

regulations in the **Federal Register** (see 26 CFR part 301 revised as of April 1, 2009).

\* \* \* \* \*

**Par. 5.** Section 301.6112-1 is amended as follows:

1. Paragraph (b)(1) is revised.
2. Paragraphs (c)(3) and (c)(12) are amended by adding the language "26.6011-4," after "25.6011-4,".
3. Paragraphs (f) and (g) are revised. The revisions read as follows:

**§ 301.6112-1 Material advisors of reportable transactions must keep lists of advisees, etc.**

\* \* \* \* \*

(b) \* \* \* (1) *In general.* A separate list must be prepared and maintained for each reportable transaction. However, one list must be maintained for substantially similar transactions. A material advisor will have 30 calendar days from the date the list maintenance requirement first arises (see § 301.6111-3(b)(4) and paragraph (a) of this section) with respect to a reportable transaction to prepare the list that must be maintained under this section with respect to that transaction. The Commissioner in his discretion also may provide in published guidance designating a transaction as a reportable transaction a list preparation time period greater than 30 calendar days. If a list is requested under this section during the list preparation time period, the request for the list will be treated as having been made on the day after the list preparation time period ends. A list must be maintained in a form that enables the IRS to determine without undue delay or difficulty the information required in paragraph (b)(3) of this section. The Commissioner in his discretion may provide in published guidance a form or method for maintaining or furnishing the list.

\* \* \* \* \*

(f) *Designation agreements.* If more than one material advisor is required to maintain a list of persons for a reportable transaction, in accordance with paragraph (b) of this section, the material advisors may designate by written agreement a single material advisor (the designated material advisor) to maintain the list or a portion of the list. A designation agreement does not relieve material advisors from their obligation to maintain the list in accordance with paragraph (b) of this section or to furnish the list to the IRS in accordance with paragraph (e)(1) of this section, but a designation agreement may allow one material advisor to maintain the list on behalf of the other material advisors who are a party to the designation agreement. A

material advisor is not relieved from the requirement of this section because a material advisor is unable to obtain the list from any designated material advisor, any designated material advisor did not maintain a list, or the list maintained by any designated material advisor is not complete. The existence of a designation agreement does not affect the ability of the IRS to request the list from any party to the designation agreement. The IRS may request the list from any party to the designation agreement, and the party receiving the request must furnish the list to the IRS in accordance with paragraph (e)(1) of this section, regardless of whether the list was maintained by another party pursuant to the terms of a designation agreement.

(g) *Effective/applicability date.* In general, this section applies to transactions with respect to which a material advisor makes a tax statement under § 301.6111-3 on or after August 3, 2007. However, this section applies to transactions of interest entered into on or after November 2, 2006, with respect to which a material advisor makes a tax statement under § 301.6111-3 on or after November 2, 2006. Paragraphs (b)(1), (c)(3), (c)(12), and (f) of this section apply to transactions with respect to which a material advisor makes a tax statement under § 301.6111-3 after the date these regulations are published as final regulations in the **Federal Register**. Otherwise, the rules that apply on or before the date these regulations are published as final regulations in the **Federal Register** are contained in this section in effect prior to the date these regulations are published as final regulations in the **Federal Register** (see 26 CFR part 301 revised as of April 1, 2009).

Linda E. Stiff,

Deputy Commissioner for Services and Enforcement.

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**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 721**

[EPA-HQ-OPPT-2008-0483; FRL-8432-3]

RIN 2070-AJ36

**Elemental Mercury Used in Flow Meters, Natural Gas Manometers, and Pyrometers; Proposed Significant New Use Rule**

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing a significant new use rule (SNUR) under section 5(a)(2) of the Toxic Substances Control Act (TSCA) for elemental mercury (CAS No. 7439-97-6) for use in flow meters, natural gas manometers, and pyrometers, except for use in these articles when they are in service as of the effective date of the final rule. This action would require persons who intend to manufacture (including import) or process elemental mercury for an activity that is designated as a significant new use by this proposed rule to notify EPA at least 90 days before commencing that activity. Persons subject to the provisions of this proposed rule would not be exempt from significant new use reporting if they import into the United States or process elemental mercury as part of an article. The required notification would provide EPA with the opportunity to evaluate the intended use and, if necessary, to prohibit or limit that activity before it occurs.

**DATES:** Comments must be received on or before November 10, 2009.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA-HQ-OPPT-2008-0483, by one of the following methods:

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

- *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001.

- *Hand Delivery:* OPPT Document Control Office (DCO), EPA East Bldg., Rm. 6428, 1201 Constitution Ave., NW., Washington, DC. Attention: Docket ID Number EPA-HQ-OPPT-2008-0483. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564-8930. Such deliveries are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to docket ID number EPA-HQ-OPPT-2008-0483. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line 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 regulations.gov or e-mail. The regulations.gov website 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the 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 you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

**Docket:** All documents in the docket are listed in the docket index available at <http://www.regulations.gov>. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically at <http://www.regulations.gov>, or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566-1744, and the telephone number for the OPPT Docket is (202) 566-0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

**FOR FURTHER INFORMATION CONTACT:** For general information contact: Colby Lintner, Regulatory Coordinator, Environmental Assistance Division (7408M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone

number: (202) 554-1404; e-mail address: [TSCA-Hotline@epa.gov](mailto:TSCA-Hotline@epa.gov).

