulgated NESHAPs for radionuclide emissions from Department of Energy facilities, Nuclear Regulatory Commission licensees, underground uranium mines, and inactive uranium mill tailings piles, EPA noted the numerous uncertainties in establishing risk assessment parameters, modelling actual emissions, and estimating the numbers of people exposed and concluded that an estimated maximum risk as high as 3×10^{-4} could be regarded as essentially equivalent to an estimated maximum risk of 1×10^{-4} for purposes of selecting an "acceptable" emission level. In selecting an "acceptable" emission level for polonium-210 emissions from elemental phosphorus plants, EPA concluded that the uncontrolled baseline emissions were higher than the level which could be deemed acceptable, but EPA did not consider whether specific alternative emission levels between baseline levels and 2 curies might be deemed acceptable. EPA did not consider the acceptability of emission levels higher than 2 curies/year because it appeared from the available information that a level of 2 curies/year or less could be readily achieved at all facilities by proper installation and operation of available control technology. If the baseline levels were not acceptable, then EPA believed that the next logical choice for an option to be considered was one that was achievable with existing technology and which presented risks about a factor of three below the baseline. As EPA noted when it originally proposed subpart K, *see* 54 FR 9612, 9625, March 7, 1989, although risks associated radionuclide emissions exist on a continuum, the Agency selects an acceptable level by considering specific discrete alternative emission levels. The fact that EPA must choose a specific emission level as acceptable does not necessarily mean that alternatives that were not specifically considered and that present risks slightly higher than the chosen level are inherently unacceptable.

After selecting an acceptable level of 2 curies/year, EPA then determined that significantly reducing emissions of polonium-210 below a curies/year would be very costly and would result in very small incremental risk reductions. For these reasons, EPA concluded that a standard of 2 curies/year would also protect public health with an ample margin of safety.

C. Objections to Subpart K by FMC Corporation

FMC Corporation operates an elemental phosphorus plant in Pocatello, Idaho, which is the single largest source affected by subpart K. Following promulgation of subpart K, FMC Corporation petitioned for judicial review of the standard pursuant to Clean Air Act section 307(b), *FMC Corporation* v. *U.S. Environmental Protection Agency*, Docket No. 90–1057, United States Court of Appeals for the D.C. Circuit. The Circuit Court subsequently consolidated the FMC petition with ten other petitions for review of various radionuclide NESHAPs. These consolidated cases are presently being held in abeyance pending further actions by EPA.

Following publication of the radionuclide NESHAPs on December 15, 1989, EPA received over 25 separate petitions requesting that EPA reconsider some or all of the individual standards incorporated in 40 CFR part 61 pursuant to Clean Air Act section 307(d)(7)(B). In one of these petitions, FMC requested that EPA reconsider the standard for Elemental Phosphorus Plants set forth in subpart K. In its petition, FMC argued that: (1) The Notice of Proposed Rulemaking did not provide adequate notice of the provisions in the final rule, or of the EPA methodology and its application; (2) EPA failed to properly consider intermediate emission levels and the associated acceptable risk levels; (3) EPA based the final rule upon material omitted from the administrative record; (4) new epidemiologic information calls into question EPA estimates of the health risk associated with radionuclide emissions from FMC's Pocatello, Idaho facility; and (5) the rule may not have been validly promulgated because Assistant Administrator William Rosenberg did not have the authority to sign the rule.

At the time FMC submitted its petition for reconsideration, EPA was not persuaded that any of the legal or substantive arguments advanced by FMC provided any basis for reconsideration of the rule. Although EPA acknowledged that it had not considered intermediate emission levels between the baseline emission levels and 2 curies/year in selecting an acceptable risk level, it was not clear why this alleged deficiency in the Agency's analytic process would have any effect on the final standard. EPA

assumed at that time that all affected facilities, including the FMC plant in Pocatello, Idaho, could achieve compliance with the 2 curies/year standard by installation of a specific scrubber system manufactured by the John Zink Company, which had proven highly effective in reducing polonium-210 emissions at an elemental phosphorus plant operated by another company. Since EPA knew of no other technology that would achieve a level of emissions in between the baseline and 2 curies/year, EPA did not believe it was reasonable to consider an intermediate emission level as an option for the acceptable risk decision. Subsequently, on April 23, 1990, FMC submitted the results of pilot testing it had performed with the John Zink scrubber system. Based on the results of this pilot testing and on the size and operational characteristics of its Pocatello, Idaho facility, FMC argued that installation of this system at the Pocatello plant might not be sufficient to enable FMC to meet the 2 curies/year standard established by subpart K. These concerns regarding the capabilities of the available scrubber technology made FMC's prior argument that EPA should have considered intermediate emission levels in selecting an acceptable level seem more consequential.

