

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 8**

[FRL-7114-3]

RIN 2020-AA34

**Environmental Impact Assessment of Nongovernmental Activities in Antarctica****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

**SUMMARY:** Public Law 104-227, the Antarctic Science, Tourism, and Conservation Act of 1996 (the Act), amends the Antarctic Conservation Act of 1978 to implement the Protocol on Environmental Protection (the Protocol) to the Antarctic Treaty of 1959 (the Treaty). The Act directs the Environmental Protection Agency (EPA) to promulgate regulations that provide for assessment of the environmental impacts of nongovernmental activities in Antarctica and for coordination of the review of information regarding environmental impact assessments received from other Parties under the Protocol. This final rule establishes the requirements for assessment of the environmental impacts of nongovernmental activities in Antarctica and for coordination of the review of information regarding environmental impact assessments received from other parties under the Protocol.

**DATES:** This rule will be effective on January 7, 2002.

**FOR FURTHER INFORMATION CONTACT:** Mr. Joseph Montgomery or Ms. Katherine Biggs at telephone: (202) 564-7157 or (202) 564-7144, respectively, or by mail at: NEPA Compliance Division; Office of Federal Activities (2252A); U.S. Environmental Protection Agency; 1200 Pennsylvania Avenue, NW; Washington, D.C. 20460.

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**I. Introduction****A. Statutory Background**

On October 2, 1996, the President signed into law the Antarctic Science, Tourism, and Conservation Act of 1996 (the Act). The purpose of the Act is to implement the provisions of the Protocol on Environmental Protection (the Protocol) to the Antarctic Treaty of 1959 (the Treaty). The Act provides that:

"The [Environmental Protection Agency] shall within 2 years after the date of \* \* \* enactment \* \* \* promulgate regulations to provide for \* \* \* the environmental impact assessment of nongovernmental activities, including tourism, for which the United States is required to give advance notice under Paragraph 5 of Article VII of the Treaty \* \* \* and \* \* \* coordination of the review of information regarding environmental impact assessment received from other Parties under the Protocol." Regulations must be "consistent with Annex I to the Protocol."

**B. Background of the Rulemaking**

Although the Act gave the Environmental Protection Agency (EPA) two years to promulgate regulations, the United States (U.S.) sought immediate ratification of the Protocol which, in turn, required EPA, contemporaneous with ratification, to have regulations in effect which enabled the U.S. to comply with its obligations under the Protocol. Accordingly, on April 30, 1997, EPA promulgated an interim final rule so that the United States could ratify the Protocol and implement its obligations under the Protocol as soon as the Protocol entered into force.

Because of the importance of facilitating the Protocol's prompt entry into force, EPA believed it had good cause under 5 U.S.C. 553(b)(B) to find that implementation of notice and comment procedures for the interim final rule would be contrary to the public interest and unnecessary. Therefore, the interim final regulations were issued without notice and an opportunity to comment and, for the same reasons, under 5 U.S.C. 553(d)(3), the interim final regulations took effect on April 30, 1997.

Further, EPA believed that public comment on the requirements for environmental documentation, including procedures and content, in the interim final regulations was unnecessary because the interim final regulations incorporated the environmental documentation requirements of the Protocol, which was signed by the U.S. in 1991 and received the advice and consent of the Senate in 1992. Specifically, language from the Protocol was incorporated into the interim final regulations regarding the content of initial environmental evaluation (IEE) and comprehensive environmental evaluation (CEE) documentation as required by the Protocol, and the timing requirements of the interim final regulations were set out to meet those established by Annex I to the Protocol.

At the time the interim final regulations were promulgated, EPA announced its plans to provide extensive opportunities for public comment in the development of the proposed final regulations. EPA stated the final regulations would be proposed and promulgated in accordance with the provisions of the Administrative Procedure Act (5 U.S.C. 553 *et seq.*), which generally requires notice to the public, description of the substance of the proposed rule and an opportunity for public comment. Further, EPA announced that it would prepare under the National Environmental Policy Act

(42 U.S.C. 4321 *et seq.*) an Environmental Impact Statement (EIS), which would consider the environmental impacts of the proposed rule and alternatives and address the environmental and regulatory issues raised by interested agencies, organizations, groups and individuals. EPA stated that the public would have an opportunity to participate in the scoping process for the EIS. The Notice of Availability for the "Draft Environmental Impact Statement for the Proposed Rule on Environmental Impact Assessment of Nongovernmental Activities in Antarctica" (DEIS) was published in the **Federal Register** on February 16, 2001; the public comment period closed on April 2, 2001. In preparing this final rule, EPA considered the comments received on the issues involved with and the alternatives presented in the DEIS for this regulatory action.

The interim final regulations were intended to be limited in time and effect to provide for a transition period until the final regulations could be developed. This was expected to occur prior to the statutory deadline of October 2, 1998. However, during scoping, the International Association of Antarctica Tour Operators, individual tour operators, and The Antarctica Project/Antarctic and Southern Ocean Coalition requested that the deadline for the interim final rule be extended to give the operators an opportunity to determine the "workability" of the requirements and then to comment to EPA. After consultation with other interested federal agencies, EPA determined that this request was reasonable and that additional time to develop the final rule would be beneficial. Thus, EPA issued a direct amendment to the interim final rule effective July 14, 1998, which extended its applicability through the 2000–2001 austral summer. The interim final regulations served as the model for these final regulations which are described below. Certain aspects of these final regulations are new or different from the interim final regulations, including a new provision that would allow submission of environmental documentation on a multi-year basis and a definition of the term "more than a minor or transitory impact."

## II. Public Comments on the Proposed Rule and EPA's Response to These Comments

Five sets of comments were received in response to the June 29, 2001, notice of proposed rule-making. Comments were received from: two federal

agencies, the U.S. Department of State and the National Science Foundation; tour industry respondents including the International Association of Antarctica Tour Operators (IAATO), its U.S. members and one non-member; and two non-governmental environmental interest organizations including The Antarctica Project on behalf of the Antarctic and Southern Ocean Coalition, and the Defenders of Wildlife. Most of the comments raised by the industry respondents and the non-governmental environmental interest organizations were the same or similar to comments raised by these entities during scoping for EPA's EIS and the subsequent public comment period on the DEIS. The scoping comments were considered by EPA in the development of the alternatives for the proposed rule-making, and the comments on the DEIS were considered by EPA in the development of the proposed rule.

Federal agencies. The two federal agencies support the rule as proposed. One agency supports implementation of the rule as soon as possible since the rule supports implementation of the Protocol on Environmental Protection to the Antarctic Treaty. The other agency commented that the rule, as proposed, is fully responsive to, and consistent with, the requirements of the Protocol and EPA's implementation authority under the Act.

Tour industry respondents. The tour industry respondents generally support EPA's approach in the proposed rule, particularly the provision for multi-year environmental documentation, although they opine that certain modifications to reduce regulatory burdens, as previously commented to EPA under the EIS scoping and DEIS review process, would be appropriate. However, the tour industry respondents did provide other specific comments which are addressed below.

In their previous comments, the tour industry respondents requested elimination of EPA's ability to pass on the adequacy of environmental documentation and to eliminate the enforcement provision in the rule in order to reduce regulatory burden. EPA is not accepting these proposed modifications because the Act requires EPA to provide for the environmental impact assessment of nongovernmental activities, including tourism, for which the U.S. is required to give advance notice under paragraph 5 of Article VII of the Treaty in order for the U.S. government to implement certain of its obligations under the Protocol. The procedures in the rule ensure that: (1) Nongovernmental operators identify and assess the potential impacts of their

proposed activities, including tourism, on the Antarctic environment; (2) operators consider these impacts in deciding whether or how to proceed with proposed activities; and (3) operators provide environmental documentation pursuant to the Act and Annex I of the Protocol. In keeping with the U.S. government's obligations under the Protocol and EPA's obligations under the Act, under the rule, EPA may make a finding that the environmental documentation submitted does not meet the requirements of Article 8 and Annex I of the Protocol and the provisions of the regulations. EPA believes that before such a finding is made, it is prudent to offer comments to the operator so that the operator may, at its discretion, make necessary revisions to the document. If the operator proceeded after EPA made a finding that the documentation does not meet the requirements of Article 8 and Annex I and the requirements of the regulations, the operator would be in violation of the regulations and would be subject to enforcement.

The tour industry respondents requested elimination of Preliminary Environmental Review Memorandums (PERMS) in order to reduce regulatory burden. EPA is not accepting this proposed modification because the preliminary environmental review process that may result in PERM-level environmental documentation is significantly different from submitting the basic information delineated in 40 CFR 8.4(a) of the rule, information similar to that submitted by operators for advance notification purposes. Simply submitting this information does not constitute the preliminary environmental review process as delineated in 40 CFR 8.6 of the rule for PERMS. EPA notes that, to date, none of the U.S.-based operators has submitted PERM-level documentation for its final environmental document.