For technical information contact: Peter Gimlin, National Program Chemicals Division, Office of Pollution Prevention and Toxics, Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (202) 566-0515; e-mail address: [gimlin.peter@epa.gov](mailto:gimlin.peter@epa.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. General Information

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

You may be potentially affected by this action if you manufacture (defined by statute to include import) or process elemental mercury used in flow meters, natural gas manometers, or pyrometers. Potentially affected entities may include, but are not limited to, manufacturers of instruments and related products for measuring, displaying, and controlling industrial process variables (North American Industrial Classification System (NAICS) code 334513). This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The NAICS codes have been provided to assist you and others in determining whether this action might apply to certain entities. To determine whether you or your business may be affected by this action, you should carefully examine the applicability provisions in 40 CFR 721.5 for SNUR-related obligations. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR**

###### FURTHER INFORMATION CONTACT.

This action may also affect certain entities through pre-existing import certification and export notification rules under TSCA. Persons who import any chemical substance governed by a final SNUR are subject to the TSCA section 13 (15 U.S.C. 2612) import certification requirements and the corresponding regulations at 19 CFR 12.118 through 12.127 and 19 CFR 127.28. Those persons must certify that the shipment of the chemical substance complies with all applicable rules and orders under TSCA, including any SNUR requirements. The EPA policy in support of import certification appears at 40 CFR part 707, subpart B. In addition, any persons who export or intend to export a chemical substance that is the subject of this proposed rule on or after October 13, 2009 are subject

to the export notification provisions of TSCA section 12(b) (15 U.S.C. 2611(b)), (see 40 CFR 721.20), and must comply with the export notification requirements in 40 CFR part 707, subpart D.

###### B. What Should I Consider as I Prepare My Comments for EPA?

1. **Submitting CBI.** Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. **Tips for preparing your comments.** When submitting comments, remember to:

- i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).
- ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- iv. Describe any assumptions and provide any technical information and/or data that you used.
- v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- vi. Provide specific examples to illustrate your concerns and suggest alternatives.
- vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- viii. Make sure to submit your comments by the comment period deadline identified.

##### II. Background

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

This proposed SNUR would require persons to notify EPA at least 90 days before commencing the manufacture, import, or processing of elemental

mercury for any of the following significant new uses: Flow meters, natural gas manometers, or pyrometers. This proposed rule does not affect the manufacturing and processing of elemental mercury for use in these articles when they are in service as of the effective date of the final rule. EPA believes this proposed SNUR is necessary because manufacturing, processing, use, or disposal of mercury associated with these uses may produce significant changes in human and environmental exposures. The rationale and objectives for this proposed SNUR are explained in Unit IV.

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

Section 5(a)(2) of TSCA (15 U.S.C. 2604(a)(2)) authorizes EPA to determine that a use of a chemical substance is a "significant new use." EPA must make this determination by rule after considering all relevant factors, including those listed in TSCA section 5(a)(2). Once EPA determines that a use of a chemical substance is a significant new use, TSCA section 5(a)(1)(B) requires persons to submit a significant new use notice (SNUN) to EPA at least 90 days before they manufacture or process the chemical substance for that use (15 U.S.C. 2604(a)(1)(B)). As described in Unit II.C., the general SNUR provisions are found at 40 CFR part 721, subpart A.

#### *C. Applicability of General Provisions*

General provisions for SNURs appear under 40 CFR part 721, subpart A. These provisions describe persons subject to the rule, recordkeeping requirements, exemptions to reporting requirements, and applicability of the rule to uses occurring before the effective date of the final rule. However, 40 CFR 721.45(f) does not apply to this SNUR. As a result, persons subject to the provisions of this proposed rule would not be exempt from significant new use reporting if they import or process elemental mercury as part of an article (see 40 CFR 721.5). Conversely, the exemption from notification requirements for exported articles (see 40 CFR 707.60(b)) remains in force. Thus, persons who export elemental mercury as part of an article are not required to provide export notification.

Provisions relating to user fees appear at 40 CFR part 700. According to 40 CFR 721.1(c), persons subject to SNURs must comply with the same notice requirements and EPA regulatory procedures as submitters of Premanufacture Notices (PMNs) under TSCA section 5(a)(1)(A). In particular, these requirements include the

information submission requirements of TSCA section 5(b) and 5(d)(1), the exemptions authorized by TSCA section 5(h)(1), (h)(2), (h)(3), and (h)(5), and the regulations at 40 CFR part 720. Once EPA receives a SNUN, EPA may take regulatory action under TSCA section 5(e), 5(f), 6, or 7 to control the activities on which it has received the SNUN. If EPA does not take action, EPA is required under TSCA section 5(g) to explain in the **Federal Register** its reasons for not taking action.