After evaluating the results of the pilot testing of the John Zink scrubber system by FMC, EPA concluded that the pilot test results were equivocal. While it is quite probable that the 2 curies/year standard can be achieved by FMC at its Pocatello, Idaho facility following installation of the scrubber system, it is possible that the resultant reductions in emissions might not be sufficient to achieve this result. Given this uncertainty, the reluctance of FMC to make the large capital investments necessary to install and operate the scrubber system was understandable. After it became apparent to EPA that FMC would be willing to install the John Zink scrubber system at its Pocatello, Idaho facility if it could have reasonable assurance that it could thereby achieve compliance with Subpart K, EPA decided to enter into settlement discussions with FMC.

D. Settlement Discussions Between EPA and FMC Corporation

Throughout the settlement discussions between FMC and EPA, the Agency had two principal policy objectives: (1) To have FMC install the John Zink scrubber system, and to achieve the resulting reductions in the risks to human health associated with exposure to polonium-210, as rapidly as possible; and (2) to resolve in a definitive manner all pending disputes between FMC and EPA concerning subpart K. It quickly became apparent that FMC would be willing to forego further litigation concerning subpart K if FMC could be assured that installation and operation of such a scrubber system would result in compliance with subpart K. At that point, the principal task for the negotiators was to establish a set of specifications for installation and operation of the scrubber system which would assure EPA that polonium-210 emissions were being reduced to a level sufficient to provide an ample margin of safety, while still affording FMC engineers an adequate range of operational flexibility.

EPA and FMC ultimately reached agreement on the detailed specifications for the scrubber system which are set forth in today's proposed amendment of subpart K. If an elemental phosphorus plant installs and operates a John Zink scrubber system conforming to these criteria, it will be deemed to be in compliance with subpart K, even if it does not thereby achieve compliance with the underlying standard of 2 curies/year. The standard provides for some operational flexibility, but a plant must strictly adhere to the operating conditions unless it can otherwise reduce emissions to less than 2 curies/year. To insure that the standard does not unnecessarily constrain affected facilities, alternative operating conditions which can be shown to achieve an overall removal efficiency for polonium-210 equal to or greater than the operating conditions specified by the standard can be used with the prior approval of the EPA Administrator.

Once a tentative settlement agreement was reached between EPA and FMC, EPA published a notice of settlement as required by the section 113(g) of the 1990 Clean Air Act Amendments. (56 FR 32572, July 17, 1991). A status report and notice of the proposed settlement agreement was also filed and served on all parties in the pending Court of Appeals case, *FMC Corporation* v. *EPA*, Docket No. 90–1057 (D.C. Cir.), on July 19, 1991. The settlement agreement between EPA and FMC was finally approved by EPA on August 21, 1991.

Under the settlement agreement between FMC and EPA, EPA is today granting FMC's pending petition for reconsideration for the purpose of proposing this rule to modify subpart K. The proposed modifications of subpart K are set forth below. Pursuant to the provisions of the settlement agreement, FMC and EPA will now file a joint motion with the DC Circuit Court to sever FMC's petition for review from the remaining consolidated cases and to hold the FMC petition in abeyance pending conclusion of this rulemaking. FMC also will withdraw all intervention in the remaining consolidated cases and will not subsequently seek intervention in those cases.

If EPA adopts the proposed modifications of Subpart K set forth in this proposed rule as a final rule, or EPA adopts a final rule which contains provisions which are substantially similar to the proposed modifications, FMC has agreed that it will seek dismissal with prejudice of its pending petition for review of subpart K. In that event, FMC has further agreed that it will waive any right it would otherwise have to seek judicial review of the newly promulgated final rule.