The tour industry respondents requested that the rule provide for automatic reciprocity when environmental documentation is prepared for other Treaty Parties in order to reduce regulatory burden. EPA is not accepting this proposed modification because it is the responsibility of the U.S. government to comply with its obligations under the Protocol. The U.S. government would need to determine whether on a case-by-case basis it could rely on the regulatory procedures of another Party. Therefore, EPA believes that a discretionary process should not be included in the rule.

To reduce regulatory burden, the tour industry respondents requested that the rule provide a "categorical exclusion"

from the requirement to prepare environmental documentation for ship-based tourism conducted according to the "Lindblad model." EPA is not accepting this proposed modification for the following reasons. As discussed in the Preamble at section III.H., the National Environmental Policy Act (NEPA) defines "categorical exclusion" as "a category of actions which do not individually or cumulatively have a significant effect on the human environment \* \* \* and for which, therefore, neither an environmental assessment nor an environmental impact statement is required" (40 CFR 1508.4). Only narrow and specific classes of activities can be categorically excluded from environmental review. For example, EPA in its NEPA regulations at 40 CFR 6.107(d) excludes "\* \* \* actions which are solely directed toward minor rehabilitation of existing facilities \* \* \*" and the National Science Foundation in its environmental assessment regulations at 45 CFR 641(c)(1) and (2) excludes certain scientific activities (e.g., use of weather/research balloons that are to be retrieved) and interior remodeling and renovation of existing facilities. EPA does not have a specific definition for the "Lindblad model." EPA also believes that a broad categorical exclusion covering ship-based tourism as now conducted does not fit well with the approach used by the U.S. government for categorical exclusions because it does not identify actions to be excluded in sufficient detail. Further, more needs to be known about potential cumulative impacts of nongovernmental activities undertaken by U.S.-based ship-based tour operators before deciding to exclude some or all of these specific activities. Categorical exclusions can be designated by amendment to the rule if categorical exclusion activities are identified in the future. Any such amendment to the rule would be subject to notice and comment.

The tour industry respondents requested that the rule clarify that even if mitigation is not carried out as described in the environmental documentation, this would not subject an operator to enforcement action or otherwise place an operator in violation of its obligations under the Protocol, the Act and EPA's implementing regulations. EPA is not accepting this proposed modification for the following reasons. EPA recognizes that the rule requires only that environmental documentation be prepared and does not specifically require implementation of either the activities, as described, or

the planned mitigation measures. However, if, for example, an operator proposes to mitigate the potential environmental impacts associated with a proposed activity, and the assessment of the proposed activity without the mitigative measures would be greater than minor or transitory effects, EPA assumes the operator will proceed with these mitigation measures. Otherwise, to be in compliance with the provisions of the rule, the operator's decision might have been to prepare a CEE, a different level of environmental documentation used when the reasonably foreseeable potential environmental effects of a proposed activity are likely to be more than minor or transitory. (e.g., if planned mitigation measures are the basis for the level of documentation there is an obligation on the part of the operator to implement the planned mitigation, otherwise, the level of documentation might not have met the requirements of the Protocol and the regulations.)

Further, EPA assumes the activities will be undertaken as planned and described because, based on experience to date, the planned mitigation measures are generally one of the following: requirements or prohibitions of federal laws (for example, tour vessels are operated according to the domestic legislation of its flag state that gives effect to MARPOL, U.S.-based tour operators adhere to applicable domestic statutes and regulations, and staff are trained and passengers educated on the mandates and prohibitions of the Treaty, the Protocol, and U.S. regulations); adopted recommendations under the Antarctic Treaty System (for example, certain mitigation measures include staff training and passenger education on Recommendation XVIII-1); and, for most U.S.-based ship-based tour operators, requirements for membership under IAATO's Bylaws (for example, certain mitigation measures include adherence to the membership provisions of the IAATO Bylaws, specifically, agreement not to have more than 100 passengers ashore at any one site at the same time). EPA acknowledges that section II.D.3.(d), Mitigation, in the proposed rule's Preamble (section III.D.3.(d) in the Preamble to this final rule) was not in the Preamble to the Interim Final Rule. However, section II.D.5, Measures to Assess and Verify Environmental Impacts, in the Preamble to the Interim Final Rule states in the example for activities requiring an IEE that the information could include, as appropriate, "\* \* \* description of any activity requiring mitigation, the

mitigative actions undertaken, and the actual or projected outcome of the mitigation" (italics added for emphasis). Once again, EPA believes that if an operator chooses to mitigate and the mitigation measures are the basis for the level of environmental documentation, EPA assumes the operator will proceed with these mitigation measures. Otherwise, the level of documentation may not have met the requirements of Article 8 and Annex I and the provisions of the regulations. Were an operator to fail to comply with these regulations, the operator could be subject to enforcement under the provisions listed in 40 CFR 8.11.

The tour industry respondents requested that EPA, in the Preamble to the rule, confirm the respondents' interpretation of the nature of the requirements of section 8.9, measures to assess and verify environmental impacts, including that operators are under no regulatory obligation to submit post-season reports related to the assessment and verification of environmental impacts to EPA (or to any other Federal agency), that operators are responsible for deciding whether and how to proceed with proposed activities, and that operators are not subject to any regulatory requirement to make assessment and verification information available to EPA. These same issues were addressed by EPA in the Information Collection Request, Part C of the Supporting Statement, for the Interim Final Rule and have been addressed by EPA in the Supporting Statement for the Information Collection Request for this rule. With regard to assessment and verification information, the Protocol, and thus the Act, requires that operators have procedures designed to provide a regular and verifiable record of the impacts of their activities. Like the Interim Final Rule, such a provision has been incorporated into this final rule in order to ensure that the U.S. government has the ability to implement its environmental impact assessment obligations for nongovernmental operators under the Protocol, including a requirement that operators have procedures designed to provide a regular and verifiable record of the impacts of these activities. EPA believes that this establishes a requirement that the information be available to EPA in order to verify that the operator has assessment and verification procedures. Otherwise, there would be no way to know if an operator was in compliance with this requirement of the regulation. Operators are currently voluntarily providing this information to the

government, thus it is available to EPA. As indicated in the regulations (40 CFR 8.1(b)), this Preamble (section III.C.), and the Supporting Statement for the Information Collection Request for this rule (section 2(b)), the operator is responsible for deciding whether or how to proceed with proposed activities.

The tour industry respondents requested that EPA clarify in the final rule that, at least in the near term, the Agency does not expect environmental documentation to include assessment of cumulative impacts in that information is currently insufficient to determine whether such impacts are in fact likely. EPA is not accepting this proposed modification because, as acknowledged by the tour industry respondents, Annex I includes consideration of cumulative impacts in light of existing and known planned activities for IEE and CEE level documentation. In order to remain consistent with Annex I, the final rule requires the same. However, EPA believes that, to date, the IEEs submitted by U.S.-based operators have contained sufficient detail to assess whether proposed activities may have more than a minor or transitory impact on the Antarctic environment including consideration of cumulative impacts in light of existing and known proposed activities. EPA further believes that the operators' conclusions to date, including those for cumulative impacts, have been supported by the information currently available. (e.g., based on the current scientific studies, there is no evidence of cumulative environmental impacts related to tourism.) However, the issue of cumulative impacts, particularly in the Peninsula area, remains a concern in light of such factors as the increasing number of tour operators, expeditions, and passengers landed; the number of sites visited; and the frequency with which certain sites are visited. For these reasons, EPA jointly sponsored a workshop with the National Science Foundation and IAATO to consider the issue of possible cumulative environmental impacts associated with ship-based tourism. Amongst other things, the workshop discussions exemplified the difficulties of identifying cumulative impacts related specifically to tourism. (For example, research findings suggest that most of the variability associated with the decline in Adelie penguins can be explained by the effects of climate change, and tourism is not having a measurable impact on Adelie penguin populations in the Palmer Station area.) As data and information become available on cumulative impacts, the operators may, as appropriate, decide to

modify their activities and/or their mitigation measures, or they may determine that a different level of environmental documentation is appropriate. To date, however, EPA believes that the IEEs prepared by the U.S.-based operators have identified and assessed the potential environmental consequences associated with their planned activities, including cumulative impacts.

Non-governmental environmental interest organizations. One of the non-governmental environmental interest organizations incorporated by reference the comments it made to EPA during the scoping process for the DEIS for the proposed rule and on the DEIS. Comments in these attachments either reiterate comments provided by the commentor on the proposed rule and/or provide recommendations that were considered in EPA's preparation of the DEIS for this rule-making. EPA has focused its response to the issues specifically addressed in the commentor's letter on the proposed rule except where both non-governmental environmental interest organizations provided comment on the same issue; any such issues are specifically responded to below.