Persons who export or intend to export a chemical substance identified in a proposed or final SNUR are subject to the export notification provisions of TSCA section 12(b). The regulations that interpret TSCA section 12(b) appear at 40 CFR part 707, subpart D. Persons who import a chemical substance identified in a final SNUR are subject to the TSCA section 13 import certification requirements, codified at 19 CFR 12.118 through 12.127 and 19 CFR 127.28. Such persons must certify that the shipment of the chemical substance complies with all applicable rules and orders under TSCA, including any SNUR requirements. The EPA policy in support of import certification appears at 40 CFR part 707, subpart B.

### **III. Summary of the Proposed Rule**

#### *A. Overview of Mercury and Mercury Uses*

1. *Mercury.* This proposed rule applies to elemental mercury (CAS No. 7439-97-6), which is a naturally occurring element. Because of its unique properties (e.g., exists as a liquid at room temperature and forms amalgams with many metals), elemental mercury has been used in many industrial processes and consumer products. In addition to its useful characteristics, mercury also is known to cause adverse health effects in humans and wildlife. These effects can vary depending on the form of mercury to which a person or animal is exposed, as well as the magnitude, length, and frequency of exposure.

The most prevalent human and wildlife exposure to mercury results from ingesting fish contaminated with methylmercury. Methylmercury is an organo-metallic compound that is formed via the conversion of elemental or inorganic mercury compounds by certain microorganisms and other natural processes. For example, elemental mercury may evaporate and be emitted into the atmosphere. Atmospheric mercury can be deposited directly into water bodies or watersheds, where it can be washed into surface waters via overland run-off.

Once deposited in sediments, certain microorganisms and other natural processes can convert elemental mercury into methylmercury. Methylmercury bioaccumulates, which means that it is taken up and concentrated in the tissues of aquatic, mammalian, avian, and other wildlife. Methylmercury is a highly toxic substance; a number of adverse health effects associated with exposure to it have been identified in humans and in animal studies. Most extensive are the data on neurotoxicity, particularly in developing organisms. Fetuses, infants, and young children generally are more sensitive to methylmercury's neurological effects than adults.

In 2004, EPA and the Food and Drug Administration (FDA) issued a national consumption advisory concerning mercury in fish. The advisory contains recommended limits on the amount of certain types of fish and shellfish that pregnant women and young children can safely consume. By 2005, all 50 states had issued fish consumption advisories for fish from certain water bodies known to be contaminated by methylmercury, see <http://www.epa.gov/mercury/advisories.htm>.

In addition to methylmercury, exposure to elemental mercury can also pose health risks. Elemental mercury primarily causes health effects when it is breathed as a vapor that can be absorbed through the lungs. These exposures can occur when elemental mercury is spilled or products that contain elemental mercury break, resulting in release of mercury to the air, particularly in warm or poorly-ventilated indoor spaces.

For a more detailed summary of background information (e.g., chemistry, environmental fate, exposure pathways, and health and environmental effects), as well as references pertaining to elemental mercury that EPA considered before proposing this rule, please refer to EPA's proposed SNUR for mercury switches in motor vehicles, issued in the **Federal Register** of July 11, 2006 (71 FR 39035)(FRL-7733-9), or in the docket for the 2006 proposal under docket ID number EPA-HQ-OPPT-2005-0036. All documents in the docket are listed in the docket's index which is available at <http://www.regulations.gov>.

2. *Mercury uses.* Elemental mercury has been used in thousands of products and applications. Over the past two decades, there has been a dramatic drop in elemental mercury use by industries in the United States. In response to increased concerns about exposure to anthropogenic sources of mercury in the environment and also because of the availability of suitable mercury-free

products, Federal and State governments have made efforts to limit the use of elemental mercury in certain products. Various states have banned or restricted the manufacture or sale of products containing mercury, see <http://www.epa.gov/epawaste/hazard/tsd/mercury/laws.htm>. On October 7, 2007, EPA issued a final SNUR for elemental mercury used in convenience light switches, anti-lock braking system switches, and active ride control system switches in certain motor vehicles (72 FR 56903).

In the past, elemental mercury was used in the manufacture of flow meters, natural gas manometers, and pyrometers. The latest information available to EPA indicates that the manufacture of these mercury-containing articles has ceased (Ref. 1). EPA requests comments on whether elemental mercury continues to be used in manufacturing (including importing into the United States) flow meters, natural gas manometers, or pyrometers. EPA also requests comment on whether elementary mercury is being used in the remanufacturing of any of these articles that remain in use.

3. *Flow meters containing elemental mercury.* Flow meters are instruments which measure the flow rate of liquids or gases. Historically, they have been used in civil service applications, e.g., water treatment plants, sewage plants, and power stations. Flow meters contained up to 5 kilograms (kg) of elemental mercury. At present, the sale of mercury-containing flow meters is banned in six states: California, Maine, Massachusetts, New Hampshire, New York, and Vermont (Ref. 4). Many mercury-free alternatives exist, including differential pressure meters, positive displacement meters, velocity meters, and mass meters. EPA found sufficient information to conclude that mercury-containing flow meters are no longer manufactured in or imported into the United States (Ref. 1).