II. Reconsideration of Standard

A. Analytic Methodology

In reconsidering the currently effective subpart K, EPA has utilized the analytic framework required by the Vinyl Chloride decision and has applied the policy concerning acceptable risk established by the Administrator's benzene decision. The Agency's decision to reconsider the emission standard in Subpart K should not be construed as an indication that EPA is revisiting or reconsidering the benzene policy, the level of risk determined in that policy to be presumptively safe, or any of the health based regulations issued under that policy.

B. Decision on Acceptable Risk

As stated in the original rule promulgating Subpart K, the maximum individual lifetime risk to any individual from baseline emissions is 5.7×10^{-4}. This is clearly higher than the presumptively safe level established by the Administrator's benzene decision. The estimated annual incidence from baseline emissions is 0.072 fatal cancers per year. There are an estimated 5000 people that are exposed to risk levels greater than 1×10^{-4}, and an estimated 365,000 people that are exposed to risk levels greater than 1×10^{-6}.

After examining these factors in the previous rulemaking, the Administrator determined that the risk level represented by the baseline was unacceptable. EPA then estimated that a reduction in emissions to 2 curies/year Po-210 would reduce the incidence to 0.024, or 1 case every 40 years and expose no one to a risk level greater than 1×10^{-4}. EPA did not consider emission levels between the assumed baseline of 10 curies/year and 2 curies/

year in selecting an acceptable or "safe" level. Upon reconsideration, the Agency has now performed risk estimates for five levels of emissions between 2 and 10 curies/year. These estimates are presented in Table 1, along with the risk estimates associated with a baseline emission of 10 curies/year and the current emission limit of 2 curies/year. Based upon these risk estimates and the uncertainties in establishing parameters for risk assessment and in modelling actual emissions and exposures referred to in the prior rulemaking, the Agency has concluded that an annual emission level of 4.5 Ci/y represents an acceptable level of risk. Therefore, the Agency is proposing an acceptable emission level of 4.5 curies/year of polonium-210.

C. Decision on Ample Margin of Safety

In addition to considering the health-related factors discussed above, EPA has also examined the cost and technological feasability of the various types of emission control technology available to lower polonium-210 emissions from elemental phosphorus plants, as well as the degree of certainty that the available technology will succeed in reducing polonium-210 emissions to 2 curies/year at all affected facilities, in selecting an emission level which will provide an ample margin of safety to protect public health.

TABLE 1.—ACCEPTABLE LEVEL OF RISK DECISION

	Emissions (Ci/y)						
	(2)	(3)	(4)	(4.5)	(5)	(6)	(10)
Maximum individual risk (individual)	1×10^{-4}	1.8×10^{-4}	2.3×10^{-4}	2.6×10^{-4}	2.9×10^{-4}	3.5×10^{-4}	5.8×10^{-4}
Incidence within 80 km (deaths/y)	0.024	0.037	0.044	0.048	0.052	0.06	0.091
Risk individual:							
E-2 to E-1	0	0	0	0	0	0	0
E-3 to E-2	0	0	0	0	0	0	0
E-4 to E-3	0	384	700	709	1,950	2,160	8,100
E-5 to E-4	27,000	39,000	54,000	55,000	75,000	76,000	122,000
E-6 to E-5	390,000	380,000	370,000	370,000	350,000	350,000	290,000
Less E-6	1.5M	1.4M	1.4M	1.4M	1.4M	1.4M	1.4M

Other Health Impacts: Non-fatal cancers number no more than 5% of deaths.

EPA accepts the engineering judgment by FMC that a scrubber system installed and operated as specified in this proposed rule presently represents the most practicable technology capable of reducing the polonium-210 emissions at FMC's Pocatello, Idaho elemental phosphorus plant. EPA has also concluded that proper installation and operation of one of the available emission control technologies will be sufficient to reduce emissions to below 2 curies/year at all affected facilities other than the FMC Pocatello, Idaho plant, and that it is quite probable that an emission level below 2 curies/year can be achieved at the FMC Pocatello facility as well. However, even if FMC is unable to reduce polonium-210 emissions to 2 curies/year by installing and operating the specified scrubber system in the specified manner, EPA has concluded that adherence to the specified conditions will reduce polonium-210 emissions sufficiently to provide an ample margin of safety to protect public health, as required by Section 112 of the Clean Air Act.