Both of the non-governmental environmental interest organizations supported EPA's decision not to categorically exclude Antarctic ship-based tourism organized under the "Lindblad Model." One of the commentors does not believe that categorical exclusions are appropriate for any type of non-emergency activity in Antarctica. EPA disagrees with this opinion. Although no activities have yet been identified that can be categorically excluded, EPA believes this regulatory option should not be precluded automatically. EPA reiterates that categorical exclusions can be designated by amendment to the rule if such activities are identified in the future. Any such amendment to the rule would be subject to notice and comment.

One of the non-governmental environmental interest organizations supported a provision for multi-year environmental documentation and the other objected to the multi-expedition/multi-year environmental documentation provisions. EPA is not removing these provisions from the final rule for the following reasons. EPA believes that the environmental impact assessment process documented in the IEEs prepared by the U.S.-based operators that have included multiple expeditions by a single operator, and by more than one operator, have identified the potential environmental impacts, including direct, indirect and

cumulative impacts. The assessment process employed by the operators under the regulations is the same as that delineated in Article 8 and Annex I. EPA believes this process can be, and has been, applied appropriately to multiple expeditions by a single operator, or by more than one operator. Further, the multi-year provision is applicable only if the conditions described in the document, including the assessment of cumulative impacts, are unchanged. An operator would need to take into account any additional data or information obtained over the course of the five-year life of the environmental document and if the conditions described in the initial multi-year document are changed by this data or information, then the operator would need to submit supplemental environmental documentation that appropriately addresses this information relative to the operator's planned activities as delineated in the multi-year document. If, for example, a new activity is added, this information can be submitted as a supplement to the multi-year document provided that this does not change the overall assessment of impacts and conclusion by the operator (e.g., for an IEE, the potential impacts are no more than minor or transitory).

One of the non-governmental environmental interest organizations supported the multi-year environmental documentation provision but recommended that operators submit some form of annual certification, under the enforcement sanctions provision, that there have been no change in the conditions described in the multi-year document. EPA is not accepting this proposed modification to the multi-year provision because this requirement, including the enforcement sanction provision, is implicit in 40 CFR 8.4(e). If the operator were to continue with planned expeditions that do not meet the conditions described in the multi-year document, the operator's documentation may not meet the requirements of Article 8 and Annex I and the requirements of the rule and the operator could, therefore, be subject to enforcement under 40 CFR 8.11.

Both of the non-governmental environmental interest organizations disagree with defining in the rule "more than a minor or transitory impact" as having the same meaning as the term "significantly" as defined in regulations under the National Environmental Policy Act at 40 CFR 1508.27. EPA is retaining this definition for the following reasons. The Protocol does not define "minor or transitory." Until the Antarctic Treaty Consultative

Meeting (ATCM) provides guidance or definition, EPA believes it is reasonable to provide such guidance to operators and that it is prudent to define the term "more than a minor or transitory impact" consistent with the threshold definition applied to the environmental impact assessment of governmental activities in Antarctica as delineated in 16 U.S.C. 2401 et seq. If a definition were to be provided under the Protocol or other appropriate means under the Treaty, EPA would amend its final rule, as appropriate, to ensure it is consistent with Annex I as required by the Act. Contrary to the commentors' assertions, as with the Protocol, NEPA's starting point is the environment. As stated in 40 CFR 1500.1, NEPA "is our basic national charter for protection of the environment" (*italics added for emphasis*).

Both of the non-governmental environmental interest organizations commented on public review of IEEs. One commentor agreed with EPA's process for advertising the public availability of IEEs on its website and the schedule for IEE reviews. The other commentor recommended a regulatory provision for EPA to advertise the availability of IEEs on its website and for public comment on IEEs. EPA is not accepting these proposed modifications because this process is required by Article 8 and Annex I only for CEEs. EPA will continue to publish notice of availability of IEEs on its website. Based on its experience to date, there has been no evidence that interested parties have been unable to obtain IEEs and to offer comments to the operators under this notification scheme. EPA believes that including a regulatory provision for public notice and comment on IEEs would not necessarily reduce environmental impacts (*e.g.*, an operator's conclusion for an IEE would remain that the potential impacts of the proposed activity will be no more than minor or transitory). It would, however, impose obligations and undue burden on U.S. nongovernmental operators not required under Annex I or the Act, and would not be consistent with the environmental impact assessment requirements that apply to U.S. governmental entities for activities in Antarctica. *C.f.* 45 CFR 641.10 through 641.22 (National Science Foundation regulations for assessing impacts of governmental activities in Antarctica).

Both of the non-governmental environmental interest organizations commented on the schedules for environmental documentation submission and review. One commentor recommended that EPA change either the default provisions that provide for

approval of nongovernmental activities or extend the time period in which it can respond to environmental documentation. The other commentor believes the dates listed for CEEs are inaccurate and recommends that CEEs be required 180 days prior to the next ATCM rather than on December 1 since the December 1 date assumes the ATCMs will be on schedule for spring meetings which is not always the case. Regarding the first comment, under the final rule, EPA does not "approve" activities. EPA, in consultation with other interested Federal agencies, will review the environmental documentation to determine whether it meets the requirements of Article 8, Annex I and the regulations. Regarding the comments on the schedules for review, EPA is not accepting the commentors' proposed modifications because it believes the schedules in the rule are reasonable, as has been demonstrated by experience under the Interim Final Rule. Further, these schedules conform to the necessary time frames should an operator decide, based on comments offered by EPA, to revise the document or to submit a higher level of environmental documentation. Regarding the recommendation to change the submission for CEEs to 180 days before the next ATCM, EPA believes this is not reasonable nor is it warranted. The ATCM traditionally has been held in the May-June time frame, although the Protocol does not dictate this schedule. The date of the ATCM may vary. While it is possible that the meeting schedule would be set early enough to allow time for an operator to submit a draft CEE 180 days before the next ATCM, this is not certain. This commentor also expressed concern that since an activity cannot be held up for more than 15 months, there may not be time for the operator to address comments received at the ATCM, particularly if the ATCM is held relatively close to the beginning of the Antarctic tourist season. The final rule states that a draft CEE must be submitted by December 1 of the preceding year. The 15-month clock does not begin on the date the CEE is submitted to the State Department, but rather starts on the date the State Department circulates the draft CEE to the Parties to the Protocol and the Committee for Environmental Protection. Thus, even if the draft CEE was circulated by the State Department as early as mid-December, the 15-month clock for this project would run through mid-March of the next season which falls after the end of the regular tourist season for that year.

One of the non-governmental environmental interest organizations commented that it believes the rule proceeds on a number of erroneous factual, legal and policy conclusions, that it insufficiently implements the mandate of Congress in legislating the Act, and will inadequately protect the Antarctic environment for nongovernmental activities conducted there, particularly tourism. EPA disagrees with this opinion. EPA sought assistance from the Department of State, the Department of Justice and the National Science Foundation on factual, legal and policy issues.

One of the non-governmental environmental interest organizations reiterated its concern that the rule proceeds on the assumption that Antarctic tourism is limited, controlled and easily subject to self-regulation by the industry, and that the projections for increases in Antarctic tourism have been deliberately understated perhaps requiring a new round of regulatory review in 5–10 years. EPA disagrees with these opinions. In keeping with the purpose and need for this rule-making, EPA's objective during the rule-making process, including the DEIS for the proposed rule, has not been to analyze the magnitude and impact of tourism on the Antarctic environment but rather to evaluate the environmental impacts of the alternatives for the final rule. EPA disagrees that the projections for increases in Antarctic tourism have been deliberately understated. The projections used by EPA are based on the available data and information in referenced sources in the DEIS. The rule delineates the environmental impact assessment process, a process that accounts for increases in tourism and assessment of any potential impacts, including cumulative impacts, that could result from such increases. EPA does not believe that increases in tourism will necessarily require new regulatory review. Rather, to the extent that increases in tourism would have the potential to result in impacts that are more than minor or transitory, an operator would prepare a CEE to be in compliance with the regulations.

One of the non-governmental environmental interest organizations' primary objections to the legal conclusions propounded in the rule includes objection that the rule does not broaden the definition of "operator;" in the opinion of the commentor, section 4(a)(6) of the Act extends applicability of the Act, and thus the rule, to any person who organizes, sponsors, operates or promotes a non-governmental expedition to the United States, and who does business in the

United States. In response, the authority for EPA's rule-making is 16 U.S.C. 2401 *et. seq.*, as amended, 16 U.S.C. 2403a. EPA does not believe that section 2403(a)(6) (e.g., section 4(a)(6) of the Act) is germane to this rule-making. EPA sought legal, and programmatic, assistance from the Department of State, the Department of Justice and the National Science Foundation on this issue; EPA stands by this analysis.