4. *Natural gas manometers containing elemental mercury.* A manometer is an instrument used to measure the pressure of gases or liquids. For purposes of this proposed rule, a natural gas manometer means a mercury-containing instrument used in the natural gas industry to measure the pressure differential of natural gas in a pipeline. Mercury manometers have been used in the natural gas industry on individual wells, pipeline junctions, pipeline manifolds, compressor stations, and distribution points. The manometers contain between 3.2 and 54.5 kg of mercury. A common design for manometers is a U-shaped tube with one end opened to the atmosphere and

the other connected to a process. Contained in the tube is a liquid (mercury, in the past). Pressure differential is measured by comparing the liquid levels in each of the two vertical sections of the tube. Seven states have enacted broad bans on the sale of mercury manometers (Ref. 4), and Louisiana prohibits the sale of mercury-containing natural gas manometers (Ref. 2). Available information indicates that bellows orifice meters have replaced mercury meters in the natural gas industry. EPA found sufficient information to conclude that mercury-containing manometers are no longer manufactured in or imported into the United States (Ref. 1).

5. *Pyrometers containing elemental mercury.* A pyrometer is an instrument that is similar to a thermometer but is typically used to measure extremely high temperatures in industrial processes such as in foundries, for pottery and ceramic kiln work, and in automotive applications. Historically, pyrometers contained mercury in sensing units in amounts ranging between 5 and 10 grams of mercury. In recent years, California, Maine, Massachusetts, New Hampshire, New York, and Vermont have banned the sale of mercury-containing pyrometers (Ref. 4). EPA found sufficient information to conclude that mercury-containing pyrometers are no longer manufactured, or imported into the U.S. (Ref. 1).

6. *Potential exposure and release.* The typical lifecycle of flow meters, natural gas manometers, and pyrometers includes several stages: Manufacture, distribution in commerce, use, and waste management (landfilling or recycling). At any point in the lifecycle, there is potential for mercury to be released as liquid or vapor. Workers and others can be exposed to the mercury and it can be released into water, air, or onto land as the mercury is transported, stored, and handled during manufacturing. While the flow meters, manometers, and pyrometers are in use, the mercury can vaporize or spill due to breakage during transport, installation, maintenance, refilling, or repair. Beginning in the 1920s, mercury-containing manometers were used in the Louisiana natural gas industry. Mercury from these manometers has been identified as a source of soil contamination. (Ref. 3). Other opportunities for release can occur at the end of the lifecycle of flow meters, manometers, and pyrometers, as the devices are removed from equipment and facilities, and handled during waste management.

## B. Proposed Action

EPA is proposing to designate as significant new uses use of elemental mercury in flow meters, natural gas manometers, or pyrometers. However, use of elemental mercury in these articles when they are in service as of the effective date of the final rule would not be covered as a significant new use under this proposed SNUR. Proposed definitions of "flow meter," "natural gas manometer," and "pyrometer" can be found at 40 CFR 721.10068 of the regulatory text for this proposal.

This action would amend 40 CFR 721.10068 and require persons who intend to manufacture or process elemental mercury for a use designated by this proposed rule as a significant new use to notify EPA at least 90 days before commencing the manufacturing or processing of elemental mercury for such significant new use. The required notification would provide EPA with the opportunity to evaluate the intended use and, if necessary, to prohibit or limit that activity before it occurs.

For this SNUR, EPA is proposing not to include the general "article" exemption at 40 CFR 721.45(f). Thus, persons importing or processing elemental mercury (including when part of an article) for a significant new use would be subject to the notification requirements of 40 CFR 721.25. EPA proposes not to include this exemption because flow meters, natural gas manometers, and pyrometers are articles, and a primary concern associated with this SNUR is potential exposures associated with the lifecycle of these uses. Further, it is possible to reclaim elemental mercury from certain articles, which could be used to produce flow meters, natural gas manometers, and pyrometers. EPA notes that, in accordance with TSCA section 12(a) and 40 CFR 721.45(g), persons who manufacture or process elemental mercury solely for export would be exempt from the notification requirements of 40 CFR 721.25, if when distributing the substance in commerce, it is labeled in accordance with TSCA section 12(a)(1)(B). Further, EPA notes that the exemption from the TSCA section 12(b) notification requirements for exported articles (see 40 CFR 707.60(b)) would remain in force. Thus, persons who export elemental mercury as part of an article would not be required to provide export notification.

EPA believes elemental mercury is no longer used to manufacture flow meters, natural gas manometers, or pyrometers, but some of these articles may remain in service in the United States. EPA believes the ongoing use of such

articles, including some maintenance and servicing activities, falls outside the regulation of significant new uses, and EPA has clarified this in the proposed rule text. Thus, the manufacturing and processing of elemental mercury for use in these articles, provided they are in service as of the effective date of the final rule, would not be covered by the rule. For example, if an article that is in service as of the effective date of the final rule is removed from service for maintenance or servicing, including the addition of new mercury, and then placed back into service, any manufacturing or processing of mercury associated with that maintenance or servicing would not be covered by the rule. Otherwise, the addition of new mercury to these existing articles after the effective date of the final rule could potentially trigger a significant new use notice under this proposed rule (e.g., if it involved processing of the mercury), which is not EPA's intent.