Based on this determination concerning ample margin of safety, EPA is proposing to amend the emission standard in subpart K to permit each affected facility to demonstrate compliance either by limiting total polonium-210 emissions to no more than 2 curies per year, or by: (1) Installing a John Zink Tandem Nozzle Hydrosonic Fixed Throat Venturi Scrubber System including four scrubber units, (2) operating all four scrubber units continuously with a minimum average over any 6-hour period of 40 inches (water column) of pressure drop across each scrubber during calcining of phosphate shale, (3) scrubbing emissions from all calciners and/or nodulizing kilns at the plant, and (4) limiting total emissions of polonium-210 from the plant to no more than 4.5 curies per year. This choice of compliance mechanisms will be available to all affected facilities. However, EPA anticipates that facilities other than the FMC Pocatello, Idaho plant will likely enjoy greater operational flexibility simply by meeting the 2 curies/year limitation.

III. Proposal to Amend Subpart K

A. Description of Proposal

In accordance with the above discussion, EPA proposes to amend § 61.122 of 40 CFR part 61, subpart K, to permit elemental phosphorus plants an alternative means of demonstrating compliance. As under the present standard, compliance may be demonstrated by limiting total polonium-210 emissions to no more than 2 curies/year. In the alternative, compliance may be conclusively shown by: (1) Installing a John Zink Tandem Nozzle Hydrosonic Fixed Throat Venturi Scrubber System including four scrubber units, (2) operating all four scrubber units continuously with a minimum average over any 6-hour period of 40 inches (water column) of pressure drop across each scrubber during calcining of phosphate shale, (3) scrubbing emissions from all calciners and/or nodulizing kilns at the plant, and (4) ensuring total emissions of polonium-210 from the plant do not exceed 4.5 curies per year. Alternative operating conditions, which can be shown to achieve an overall removal efficiency for emissions of polonium-210 which is equal to or greater than the efficiency which would be achieved under the operating conditions described in (1), (2), and (3) above (and that ensure that total emissions of polonium-210 from the plant do not exceed 4.5 curies per year), may be used with prior approval of the Administrator. Facilities wishing to utilize alternative operating conditions will have to apply for such approval in writing, and the Administrator will act upon such requests within 30 days after receipt of a complete and technically sufficient application. To ensure that the operating conditions specified by the revised standard can be enforced and verified and to enhance the enforceability of the numerical limits in the standard, EPA is also proposing to amend § 61.126 to require the continuous measurement of system pressure drop when scrubbers are used, and primary and secondary current and voltage in each electric field when an electrostatic precipitator is used.

Although the alternative mechanism for demonstrating compliance with the standard which is incorporated in this proposed rule is legally available to all

elemental phosphorus plants, EPA has concluded that all of the affected facilities except for the FMC plant in Pocatello, Idaho will achieve greater operational flexibility by electing to meet the underlying 2 curies/year limitation. Since the only practical effect of this proposal will be on FMC's Pocatello facility and FMC is already installing the John Zink system at that facility, EPA does not believe that the proposed rule will provide an inappropriate competitive advantage to the John Zink system. If a large new elemental phosphorus plant were to be constructed in the future or an existing plant were to be modified or expanded so as to raise this issue, EPA would then be prepared to consider any alternative emission control technology that could be shown to offer equivalent or improved performance.

The Agency seeks public comment on all aspects of this proposal.

B. Legal Authority

At the outset, it should be noted that section 112(q)(2) of the 1990 Clean Air Act Amendments provides that section 112, as in effect prior to the 1990 Amendments, continues to govern the promulgation of any NESHAP for elemental phosphorus plants. The procedures to be utilized to modify or revise a NESHAP under the old section 112 are the same as the procedures used to promulgate the NESHAP in the first place. (Clean Air Act Sections cited in the balance of this discussion are the sections in effect prior to enactment of the 1990 Amendments.)

The revised standard set forth in this proposed rule affords facilities governed by the standard a choice between: (1) A simple quantitative emission limitation of 2 curies/year of polonium-210, and (2) an alternative quantitative emission limitation of 4.5 curies/year of polonium-210 which is supplemented by detailed and mandatory operation and maintenance requirements intended to provide additional emission reductions. On its face, section 112 appears to establish a dichotomy between "emission standards" promulgated under section 112(b) and "design, equipment, work practice, and operational standards" promulgated under section 112(e). Since any standard promulgated under section 112(e) is "treated as an emission standard" under section 112(e)(5), it appears that this dichotomy may have little ultimate practical significance. Nonetheless, the Agency believes it is necessary to consider which section(s) provide the legal authority to promulgate the proposed standard.