One of the non-governmental environmental interest organizations' primary objections to the legal conclusions propounded in the rule includes its opinion that the rule should include a requirement that environmental documentation demonstrate compliance with applicable Protocol and statutory provisions; further, the Act does not require parity between governmental and nongovernmental activities in this regard. EPA is not accepting this proposed modification for the following reasons. First, certain provisions of the Act are the responsibility of other federal agencies. Further, rather than imposing a blanket requirement that may add unnecessary burden on the operator, EPA maintains that the EIA documentation provides the mechanism to identify whether a proposed activity raises issues under other obligations of the Protocol or domestic law which need further review by the responsible authority. Operators may, and do, reference compliance with appropriate Protocol provisions and U.S. regulations as planned mitigation measures for their activities, measures which support the level of environmental documentation for the planned activities. A mandatory blanket requirement to demonstrate compliance would impose obligations not required under Annex I or the Act and would require considerations that may have no relevance to the activity and, thus, no effect in reducing environmental impacts. EPA acknowledges that the Act does not require consistency between the governmental and nongovernmental environmental impact assessment processes and regulations. However, regardless of whether the activities are governmental or nongovernmental, it is the U.S. government that has the responsibility to ensure that the U.S. is able to comply with its obligations under the Protocol. The National Science Foundation is charged with this responsibility for governmental activities, and EPA for purposes of nongovernmental activities. EPA believes it is reasonable that the governmental and nongovernmental processes be consistent with regard to

the requirements of Article 8 and Annex I to the Protocol.

One of the non-governmental environmental interest organizations' primary objections to the legal conclusions propounded in the rule includes its opinion that Article 3 of the Protocol, unlike NEPA, imposes substantive requirements and because the rule does not impose substantive requirements, nongovernmental operators can file IEEs and CEEs that disclose substantial risks to the Antarctic environment or associated and dependent ecosystems and those activities could be approved. EPA sought legal, and programmatic, assistance from the Department of State and the National Science Foundation on the Article 3 issue. It is the U.S. government's position that Article 3 of the Protocol does not impose substantive obligations. Thus, EPA is not accepting this proposed modification. Further, as noted above, as with the Interim Final Rule, under the final rule, EPA does not "approve" activities. EPA, in consultation with other interested federal agencies, will review the environmental documentation to determine whether it meets the requirements of Article 8 and Annex I and the regulations.

One of the non-governmental environmental interest organizations expressed concerns that the Preamble language discussing harmonization between regulation of governmental and nongovernmental actors and cost/benefit analyses of the provisions of the rule have the effect of narrowing the scope of the regulatory regime. This commentor also maintains the regulatory regime is also narrowed by EPA's argument that if enhanced regulation and enforcement is adopted, U.S.-based operators will simply move to another country to evade such regulation or enforcement. EPA acknowledges that the Act does not require consistency between the governmental and nongovernmental environmental impact assessment processes and regulations. However, regardless of whether the activities are governmental or nongovernmental, it is the U.S. government that has the responsibility to ensure that the U.S. is able to comply with its obligations under the Protocol. As discussed above, the National Science Foundation is charged with this responsibility for governmental activities, and EPA for purposes of nongovernmental activities. EPA believes it is reasonable that the governmental and nongovernmental processes be consistent with regard to the requirements of Article 8 and Annex I of the Protocol. EPA further

acknowledges that neither the Protocol nor the Act dictates a cost-benefit requirement but that it gave consideration to, amongst other things, the concern that U.S.-based operators continue to do business as U.S. operators and not move their Antarctic business operations to a non-Party country because of any undue burden imposed by the final rule. However, this was one of several considerations that EPA believed was reasonable in its analysis of the alternatives for the rule-making in the DEIS and the process to promulgate the final rule.

One of the non-governmental environmental interest organizations expressed concern that the Preamble language discussing IEEs as the appropriate level of environmental documentation has the effect of corrupting the integrity of the environmental impact assessment process and narrowing the scope of the regulatory regime. EPA disagrees with this opinion. The Preamble at section III.D.3.(b) includes reference to not only ATCM Recommendation XVIII-1 but also the relevant provisions of other U.S. statutes and Annexes II-V to the Protocol. The information in the Preamble is not regulatory, rather it is a guideline to operators. The regulations state the mandatory requirements that must be met by operators and include the criteria for the level of environmental documentation. EPA believes that providing a level of guidance to those subject to regulation does not corrupt the integrity of the regulatory process. Contrary to the commentor's assertion that EPA has made a conclusory statement regarding IEEs, including that a CEE may not be called for in some cases for nongovernmental activities, EPA's view is that, as stated in the Preamble, at a minimum, an IEE is the appropriate level of environmental documentation where multiples of the activity over time are likely and may create a cumulative impact.

One of the non-governmental environmental interest organizations expressed concern that the Preamble language discussing the criteria for a CEE narrows the scope of the regulatory regime. EPA disagrees with this opinion. In section III.D.4., EPA provides the new crushed rock airstrip or runway example as a level of guidance to those subject to regulation. EPA disagrees that a 10% increase in tourism activity would automatically trigger the need for a CEE. As with any activity, including the runway example or a 10% increase in tourism, the rule delineates the environmental impact assessment process to be employed by

an operator to determine the level of potential impact for the proposed activity and, thus, the level of environmental documentation required by the rule.

This final rule is being promulgated without change in response to comments for the reasons stated above and because these regulations are consistent with Annex I to the Protocol and ensure that the U.S. government is able to meet its obligations under the Protocol. This final rule ensures that nongovernmental operators identify and assess the potential impacts of their proposed activities, including tourism, on the Antarctic environment; that operators consider these impacts in deciding whether or how to proceed with proposed activities; and that operators provide environmental documentation pursuant to the Act and Annex I of the Protocol. This final rule also provides for coordination of the review of information regarding environmental impact assessment received from other Parties under the Protocol.

### III. Description of Program and These Regulations

#### A. The Antarctic Treaty and Protocol

The Antarctic Treaty of 1959 entered into force in 1961 and guarantees freedom of scientific research in Antarctica, reserves Antarctica exclusively for peaceful purposes, establishes regular meetings of the Parties to the Treaty (Parties) to develop measures to implement the Treaty and to deal with issues that may arise, and freezes territorial claims. Currently 27 countries participate in decision-making under the Treaty as Consultative Parties. Eighteen other countries are Parties, but may not block decisions taken by consensus of the Consultative Parties.

As human activities in Antarctica intensified, concern grew regarding the effects of such activities on the Antarctic environment and the potential consequences of the development of mineral resources. In 1990, the U.S. Congress responded by passing the Antarctic Protection Act, which prohibited persons subject to U.S. jurisdiction from engaging in Antarctic mineral resource activities and called for the negotiation of an environmental protection agreement.

Over the years, the Antarctic Treaty Parties have adopted a variety of measures to protect the Antarctic environment. In 1991, the Parties adopted the Protocol on Environmental Protection which builds upon the Treaty by extending and strengthening Antarctic environmental protection. The

Protocol designates Antarctica as a natural reserve dedicated to peace and science, and bans non-scientific mineral activities. The Protocol requires prior assessment of the possible environmental impacts of all activities to be carried out in Antarctica. It establishes the Committee for Environmental Protection (the Committee) to provide expert scientific and technical advice to the Parties on measures necessary to effectively implement the Protocol. The Protocol requires that draft CEEs for activities likely to have more than a minor or transitory impact on Antarctica and its dependent and associated ecosystems be provided to the Parties and to the Committee. Because legislation was needed in order for the United States to be able to implement its obligations under the Protocol, the Antarctic Science, Tourism, and Conservation Act of 1996 was enacted by Congress. The Act directs EPA to issue regulations implementing the requirements for environmental impact assessments of nongovernmental activities, including tourism, for which the U.S. is required to give advance notice under the Treaty.

#### B. The Purpose of These Regulations

The purpose of these final regulations is to provide for the evaluation of the potential environmental impact of those nongovernmental activities in Antarctica, including tourism, for which the United States is required to give advance notice under paragraph 5 of Article VII of the Treaty. The Treaty requires notice of, *inter alia*, "all expeditions to Antarctica organized in or proceeding from" the United States. In addition, these regulations provide for coordination of reviews of draft CEEs received from other Parties, in accordance with the Protocol. The Act states that these regulations are to be consistent with Annex I to the Protocol.