#### IV. Rationale and Objectives

##### A. Rationale

As summarized in Unit III.A., EPA has concerns regarding the environmental fate and the exposure pathways that lead to the presence of methylmercury in fish and the consumption of mercury-contaminated fish by humans and wildlife. EPA is encouraged by the discontinuation of the use of elemental mercury in the manufacturing of flow meters, natural gas manometers, and pyrometers. However, EPA is concerned that the manufacturing or processing of elemental mercury for use in flow meters, natural gas manometers, or pyrometers could be reinitiated in the future. Accordingly, EPA wants the opportunity to evaluate and control, where appropriate, activities associated with those uses, if such manufacturing or remanufacturing were to occur again. The required notification provided by a SNUN would provide EPA with the opportunity to evaluate activities associated with a significant new use and an opportunity to protect against unreasonable risks, if any, from exposure to mercury.

##### B. Objectives

Based on the considerations in Unit IV.A., EPA has the following objectives with regard to the significant new uses that are designated in this proposed rule:

1. EPA would receive notice of any person's intent to manufacture or process elemental mercury for any of the described significant new uses before that activity begins.

2. EPA would have an opportunity to review and evaluate data submitted in a SNUN before the notice submitter begins manufacturing or processing of elemental mercury for any of the described significant new uses.

3. EPA would be able to regulate prospective manufacturers or processors of elemental mercury before the described significant new uses of the chemical substance occur, provided that regulation is warranted pursuant to TSCA sections 5(e), 5(f), 6 or 7.

#### V. Significant New Use Determination

Section 5(a)(2) of TSCA states that EPA's determination that a use of a chemical substance is a significant new use must be made after consideration of all relevant factors including:

- The projected volume of manufacturing and processing of a chemical substance.
- The extent to which a use changes the type or form of exposure of human beings or the environment to a chemical substance.
- The extent to which a use increases the magnitude and duration of exposure of human beings or the environment to a chemical substance.
- The reasonably anticipated manner and methods of manufacturing, processing, distribution in commerce, and disposal of a chemical substance.

In addition to these factors enumerated in TSCA section 5(a)(2), the statute authorizes EPA to consider any other relevant factors.

To determine what would constitute a significant new use of elemental mercury, EPA considered the four factors listed in section 5(a)(2) of TSCA. The latest information available to EPA indicates that there is no ongoing use of elemental mercury in the manufacture or remanufacture of flow meters, natural gas manometers, or pyrometers. Resumption of these uses of elemental mercury could result in a significant increase in the magnitude and duration of exposure to workers and the surrounding environment at facilities of all types in the lifecycle, as well as an increase in releases which could contribute additional mercury to the atmosphere for long-range transport. Resumption of these uses could also result in exposures to workers who had not previously worked in these facilities when elemental mercury was commonly used, as well as exposures to workers who are not currently being exposed to mercury in the manufacture of flow meters, natural gas manometers, or pyrometers. Increases in mercury releases could lead to increases in mercury concentrations in the environment and reduction in overall

ecosystem and human health from consumption of mercury-contaminated fish.

EPA believes that any of these renewed uses of elemental mercury would increase the magnitude and duration of exposure to humans and the environment over that which would otherwise exist. Based upon the relevant factors as discussed in this Unit, EPA has determined that any manufacturing or processing of elemental mercury for use in flow meters, natural gas manometers, or pyrometers is a significant new use.

#### VI. Alternatives

Before proposing this SNUR, EPA considered the following alternative regulatory actions:

##### A. Promulgate a TSCA Section 8(a) Reporting Rule

Under a TSCA section 8(a) rule, EPA could, among other things, generally require persons to report information to the Agency when they intend to manufacture or process a listed chemical for a specific use or any use. However, for elemental mercury used in flow meters, natural gas manometers, and pyrometers, the use of TSCA section 8(a) rather than SNUR authority would have several limitations. First, if EPA were to require reporting under TSCA section 8(a) instead of TSCA section 5(a), EPA would not have the opportunity to review human and environmental hazards and exposures associated with the proposed significant new use and, if necessary, take immediate follow-up regulatory action under TSCA sections 5(e) or 5(f) to prohibit or limit the activity before it begins. In addition, EPA may not receive important information from small businesses, because such firms generally are exempt from TSCA section 8(a) reporting requirements. In view of the level of health and environmental concerns about elemental mercury, if used for the proposed significant new use, EPA believes that a TSCA section 8(a) rule for this substance would not meet EPA's regulatory objectives.