In those instances where a standard consists exclusively of a quantitative emission limitation, the authority to promulgate the standard is clearly provided by section 112(b). Conversely, when a standard consists exclusively of design, equipment, work practice, and/or operational requirements, such a standard must be promulgated under the authority provided by section 112(e). In the case where a standard is partially quantitative, but is supplemented by operational or work practice requirements, as in this instance, EPA believes that the better interpretation of section 112 is to construe such a "hybrid" standard as an emission standard governed by section 112(b). Nothing in section 112 compels a different conclusion. Moreover, section 302(k) expressly defines an emission standard as "including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction." Finally, since the analytic framework established by the Vinyl Chloride decision authorizes EPA to determine what constitutes an "ample margin of safety" in part on the basis of technological feasibility, it would not be logical for EPA to be precluded from writing an emission standard which reflects the hybrid character of the standard setting process.

In the alternative, the proposed standard here can be viewed as an emission standard supplemented by a work practice standard promulgated under section 112(e). The Administrator may promulgate a work practice standard under section 112(e) to the extent he determines that "it is not feasible to prescribe or enforce an emission standard."

Section 112(e)(2) defines the phrase "not feasible to prescribe or enforce an emission standard" to include any situation where "the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations." EPA believes that this definition clearly encompasses the factual circumstances here. Of course, the measurement methodology is presently adequate to enable EPA to "enforce" a quantitative emission limit. However, given the uncertainties for the FMC facility regarding the quantitative emission reductions which can be achieved with the available technology, as described above, EPA has determined that it is not practicable to apply measurement methodology to "prescribe" a quantitative emission limit based on the available technology.

To the extent that the work practice and operational provisions of the proposed standard are construed as promulgated under the authority of section 112(e)(1), section 112(e)(4) requires EPA to repromulgate these provisions as an emission standard whenever it becomes feasible to do so. After FMC has installed the scrubber technology specified by the proposed rule, and has operated that technology in a variety of circumstances over a period of a few (1–3) years, EPA expects that it will be practicable to prescribe a quantitative emission limit based on the capabilities of the technology.

IV. Miscellaneous

EPA has determined that this action does not constitute a major rule within the meaning of Executive Order 12291 since it is not likely to result in (1) a nationwide annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Accordingly, a Regulatory Impact Analysis is not being prepared for this action.

Section 603 of the Regulatory Flexibility Act, 5 U.S.C. 603, requires EPA to prepare and make available for comment an "initial regulatory flexibility analysis" in connection with any rulemaking for which there is a statutory requirement that a general notice of proposed rulemaking be published. The "initial regulatory flexibility analysis" describes the effect of the proposed rule on small business entities. However, section 604(b) of the Regulatory Flexibility Act provides that section 603 "shall not apply to any proposed * * * rule if the head of the Agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."

EPA believes that the proposed changes, if promulgated, would tend to ease the regulatory burdens associated with provisions of the existing final rule. Therefore, this rule will have no adverse effect on small businesses. For the preceding reasons, I certify that this rule will not have significant economic impact on a substantial number of small entities.

This action was submitted to the Office of Management and Budget (OMB) for review as required by Executive Order 12291. Any written

comments from OMB to EPA and any EPA written response to those comments are available for public inspection at Docket A–91–51.

List of Subjects for 40 CFR Part 61

Air pollution control, Radionuclides, Reporting and recordkeeping requirements.

Dated: September 6, 1991.

William K. Reilly,

Administrator.

PART 61—[AMENDED]

It is proposed to amend part 61 of chapter I of title 40 of the Code of Federal Regulations as follows:

1. The authority citation for Part 61 continues to read as follows:

Authority: Secs. 101, 112, 114, 116, 301, Clean Air Act as amended (42 U.S.C. 7401, 7412, 7414, 7416, 7601).

Subpart K—National Emission Standards for Radionuclide Emissions From Elemental Phosphorus Plants

2. Subpart K is amended by revising § 61.122 to read as follows:

§ 61.122 Emission standard.