Among other things, these regulations specify the procedures that need to be followed by any person or persons organizing a nongovernmental expedition to or within Antarctica ("operator" or "operators") in evaluating the potential environmental impacts of their activities. These regulations include considerations and elements relevant to environmental documentation of the evaluation, as well as procedures for submission of environmental documentation that allow the EPA to review whether the evaluation meets the provisions of the regulations and the requirements of Annex I of the Protocol.

Operators currently provide information prior to each Antarctic summer season to the Department of

State to meet U.S. obligations for notification pursuant to Article VII of the Treaty, which requires advance notice of expeditions to and within Antarctica. This information is also part of the basic information requirements for preparation of environmental documentation, as addressed in Section 8.4(a) of these regulations. While operators would be required to include this information in environmental documentation, they could also continue to provide this information directly to the Department of State.

#### C. Summary of the Protocol

This final rule implements Annex I to the Protocol, which describes procedures to be used in conducting environmental impact assessments of effects of activities in Antarctica. Article 8 of the Protocol provides that Parties to the Protocol ensure that the assessment procedures of Annex I are applied in planning processes leading to decisions about any activities, including nongovernmental activities, including tourism, to be undertaken in the Antarctic Treaty area for which advance notice is required under paragraph 5 of Article VII of the Treaty.

The procedures set forth in Annex I require that all proposed activities by operators be assessed, through one or more stages of environmental impact assessment. If an activity will have an impact that is less than minor or transitory, only a preliminary environmental assessment would need to be submitted in accordance with these regulations before the activity proceeds. For an activity that will have no more than a minor or transitory impact, an initial environmental evaluation (IEE) must be submitted in accordance with these regulations before the activity proceeds. Finally, if it is determined (through an IEE or otherwise) that an activity is likely to have more than a minor or transitory impact, a comprehensive environmental evaluation (CEE) must be submitted in accordance with these regulations before the activity proceeds.

An IEE describes an activity's purpose, location, duration and intensity, and considers alternatives and assesses impacts, including cumulative impacts, in light of existing and known proposed activities. A CEE is a detailed analysis that comprehensively evaluates the activity, its impacts, alternatives, mitigation and the like. A draft CEE must be provided to the Parties and the Committee at least 120 days before the next consultative meeting where the draft CEE may be addressed. No final decision shall be taken to proceed with any activity for which a CEE is prepared



unless there has been an opportunity for consideration of the draft CEE at an Antarctic Treaty Consultative Meeting (ATCM) on the advice of the Committee (unless the decision to proceed with the activity has already been delayed more than 15 months since the date of circulation of the draft CEE). A final CEE must be circulated at least 60 days before commencement of the proposed activity. Any decision by the operator on whether a proposed activity should proceed in either its original or modified form must be based upon the final CEE as well as other relevant considerations, and procedures must be put in place for monitoring the impact of any activity that proceeds following completion of a CEE.

Environmental impact assessments need to address Annex I to the Protocol. The information contained in an evaluation should allow the operator to make decisions based on a sound understanding of factors relevant to the likely impact of the proposed activity. An evaluation should, as appropriate, contain sufficient information to allow assessments of, and informed judgments about, the likely impacts of proposed activities on the Antarctic environment and on the value of the Antarctic environment for the conduct of scientific research. Depending on the specific circumstances surrounding the proposed activities, various factors may be relevant for consideration in the environmental impact assessment process such as the scope, duration and intensity of the activity proposed in Antarctica, cumulative impacts, impacts on other activities in the Antarctic Treaty area, and capacity to assess and verify adverse environmental impacts. Operators may also find it appropriate to consider the availability of technology and procedures for environmentally safe operations and whether there exists the capacity to respond promptly and effectively to accidents with environmental effects.

#### *D. Activities Covered by These Regulations*

##### **1. Persons Required to Carry Out an EIA**

The requirements of these final regulations apply to operators of nongovernmental expeditions organized in or proceeding from the territory of the United States to Antarctica. The term "expedition" is taken from paragraph 5 of Article VII of the Treaty and encompasses all actions or activities undertaken by a nongovernmental expedition while it is in Antarctica. These regulations do not apply to individual U.S. citizens or groups of citizens planning to travel to Antarctica

on an expedition for which they are not acting as an operator.

For a commercial tour, typical functions of an operator would include, for example, acting as the primary person or group of persons responsible for acquiring use of vessels or aircraft, hiring expedition staff, planning itineraries, and other organizational responsibilities. Non-commercial expeditions covered by these regulations would include trips by yachts, skiing or mountaineering expeditions, privately funded research expeditions, and other nongovernmental or nongovernment-sponsored activities.

These regulations do not apply to U.S. citizens who participate in tours organized in and proceeding from countries other than the United States. As provided in the Protocol, the requirements do not apply to activities undertaken in the Antarctic Treaty area that are governed by the Convention on the Conservation of Antarctic Marine Living Resources or the Convention for the Conservation of Antarctic Seals. Persons traveling to Antarctica are subject to the requirements of the Marine Mammal Protection Act, 16 U.S.C. 1371 *et seq.*

##### **2. Differences Between Governmental and Nongovernmental Activities**

These regulations do not apply to governmental activities. C.f. 45 CFR 641.10 through 641.22 (National Science Foundation regulations for assessing impacts of governmental activities in Antarctica). However, EPA believes that, to the extent practicable, similar procedures should generally be used for assessing both governmental and nongovernmental activities. Consistent with this approach, these regulations generally establish procedures for assessing the impacts of nongovernmental activities in Antarctica similar to those used for governmental activities under the National Science Foundation regulations.

However, EPA also recognizes that it will not always be appropriate to apply identical standards and procedures for governmental and nongovernmental activities. Specifically, numerous mechanisms and processes exist to ensure public scrutiny and accountability of governmental activities. In some instances, no comparable mechanisms or processes exist for nongovernmental activities. Thus, these regulations provide for direct federal review of each nongovernmental environmental impact assessment by giving EPA authority to review, in consultation with other interested federal agencies,

nongovernmental environmental impact assessments for compliance with the requirements of Annex I to the Protocol and these regulations.

To promote consistency regarding environmental documentation, EPA intends to consult with the National Science Foundation and other U.S. government agencies with appropriate expertise in the course of reviewing the assessments of proposed nongovernmental activities in the Antarctic. Further, following the final response from the operator to EPA's initial comments, EPA will obtain the concurrence of the National Science Foundation in making any determination that the environmental documentation submitted by an operator fails to meet the requirements under Article 8 and Annex I to the Protocol and the provisions of these regulations.

##### **3. Appropriate Level of Environmental Documentation**

(a) Preliminary Environmental Review Memorandum (PERM). These regulations provide that an operator who asserts that an expedition will have less than a minor or transitory impact must provide a Preliminary Environmental Review Memorandum (PERM) to the EPA no later than 180 days before the proposed departure of the expedition to Antarctica. The timing requirement has been established to provide sufficient time for the operator to prepare an IEE if one is needed. The EPA, in consultation with other interested federal agencies, will review the PERM to determine if it is sufficient to demonstrate that the activity will have less than a minor or transitory impact or whether additional environmental documentation, *i.e.*, an IEE or CEE, is required to meet the obligations of Annex I. The EPA will provide its comments to the operator within fifteen (15) days of receipt of the PERM, and the operator will have seventy-five (75) days to prepare a revised PERM or an IEE, if necessary. Following the final response from the operator, EPA may make a finding that the submitted environmental documentation does not meet the requirements of Article 8 and Annex I of the Protocol and the provisions of these regulations. This finding will be made with the concurrence of the National Science Foundation. If EPA does not provide notice of such a finding within thirty (30) days, the operator will be deemed to have met the requirements of these regulations.

If EPA recommends an IEE and one is prepared and submitted within the seventy-five (75) day response period,



the schedule for review will follow the time frames set out for an IEE in these regulations. (See: section II.D.3(b), below.) Should EPA recommend a CEE, timing requirements applicable to CEEs may necessitate a delay in plans to initiate a proposed activity. Operators are encouraged to consult with EPA on options in this regard.

(b) Initial Environmental Evaluation (IEE). Article 2 of Annex I to the Protocol requires that unless it has been determined that an activity will have less than a minor or transitory impact, or unless a CEE is being prepared in accordance with Article 3 of Annex I, an IEE must be prepared. Among the items to be included in an IEE to document that an activity will have no more than a minor or transitory impact are the cumulative impacts of the proposed activity in light of existing and known proposed activities. Expeditions, by their nature, involve the transport of persons to Antarctica that will result in physical impacts, which may include, but are not limited to: air emissions, discharges to the ocean, noise from engines, landings for sight-seeing, and activities by visitors near wildlife. Accordingly, it is EPA's view, which has been confirmed by its experience under the interim final regulations, that, at a minimum, an IEE is the appropriate level of environmental documentation for proposed activities where multiples of the activity over time are likely and may create a cumulative impact, unless an existing IEE or CEE supports a finding that the type of activity proposed results in a less than minor or transitory cumulative impact. However, as noted below, it is also EPA's view that the types of nongovernmental activities that are currently being carried out will typically be unlikely to have impacts that are more than minor or transitory assuming that activities will be carried out in accordance with the guidelines set forth in the ATCM Recommendation XVIII-1, Tourism and Non-Governmental Activities, the relevant provisions of other U.S. statutes, and Annexes II-V to the Protocol. In the event that a determination is made that a CEE is needed to meet the requirements of Annex I to the Protocol and the provisions of these regulations, timing requirements applicable to CEEs may necessitate a delay in plans to initiate a proposed activity, and operators are encouraged to consult with EPA on options.