##### B. Regulate Elemental Mercury for Use in Flow Meters, Natural Gas Manometers, and Pyrometers Under TSCA Section 6

EPA may regulate under TSCA section 6 if "the Administrator finds that there is a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use or disposal of a chemical substance or mixture . . . presents or will present an unreasonable risk of injury to health or the environment." (TSCA section

6(a)) Given that elemental mercury is no longer being used in the manufacture of flow meters, natural gas manometers, or pyrometers, EPA concluded that risk management action under TSCA section 6 is not necessary at this time. This proposed SNUR would allow the Agency to address the potential risks associated with the proposed significant new use.

*C. Allow the Exemption for Persons Who Import or Process Elemental Mercury as Part of Articles That Could be Subject to the SNUR*

Under the SNUR exemption provision at 40 CFR 721.45(f), a person who imports or processes a substance covered by a SNUR identified in subpart E of part 721 as part of an article is not generally subject to the notification requirements of §721.25 for that substance. However, EPA is concerned that exempting articles would render the SNUR less effective because of the possibility that flow meters, natural gas manometers, or pyrometers containing elemental mercury could be imported or processed for uses subject to this proposed SNUR without the submission of a SNUN. Because mercury-containing flow meters, natural gas manometers and pyrometers are the primary concerns in this SNUR, EPA wishes to include not only bulk elemental mercury but also these and other articles when they contain elemental mercury imported or processed for a significant new use. Thus, EPA is proposing to promulgate this rule without the exemption generally provided for in §721.45(f).

**VII. Applicability of Rule to Uses Occurring Before Effective Date of the Final Rule**

As discussed in the **Federal Register** of April 24, 1990 (55 FR 17376), EPA has decided that the intent of section 5(a)(1)(B) of TSCA is best served by designating a use as a significant new use as of the date of publication of the proposed rule rather than as of the effective date of the final rule. If uses begun after publication of the proposed rule were considered ongoing rather than new, it would be difficult for EPA to establish SNUR notice requirements, because a person could defeat the SNUR by initiating the proposed significant new use before the rule became final, and then argue that the use was ongoing as of the effective date of the final rule. Thus, persons who begin commercial manufacture or processing of the chemical substance that would be regulated through this proposed rule, if finalized, would have to cease any such activity before the effective date of the

rule if and when finalized. To resume their activities, these persons would have to comply with all applicable SNUR notice requirements and wait until the notice review period, including all extensions, expires. EPA has promulgated provisions to allow persons to comply with this SNUR before the effective date. If a person were to meet the conditions of advance compliance under § 721.45(h), that person would be considered to have met the requirements of the final SNUR for those activities.

**VIII. Test Data and Other Information**

EPA recognizes that TSCA section 5 does not require developing any particular test data before submission of a SNUN. Persons are required only to submit test data in their possession or control and to describe any other data known to or reasonably ascertainable by them (15 U.S.C. 2604(d); 40 CFR 721.25). However, as a general matter, EPA recommends that SNUN submitters include data that would permit a reasoned evaluation of risks posed by the chemical substance during its manufacture, processing, use, distribution in commerce, or disposal. EPA encourages persons to consult with the Agency before submitting a SNUN. As part of this optional pre-notice consultation, EPA would discuss specific data it believes may be useful in evaluating a significant new use. SNUNs submitted for significant new uses without any test data may increase the likelihood that EPA will take action under TSCA section 5(e) to prohibit or limit activities associated with this chemical.

SNUN submitters should be aware that EPA will be better able to evaluate SNUNs that provide detailed information on:

1. Human exposure and environmental releases that may result from the significant new uses of the chemical substance.
2. Potential benefits of the chemical substance.
3. Information on risks posed by the chemical substances compared to risks posed by potential substitutes.

**IX. SNUN Submissions**

SNUNs must be mailed to the Environmental Protection Agency, OPPT Document Control Office (7407M), 1200 Pennsylvania Avenue, NW., Washington, D.C. 20460-0001. Information must be submitted in the form and manner set forth in EPA Form No. 7710-25. This form is available from the Environmental Assistance Division (7408M), 1200 Pennsylvania Avenue, NW., Washington, D.C. 20460-0001 (see

40 CFR 721.25 and 720.40). Forms and information are also available electronically at <http://www.epa.gov/opptintr/newchems/pubs/pmiforms.htm>.

**X. Economic Analysis**

EPA has evaluated the potential costs of establishing SNUR reporting requirements for potential manufacturers and processors of the chemical substance included in this proposed rule (Ref. 1). EPA's economic analysis (Ref. 1), which is briefly summarized here, is available in the docket for this proposed rule.

The costs of submission of a SNUN will not be incurred by any company until a company decides to pursue a significant new use as defined in this proposed SNUR. In the event that a SNUN is submitted, costs are estimated at approximately \$8,000 per SNUN submission, and includes the cost for preparing and submitting the SNUN, and the payment of a user fee. Businesses that submit a SNUN are either subject to a \$2,500 user fee required by 40 CFR 700.45(b)(2)(iii), or, if they are a small business with annual sales of less than \$40 million when combined with those of the parent company (if any), a reduced user fee of \$100 (40 CFR 700.45(b)(1)). In its evaluation of this rule, EPA also considered the potential costs a company might incur by avoiding or delaying the significant new use in the future, but these costs have not been quantified.