Emissions of polonium-210 to the ambient air from all calciners and nodulizing kilns at an elemental phosphorus plant shall not exceed a total of 2 curies a year, except that compliance with this standard may be conclusively shown if the elemental phosphorus plant:

(a) Installs a John Zink Tandem Nozzle Hydrosonic Fixed Throat Venturi Scrubber System including four scrubber units,

(b) All four scrubber units are operated continuously with a minimum average over any 6-hour period of 40 inches (water column) of pressure drop across each scrubber during calcining of phosphate shale,

(c) The system is used to scrub emissions from all calciners and/or nodulizing kilns at the plant, and

(d) Total emissions of polonium-210 from the plant do not exceed 4.5 curies per year.

Alternative operating conditions, which can be shown to achieve an overall removal efficiency for emissions of polonium-210 which is equal to or greater than the efficiency which would be achieved under the operating conditions described in paragraphs (a), (b), and (c) of this section, may be used with prior approval of the Administrator. A facility shall apply for such approval in writing, and the Administrator shall act upon the request within 30 days after receipt of a complete and technically sufficient application.

3. Subpart K is amended by revising § 61.126 to read as follows:

§ 61.126 Monitoring of operations.

(a) The owner or operator of any source subject to this subpart using a wet-scrubbing emission control device shall install, calibrate, maintain, and operate a monitoring device for the continuous measurement and recording of the pressure drop of the gas stream across each scrubber. The monitoring device must be certified by the manufacturer to be accurate within ±250 pascal (±1 inch of water). These continuous measurement recordings shall be maintained at the source and made available for inspection by the Administrator, or his authorized representative, for a minimum of 5 years.

(b) The owner or operator of any source subject to this subpart using an electrostatic precipitator control device shall install, calibrate, maintain, and operate a monitoring device for the continuous measurement and recording of the primary and secondary current and the voltage in each electric field. These continuous measurement recordings shall be maintained at the source and made available for inspection by the Administrator, or his authorized representative, for a minimum of 5 years.

[FR Doc. 91–21922 Filed 9–10–91; 8:45 am]

BILLING CODE 6560–50–M

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40 CFR Parts 180 and 186

[PP 1E3943 and FAP 1H5605/P524; FRL–3925–1]

RIN 2070–AC18

Pesticide Tolerances for Avermectin B_1 and its Delta-8,9-Isomer

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This document proposes that tolerances be established for residues of the insecticide avermectin B_1 and its delta-8,9-isomer in or on the raw agricutural commodity fresh tomatoes and the food commodity tomato pomace. The proposed regulations to establish maximum permissible levels for residues of the insecticide were requested pursuant to petitions submitted by Merck and Co., Inc., Merck Sharp and Dohme Research Laboratories.

DATES: Comments, identified by the document control number [PP 1E3943 and FAP 1H5605/P524], must be received on or before October 11, 1991.

ADDRESSES: By mail, submit written comments to: Public Information Branch, Field Operations Division (H7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring comments to: Rm. 1128, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202.

Information submitted as a comment concerning this document may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice. All written comments will be available for public inspection in rm. 1128 at the address given above, from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: By mail: George T. LaRocca, Product Manager (PM) 15, Registration Division (H-7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 204, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, 703-557-2400.

SUPPLEMENTARY INFORMATION: Merck Sharp & Dohme Research Laboratories, Division of Merck & Co., Inc., Hillsborough Rd., Three Bridges, New Jersey 08887, submitted pesticide petition (PP) 1E3943 proposing to establish a tolerance under section 408(e) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 346a(e)) for the insecticide avermectin B_1 and its delta-8,9-isomer [a mixture of avermectins containing > 80 percent avermectin B_{1a} (5-O-demethyl-25-de(1-methylpropyl)-25-(1-methylethyl) avermectin A_{1a}] in or on the raw agricultural commodity tomatoes imported from Mexico at 0.01 part per million (ppm) and feed additive petition (FAP) 1H5605 proposing to amend 40 CFR 186.300 by establishing a feed additive regulation under section 409 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 348) for avermectin B_1 and its delta-8,9-isomer in or on tomato pomace at 0.07 ppm.

The toxicological data considered in support of these proposed tolerances were discussed in a final rule document (PP 8F3592 and FAP 8H5550/R1032)