Any operator who wishes to make an expedition to Antarctica is required to provide an IEE to EPA no less than ninety (90) days prior to the proposed departure of the expedition to

Antarctica unless: (1) A decision has been made to prepare a CEE, or (2) the operator has submitted a PERM and there has not been a finding within the time limits of these regulations that the PERM fails to meet the requirements under Annex I to the Protocol and the provisions of these regulations.

The EPA will provide its comments to the operator within thirty (30) days of receipt of the IEE, and the operator will have forty-five (45) days to prepare a revised IEE, if necessary. Following the final response from the operator, EPA may make a finding that the documentation submitted does not meet the requirements of Article 8 and Annex I of the Protocol and the provisions of these regulations. This finding will be made with the concurrence of the National Science Foundation. If a notice of such a finding is required, EPA will provide it within fifteen (15) days of receiving the final IEE from the operator or, if the operator does not provide a final IEE, within sixty (60) days following EPA's comments on the original IEE. If EPA does not provide notice within these time limits, the operator will be deemed to have met the requirements of these regulations, provided that procedures, which may include appropriate monitoring, are carried out to assess and verify the impact of the activity.

If a CEE is required, the operator must adhere to the time limits applicable to such documentation. (See: section II.D.3.(c), below.) In the event that a determination is made that a CEE is required, EPA, at the operator's request, will consult with the operator regarding possible changes in the proposed activity that would allow preparation of an IEE.

The EPA, upon receipt of an IEE, will electronically publish notice of its receipt on the Office of Federal Activities' World Wide Web Site: <http://www.epa.gov/oeca/ofa/>. The Department of State will circulate to the Parties and make publicly available a copy of an annual list of IEEs prepared by U.S. operators in accordance with Article 2 of Annex I of the Protocol and any decisions taken in consequence thereof. Any IEE prepared in accordance with these regulations will be made available by the EPA on request.

(c) Comprehensive Environmental Evaluation (CEE). Article 3(4), of Annex I of the Protocol requires that draft CEEs be circulated to all Parties and the Committee 120 days in advance of the next Antarctic Treaty Consultative Meeting at which the CEE may be addressed. Since the 2001 ATCM occurred in July, CEEs prepared for nongovernmental activities in the 2001-

2002 season would have to have been distributed by March 2001. Operators who are anticipating activities for the 2002-2003 season that may require a CEE are encouraged to consult with the EPA as soon as possible.

In order to meet the requirements of Article 3(4), of Annex I of the Protocol which requires that draft CEEs be circulated to all Parties and forwarded to the Committee 120 days in advance of the next Antarctic Treaty Consultative Meeting at which the CEE may be addressed, and because the ATCM generally meets in May, the regulations require the operator to submit a draft CEE the preceding December in order to ensure its timely distribution to all Parties and the Committee. Thus, for example, for the 2002-2003 season, any operator who plans an activity which would require a CEE will need to submit a draft of the CEE to EPA by December 1, 2001. Within fifteen (15) days of receipt of the draft CEE, EPA will send it to the Department of State for transmittal to other Parties, publish notice of receipt of the CEE in the **Federal Register**, and provide copies to any person upon request. The EPA will accept public comments on the CEE for a period of ninety (90) days following notice in the **Federal Register**. The EPA will make these public comments available to the operator.

The EPA, in consultation with other interested federal agencies, will review the CEE to determine if it meets the requirements under Annex I to the Protocol and the provisions of these regulations. EPA will transmit its comments to the operator within 120 days following publication of notice of availability in the **Federal Register** to allow for the inclusion of any additional information in the CEE. The operator must prepare a final CEE that addresses and includes or summarizes any comments on the draft CEE received from EPA, the public and the Parties. The final CEE must be sent to EPA at least seventy-five (75) days before the proposed departure date. Following the final response from the operator, the EPA will notify the operator if EPA, with the concurrence of the National Science Foundation, makes the finding that the submitted environmental documentation does not meet the requirements of Article 8 and Annex I of the Protocol and the provisions of these regulations. This notification will occur within fifteen (15) days of submittal of the final CEE if the CEE is submitted by the operator within the time limits set out in these regulations. If no final CEE is submitted by the operator, or if the operator fails to meet

these time limits, EPA will provide such notification sixty (60) days prior to departure of the expedition. If, after receipt of such notification, the operator proceeds with the expedition without fulfilling the requirements of these regulations, the operator will be subject to enforcement proceedings pursuant to Sections 7, 8, and 9 of the Antarctic Conservation Act, as amended by the Act; 16 U.S.C. 2407, 2408, 2409, and 45 CFR part 672. If EPA does not provide notice, the operator will be deemed to have met the requirements of these regulations provided that procedures, which include appropriate monitoring, are carried out to assess and verify the impact of the activity. The EPA will transmit the final CEE to the Department of State which will circulate it to all Parties no later than sixty (60) days before proposed departure of the expedition, along with a notice of any decisions by the operator relating to the CEE. The EPA will publish a notice of availability of the final CEE in the **Federal Register**.

Operators are encouraged to consult with the EPA as early as possible if there are questions as to whether a CEE will be required for a proposed expedition.

(d) Mitigation. If an operator chooses to mitigate the environmental impacts of its activity and the mitigation measures are the basis for the level of environmental documentation, EPA will assume that the operator will undertake these mitigation measures. Otherwise, the documentation may not have met the requirements of Article 8 and Annex I and the provisions of these regulations.

#### 4. Criteria for a CEE

Article 3 of Annex I to the Protocol requires a CEE when it is determined that an activity is likely to have more than a minor or transitory impact. While the need for a CEE will be evaluated for each activity on a case-by-case basis, it is EPA's view that the type of nongovernmental activities that are currently being carried out will typically be unlikely to have impacts that are more than minor or transitory.

However, the need for a CEE could be triggered by a proposed activity that represents a major departure from current nongovernmental activities, resulting in a large increase in an adverse environmental impact at a site. Similarly, a CEE may be required if an activity is likely to give rise to particularly complex, cumulative, large-scale or irreversible effects, such as perturbations in unique and very sensitive biological systems. An example of an activity that might require a CEE would be the construction

and operation of a new crushed rock airstrip or runway.

In evaluating whether a CEE is the appropriate level of environmental documentation, the EPA will consider the impact in terms of the context of the Antarctic environment and the intensity of the activity. The Antarctic environment is for the most part unspoiled, has intrinsic value, and is of great value to science and to humankind's overall understanding of the global environment. In addition, because of the location and uniqueness of the ecosystem, there would likely be great difficulty responding to environmental threats and mitigating damage to the Antarctic ecosystem. The EPA believes a comparable threshold should be applied in determining whether an activity may have an impact that is more than minor or transitory under these regulations as is used in determining if a Federal activity will have a significant effect for purposes of the National Environmental Policy Act (NEPA). See 40 CFR 1508.27. For this reason, for purposes of these regulations and consistent with the environmental impact assessment regulations for federal activities, the term "more than a minor or transitory impact" has been defined to have the same meaning as the term "significantly" under NEPA. 16 U.S.C. 2403a(a)(1)(B); 40 CFR 1508.27. The recommendation to add this definition to these regulations was made to EPA during the scoping process and was considered in the DEIS prepared by EPA.

#### 5. Measures To Assess and Verify Environmental Impacts

The Protocol and these regulations require an operator to employ procedures to assess and provide a regular and verifiable record of the actual impacts of any activity that proceeds on the basis of an IEE or CEE. The record developed through these measures must be designed to: (a) Enable assessments to be made of the extent to which such impacts are consistent with the Protocol; and (b) provide information useful for minimizing and mitigating those impacts, and, where appropriate, on the need for suspension, cancellation, or modification of the activity. Moreover, an operator must monitor key environmental indicators for an activity proceeding on the basis of a CEE. An operator may also need to carry out monitoring in order to assess and verify the impact of an activity for which an IEE has been prepared.