In addition to comments on all aspects of this proposal, the Agency is specifically interested in comments and supporting information on the following questions related to assumptions used in the Agency's analysis:

Do you know of any current domestic production of mercury flow meters for the uses defined as significant in this rule that EPA missed? If yes, please provide detailed information.

Are mercury flow meters currently available in the market place for the uses defined as significant in this rule? If yes, please provide detailed information.

Does the analysis capture the lost option value of mercury flow meters? If no, please provide specific information that you believe should be included.

Are the costs for preparing and submitting a SNUN comparable to the costs for preparing and submitting a PMN? If not, in what ways is it different?

Providing supporting and detailed information for comments on these points will be used by EPA to review

related assumptions in the economic analysis as it prepares the final rule.

## XI. References

The following documents are specifically referenced in the preamble for this rulemaking. In addition to these documents, other materials may be available in the docket established for this rulemaking under Docket ID No. EPA-HQ-OPPT-2008-0483, which you can access through

[www.regulations.gov](http://www.regulations.gov). Those interested in the information considered by EPA in developing this proposed rule, should also consult documents that are referenced in the documents that EPA has placed in the docket, regardless of whether the other documents are physically located in the docket.

1. EPA, 2008b. Economic Analysis for the Proposed Significant New Use Rule for Mercury-Containing Flow Meters, Nanometers, and Pyrometers. Washington, D.C. OPPT/EETD/EPAB, July 21, 2009.

2. La. Sess. Law Serv. Act 126 (S.B. 615)

3. State of Louisiana Mercury Risk Reduction Plan, prepared by the Louisiana Department of Environmental Quality, 2007. Available as of September 1, 2008 at <http://www.ldeq.org/portal/Portals/0/organization/MercuryReportforweb.pdf>

4. Mercury Reduction & Education Legislation in the IMERC-Member States, prepared by Terri Goldberg and Adam Wienert, NEWMOA, June 2008. Available as of January 8, 2009 at <http://www.newmoa.org/prevention/mercury/imerclawlegislation-2008.htm>

## XII. Statutory and Executive Order Reviews

### A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993), the Office of Management and Budget (OMB) has determined that this proposed SNUR is a “significant regulatory action,” because it meets the criteria in section 3(f) of the Executive Order. Accordingly, this action was submitted to the OMB for review under Executive Order 12866 and any changes made based on OMB recommendations have been documented in the public docket for this rulemaking as required by section 6(a)(3)(E) of the Executive Order.

### B. Paperwork Reduction Act

According to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, an Agency may not conduct or

sponsor, and a person is not required to respond to a collection of information that requires OMB approval under the PRA, unless it has been approved by OMB and displays a currently valid OMB control number. The OMB control numbers for EPA’s regulations in Title 40 of the CFR, after appearing in the **Federal Register**, are listed in 40 CFR, part 9, and included on the related collection instrument, or form, if applicable.

The information collection requirements related to this action have already been approved by OMB pursuant to the PRA under OMB control number 2070-0038 (EPA ICR No. 1188). This action does not impose any burden requiring additional OMB approval. If an entity were to submit a SNUN to the Agency, the annual burden is estimated to average 110 hours per response. This burden estimate includes the time needed to review instructions, search existing data sources, gather and maintain the data needed, and complete, review, and submit the required SNUN.

Send any comments about the accuracy of the burden estimate, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques, to the Director, Collection Strategies Division, Office of Environmental Information (2822T), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, D.C. 20460-0001. Please remember to include the OMB control number in any correspondence, but do not submit any completed forms to this address.

### C. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Agency hereby certifies that promulgation of this SNUR would not have a significant adverse economic impact on a substantial number of small entities. The rationale supporting this conclusion is as follows. A SNUR applies to any person (including small or large entities) who intends to engage in any activity described in the rule as a “significant new use.” By definition of the word “new,” and based on all information currently available to EPA, it appears that no small or large entities presently engage in such activity. Since this proposed SNUR would require a person who intends to engage in such activity in the future to first notify EPA by submitting a SNUN, no economic impact will occur unless someone files a SNUN to pursue a significant new use in the future or forgoes profits by avoiding or delaying the significant new

use. Although some small entities may decide to conduct such activities in the future, EPA cannot presently determine how many, if any, there may be. However, EPA’s experience to date is that, in response to the promulgation of over 1,000 SNURs, the Agency receives on average only 5 notices per year. Of those SNUNs submitted, only one appears to be from a small entity in response to any SNUR. Therefore, EPA believes that the potential economic impact of complying with this SNUR is not expected to be significant or adversely impact a substantial number of small entities. In a SNUR that published as a final rule on August 8, 1997 (62 FR 42690)(FRL-5735-4), the Agency presented its general determination that proposed and final SNURs are not expected to have a significant economic impact on a substantial number of small entities, which was provided to the Chief Counsel for Advocacy of the Small Business Administration.

### D. Unfunded Mandates Reform Act

Based on EPA’s experience with proposing and finalizing SNURs, State, local, and Tribal governments have not been impacted by these rulemakings, and EPA does not have any reason to believe that any State, local, or Tribal government would be impacted by this rulemaking. As such, EPA has determined that this regulatory action would not impose any enforceable duty, contain any unfunded mandate, or otherwise have any effect on small governments subject to the requirements of sections 202, 203, 204, or 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104-4).

### E. Executive Order 13132: Federalism

This action would not have a substantial direct effect on 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, as specified in Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999).

### F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This proposed rule would not have Tribal implications because it is not expected to have substantial direct effects on Indian Tribes. This proposed rule would not significantly or uniquely affect the communities of Indian Tribal governments, nor would it involve or impose any requirements that affect Indian Tribes. Accordingly, the

requirements of Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000), do not apply to this proposed rule.

*G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks*

This action is not subject to Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997), because this is not an economically significant regulatory action as defined by Executive Order 12866, and this action does not address environmental health or safety risks disproportionately affecting children.

*H. Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution, or Use*

This proposed rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001), because this action is not expected to affect energy supply, distribution, or use.

*I. National Technology Transfer Advancement Act*

Since this action does not involve any technical standards; section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-113, section 12(d) (15 U.S.C. 272 note), does not apply to this action.

*J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*

This action does not entail special considerations of environmental justice related issues as delineated by Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

**List of Subjects in 40 CFR Part 721**

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements

Dated: August 25, 2009.

**Wendy C. Hamnett,**

*Acting Director, Office of Pollution Prevention and Toxics.*

Therefore, it is proposed that 40 CFR chapter I be amended as follows:

**PART 721—[AMENDED]**

■ 1. The authority citation for part 721 continues to read as follows:

**Authority:** 15 U.S.C. 2604, 2607, 2625(c).

■ 2. Section 721.10068 is amended by revising paragraph (a) and adding a new paragraph (b)(2)(vii) to read as follows:

**§ 721.10068 Elemental mercury.**

(a) *Definitions.* The definitions in §721.3 apply to this section. In addition, the following definition applies:

(1) *Motor vehicle* has the meaning found at 40 CFR 85.1703.

(2) *Flow meter* means an instrument used in various applications to measure the flow rate of liquids or gases.

(3) *Natural gas manometer* means an instrument used in the natural gas industry to measure gas pressure.

(4) *Pyrometer* means an instrument used in various applications to measure extremely high temperatures.

(b)\* \* \*

(2)\* \* \*

(vii) Manufacturing or processing of elemental mercury for use in flow meters, natural gas manometers, and pyrometers except for use in these articles when they are in service as of September 11, 2009.

\* \* \* \* \*

[FR Doc. E9-21894 Filed 9-10-09; 8:45 am]

BILLING CODE 6560-50-S

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 660**

[Docket No. 0907301200-91202-01]

RIN 0648-AY07

**Magnuson-Stevens Act Provisions; Fisheries off West Coast States; Pacific Coast Groundfish Fishery; 2009-2010 Biennial Specifications and Management Measures for Canary Rockfish and Petrale Sole**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS proposes a rule to revise the 2009 management measures for petrale sole and to revise the 2010 harvest specifications and management measures for petrale sole and canary rockfish taken in the U.S. exclusive economic zone (EEZ) off the coasts of Washington, Oregon, and California.

**DATES:** Comments on this proposed rule must be received no later than 5 p.m., local time on October 13, 2009.

**ADDRESSES:** You may submit comments, identified by RIN 0648-AY07 by any one of the following methods:

• Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal <http://www.regulations.gov>.

• Fax: 206-526-6736, Attn: Gretchen Arentzen

• Mail: Barry A. Thom, Acting Regional Administrator, Northwest Region, NMFS, 7600 Sand Point Way NE, Seattle, WA 98115-0070, Attn: Gretchen Arentzen.

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Copies of the Draft Environmental Assessment (DEA) prepared for this action is available from the NMFS Northwest Region website at <http://www.nwr.noaa.gov> or from the mailing and street addresses listed above.

**FOR FURTHER INFORMATION CONTACT:** Gretchen Arentzen (Northwest Region, NMFS), phone: 206-526-6147, fax: 206-526-6736 and e-mail [gretchen.arentzen@noaa.gov](mailto:gretchen.arentzen@noaa.gov).

**SUPPLEMENTARY INFORMATION:**

**Electronic Access**

This proposed rule is accessible via the Internet at the Office of the Federal Register's Website at <http://www.gpoaccess.gov/fr/index.html>. Background information and documents are available at the Pacific Fishery Management Council's website at <http://www.pcouncil.org/>.

**Background**

The 2009 and 2010 ABCs, OYs and HGs for Pacific coast groundfish species were established in the final rule for the 2009-2010 groundfish harvest specifications and management measures (74 FR 9874, March 6, 2009). This rule proposes interim measures for two species. For petrale sole this action would reduce catches in 2009 by