For activities requiring an IEE, an operator should be able to use procedures currently being voluntarily

utilized by operators to provide the required information. For example, such information could include, as appropriate and to the best of the operator's knowledge: identification of the number of tourists put ashore at each site, the number and location of each landing site, the total number of tourists at each site per ship and for the season; the number of times the site has been visited in the past; the number of times the site is expected to be visited in the forthcoming season; the times of the year that visits are expected to occur (e.g., before, during, or after the penguin breeding season); the number of visitors expected to be put ashore at the site at any one time and over the course of a particular visit; what visitors are expected to do while at the site; verification that guidelines for tourists are followed; description of any tourist exceptions to the landing guidelines; and a description of any activity requiring mitigation, the mitigative actions undertaken, and the actual or projected outcome of the mitigation.

These regulations do not set out detailed monitoring procedures for activities requiring a CEE because the Parties are still working to identify monitoring approaches that can best support the Protocol's implementation. Thus, should an activity require a CEE, the operator should consult with EPA to: (a) Identify the monitoring regime appropriate to that activity, and (b) determine whether and how the operator might utilize relevant monitoring data collected by the U.S. Antarctic Program. The EPA would consult with the National Science Foundation and other interested federal agencies regarding this monitoring regime.

#### *E. Incorporation of Information, Consolidation of Environmental Documentation, Waiver or Modification of Deadlines, and Provision for Multi-Year Environmental Documentation*

The EPA is strongly committed to minimizing unnecessary paperwork and to implementation of these regulations such that undue burden is not placed on operators, particularly in view of the time requirements associated with environmental documentation requirements. Therefore, provided that documentation complies with all applicable provisions of Annex I to the Protocol and these regulations, and, provided that the environmental documentation is appropriate in light of the specific circumstances of each operator's expedition or expeditions, the EPA will allow the following approaches to documentation: (1) Material may be incorporated by

referring to it in the environmental document with its content briefly described when the cited material is reasonably available to the EPA; (2) more than one proposed expedition by an operator may be included within one environmental document and may, if appropriate, include a single discussion of components of the environmental analysis that are applicable to some or all of the proposed expeditions; (3) one environmental document may also be used to address expeditions being carried out by more than one operator, provided that the environmental documentation includes the names of each operator for which the environmental documentation is being submitted pursuant to obligations under these regulations; and (4) one environmental document may be submitted by one or more operators for proposed expeditions for a period of up to five consecutive austral summer seasons, provided that the conditions described in the multi-year environmental document, including the assessment of cumulative impacts, are unchanged. The multi-year provision also allows operators to update basic information and to provide information on additional activities to supplement the multi-year environmental document without having to revise and re-submit the entire document. Further, the EPA may waive or modify the deadlines of these regulations where EPA determines an operator is acting in good faith and that circumstances outside the control of the operator created delays, provided that environmental documentation fully meets deadlines under the Protocol. The multi-year documentation provision was recommended to EPA during the scoping process and was considered in the DEIS prepared by EPA.

#### *F. Submission of Environmental Documents*

The operator must submit five copies of its environmental documentation, along with an electronic copy in HTML format, if available, to the EPA by mail at: U.S. Environmental Protection Agency; Office of Federal Activities; Director, NEPA Compliance Division—Mail Code 2252A; 1200 Pennsylvania Avenue, NW; Washington, DC 20460.

Environmental documents may also be sent by special delivery (Federal Express, United Parcel Service, etc.) or hand-carried to: U.S. Environmental Protection Agency; Office of Federal Activities; Director, NEPA Compliance Division—Room 7239A; Ariel Rios Building; 1200 Pennsylvania Avenue, NW; Washington, DC 20004.

An operator may submit environmental documentation at an

earlier date than required by this final rule. The EPA review process, including notification for public review and comment, will commence with the submittal of environmental documentation and will follow deadlines for response indicated in the appropriate sections of this rule.

#### *G. Prohibited Acts, Enforcement and Penalties*

It is unlawful for any operator to violate these regulations. An operator who violates any of these regulations will be subject to enforcement proceedings, which may include civil and criminal enforcement proceedings, and penalties, pursuant to sections 7, 8, and 9 of the Antarctic Conservation Act, as amended by the Act; 16 U.S.C. 2407, 2408, 2409, and 45 CFR part 672.

#### *H. Provision for Categorical Exclusions*

The National Environmental Policy Act defines 'categorical exclusion' as "a category of actions which do not individually or cumulatively have a significant effect on the human environment \* \* \* and for which, therefore, neither an environmental assessment nor an environmental impact statement is required" (40 CFR 1508.4). Only narrow and specific classes of activities can be categorically excluded from environmental review. For example, EPA in its NEPA regulations at 40 CFR 6.107(d) excludes \* \* \* actions which are solely directed toward minor rehabilitation of existing facilities \* \* \* and the National Science Foundation in its environmental assessment regulations at 45 CFR 641(c)(1) and (2) excludes certain scientific activities (e.g., use of weather/research balloons that are to be retrieved) and interior remodeling and renovation of existing facilities. The DEIS considered a modification that would add a provision for categorical exclusion. The DEIS noted that the International Association of Antarctica Tour Operators (IAATO) recommended that Antarctic ship-based tourism organized under the "Lindblad Model" be categorically excluded. However, EPA does not have a specific definition for the "Lindblad Model." EPA also believes that a broad categorical exclusion covering ship-based tourism as now conducted does not fit well with the approach used by the U.S. government for categorical exclusions because it does not identify actions to be excluded in sufficient detail. Further, more needs to be known about potential cumulative impacts of nongovernmental activities undertaken by U.S.-based ship-based tour operators before

deciding to exclude some or all of these specific activities. In the Preamble to the proposed rule, EPA requested comments on specific activities that the Agency should consider including as categorical exclusions in the final rule including the justification for this proposed designation. EPA did not receive any such comments, therefore, the final rule does not include a provision for categorical exclusions. However, if categorical exclusion activities are identified in the future, the rule could be amended.

#### **IV. Coordination of Review of Information Received From Other Parties to the Treaty**

Article 6 of Annex I to the Protocol provides that the following information shall be circulated to the Parties, forwarded to the Committee for Environmental Protection, and made publicly available: (1) A description of national procedures for considering the environmental impacts of proposed activities; (2) an annual list of any IEEs and any decisions taken in consequence thereof; (3) significant information obtained and any action taken in consequence thereof with regard to monitoring from IEEs and CEEs; and (4) information in a final CEE. In addition, Article 6 requires that any IEE be made available on request, and Article 3 requires that draft CEEs be circulated to all Parties, who shall make them publicly available. A period of ninety (90) days is allowed for the receipt of comments. To implement these requirements of the Protocol, this rule sets out the process for circulation of this information within the United States.

Upon receipt of a CEE from another Party, the Department of State will publish notice of receipt in the **Federal Register** and will circulate a copy of the CEE to all interested federal agencies. The Department of State will coordinate responses from federal agencies to the CEE and will transmit the coordinated response, if any, to the Party that has circulated the CEE. The Department of State will make a copy of the CEE available upon request to the public. Members of the U.S. public should comment directly to the operator who has drafted the CEE and provide a copy to the EPA for its consideration.

Upon receipt of the annual list from another Party of IEEs prepared in accordance with Article 2 of Annex I and any decisions taken in consequence thereof, the Department of State will circulate a copy to all interested federal agencies. The Department of State will make a copy of any list of IEEs from other Parties prepared in accordance

with Article 2 and any decisions taken in consequence thereof available upon request to the public.

Upon receipt of a description of appropriate national procedures for environmental impact assessments from another Party, the Department of State will circulate a copy to all interested federal agencies. The Department of State will make such descriptions available upon request to the public.

Upon receipt from another Party of significant information obtained, and any action taken in consequence therefrom from procedures put in place with regard to monitoring pursuant to Articles 2(2) and 5 of Annex I to the Protocol, the Department of State will circulate a copy to all interested federal agencies. The Department of State will make a copy of this information available upon request to the public.

Upon receipt of a final CEE from another Party, the Department of State will circulate a copy to all interested federal agencies. The Department of State will make a copy available upon request to the public.

## V. Administrative Requirements

### A. Executive Order 12866 Clearance

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the EPA must determine whether the regulatory action is "significant" and therefore subject to the Executive Order and to review by the Office of Management and Budget (OMB). The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a "significant regulatory action." This rule raises novel legal or policy issues arising out of legal mandates under Public Law 104-227, the Antarctic Science, Tourism, and Conservation Act of 1996 and the Protocol on Environmental Protection to

the Antarctic Treaty of 1959.

Accordingly, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations are documented in the public record.

### B. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA, 5 U.S.C. 601 et seq.)

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration with the North American Industry Classification System (NAICS) code for "Tour Operators" (NAICS code 561520) with maximum annual receipts of \$5.0 million (13 CFR part 121); and (2) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. Under the Antarctic Science, Tourism, and Conservation Act of 1996, governmental jurisdictions are not subject to this rulemaking.

For purposes of assessing the potential impacts of the rule on small entities, EPA assessed the potential impacts the rule may have on the U.S.-based operators regulated under the interim final rule, that is, those for which the United States provided advance notice under Paragraph 5 of Article VII of the Treaty for proposed nongovernmental expeditions organized in or proceeding from the U.S. to the Antarctic Treaty area during the austral summer season 2000-2001, and other U.S.-based operators included in such documentation. The screening assessment indicated that of the twelve operators, four would qualify as small entities under the Small Business Administration definition. EPA has estimated that these small entities have annual operating expenditures (small organization) or annual sales (small business) ranging from about \$100,000 to about \$4,600,000. Based on costs estimated under the interim final rule, EPA estimated the potential impact on these small entities to range from an average of about \$1,400 to about \$4,200

for the 5-year period a multi-year environmental document could be in effect; this represents an impact in the range of less than 1% to about 1.4%. Even if the small entities did not take advantage of the additional cost-saving alternative provided in the multi-year provision of the rule, the impact of the rule would range from an average of about \$2,300 to \$6,800 for the same 5-year period. Of the four small entities subject to today's rule, only one may be impacted significantly. Therefore, this rule will not impact a substantial number of small entities. Moreover, the potential impact on that small entity arguably is not significant. In addition, as discussed below, EPA included in today's rule cost-saving alternatives that are available to all operators, including small operators. Under the interim final rule, all operators made use of the cost-saving alternatives and EPA expects them to continue using these alternatives and the additional alternative included in today's rule.

The cost reduction provisions in this final rule include: (1) Material may be incorporated by referring to it in the environmental document with its content briefly described when the cited material is reasonably available to the EPA; (2) more than one proposed expedition by an operator may be included within one environmental document and may, if appropriate, include a single discussion of components of the environmental analysis which are applicable to some or all of the proposed expeditions; (3) one environmental document may also be used to address expeditions being carried out by more than one operator, provided that the environmental documentation includes the names of each operator for which the environmental documentation is being submitted pursuant to obligations under these regulations; and (4) one environmental document may be submitted by one or more operators for proposed expeditions for a period of up to five consecutive austral summer seasons, provided that the conditions described in the multi-year environmental document, including the assessment of cumulative impacts, are unchanged. The multi-year provision also allows operators to update basic information and to provide information on additional activities to supplement the multi-year environmental document without having to revise and re-submit the entire document. Further, the EPA may waive or modify the deadlines of these regulations where EPA determines an operator is acting in good faith and that circumstances outside the control

of the operator created delays, provided that environmental documentation fully meets deadlines under the Protocol.

In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analysis is to identify and address regulatory alternatives "which minimize any significant economic impact of the rule on small entities." 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule. The EPA believes that, because this rule only requires assessment of environmental impacts, the effects on any small entities will be limited primarily to the cost of preparing such an analysis and that the requirements are no greater than necessary to ensure that the United States will be in compliance with its international obligations under the Protocol and the Treaty. The costs are likely to be minimal because, in EPA's view, the types of activities currently being carried out typically will be unlikely to have impacts that are more than minor or transitory assuming that the activities will be carried out in accordance with the guidelines set forth in the ATCM Recommendation XVIII-1, Tourism and Non-Governmental Activities, the relevant provisions of other U.S. statutes, and Annexes II-V to the Protocol. Therefore, most activities will likely need only IEE documentation, the cost of which is minimal as shown in section VII, Paperwork Reduction Act. Further, EPA has included provisions in this final rule that are available to all respondents, including small entities, that will have a positive effect by minimizing the cost of such an analysis.

Therefore, after considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities.

#### C. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit

analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year.

Today's rule contains no Federal mandates for State, local, or tribal governments or the private sector. Furthermore, the UMRA does not apply to rules that are necessary for the national security or the ratification or implementation of international treaty obligations. These regulations are necessary to enable the United States to implement its obligations under the Protocol on Environmental Protection to the Antarctic Treaty of 1959. This rule does not apply to any governmental jurisdictions. For the private sector, there are currently less than 20 regulated operators and, because of the nature of business and the Antarctic location, this number is not expected to increase significantly. Moreover, as described in section V.B., above, this final rule provides alternatives that may be used by operators to reduce the burden and costs associated with the rule.

#### D. Paperwork Reduction Act

The Office of Management and Budget (OMB) has approved the information collection requirements contained in this rule under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2020-0007.

Public Law 104-227, the Antarctic Science, Tourism, and Conservation Act of 1996 (the Act) amends the Antarctic Conservation Act of 1978, 16 U.S.C. 2401 *et seq.*, to implement the provisions of the Protocol on Environmental Protection to the Antarctic Treaty of 1959. The Act provides that EPA must promulgate regulations to provide for the environmental impact assessment of nongovernmental activities, including tourism, for which the United States is required to give advance notice under Paragraph 5 of Article VII of the Treaty, and for coordination of the review of information regarding environmental impact assessment received from other Parties under the Protocol. This rule provides nongovernmental operators with the specific environmental documentation requirements they must meet in order to comply with the Protocol.

Nongovernmental operators, including tour operators, conducting expeditions to Antarctica are required to submit environmental documentation to EPA that evaluates the potential environmental impact of their proposed

activities. If EPA has no comments, or if the documentation is satisfactorily revised in response to EPA's comments, and the operator does not receive a notice from EPA that the environmental documentation does not meet the requirements of Article 8 and Annex I of the Protocol and the provisions of these regulations, the operator would have no further obligations pursuant to the applicable requirements of these regulations provided that any appropriate measures, which may include monitoring, are put in place to assess and verify the impact of the activity. The type of environmental document required depends upon the nature and intensity of the environmental impacts that could result from the activity under consideration. Nongovernmental operators would be able to use the following approaches for submission of the environmental documentation required under the final rule: (1) Material may be incorporated by referring to it in the environmental document with its content briefly described when the cited material is reasonably available to the EPA; (2) more than one proposed expedition by an operator may be included within one environmental document and may, if appropriate, include a single discussion of components of the environmental analysis which are applicable to some or all of the proposed expeditions; (3) one environmental document may also be used to address expeditions being carried out by more than one operator, provided that the environmental documentation includes the names of each operator for which the environmental documentation is being submitted pursuant to obligations under these regulations; and (4) one environmental document may be submitted by one or more operators for proposed expeditions for a period of up to five consecutive austral summer seasons, provided that the conditions described in the multi-year environmental document, including the assessment of cumulative impacts, are unchanged. The multi-year provision also allows operators to update basic information and to provide information on additional activities to supplement the multi-year environmental document without having to revise and re-submit the entire document. EPA anticipates that operators will make one submittal per year for all of their expeditions for that year and that most operators will be able to use the multi-year environmental documentation provision. EPA does not expect or anticipate receipt of any confidential information. No capital costs or operational and maintenance

costs are anticipated to be incurred as a result of this ICR.

*Frequency of Reporting:* Once per year.

*Affected Public:* Businesses, other nongovernmental entities including for profit entities, and not-for-profit institutions.

*Number of Respondents:* 13 to 14.

*Estimated Average Time Per Respondent:* 29 to 185 Hours depending on the anticipated level of environmental documentation and the paperwork reduction provisions employed by the respondent.

*Total Annual Burden Hours:* 377 to 562 Hours depending on the anticipated level of environmental documentation and the paperwork reduction provisions employed by the respondent.

*Estimated Average Cost Per Respondent To Prepare and Submit Environmental Documentation for the First Year:* \$2,668 to \$13,405 depending on the anticipated level of environmental documentation and the paperwork reduction provisions employed by the respondent.

*Estimated Average Cost Per Respondent To Prepare and Submit Environmental Documentation for Subsequent Years:* \$1,844 to \$14,117 depending on the anticipated level of environmental documentation and the paperwork reduction provisions employed by the respondent.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

*E. National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, Section 12(d) (15 U.S.C. 272 note)*

As noted in the proposed rule, 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) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This rulemaking does not involve technical standards.

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

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 56 FR 7629 (1994), requires each Federal agency, to the greatest extent practicable and permitted by law, to make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority or low-income populations, including Indian tribes. The provisions of Executive Order 12898 do not apply to this regulatory action because it does not have any effects on minority or low income populations.

*G. Executive Order 13132, Federalism*

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. No governmental jurisdictions including Federal, State, local and tribal governments are subject to this rulemaking. Thus, Executive Order 13132 does not apply to this rule.

*H. Executive Order 13175, Consultation and Coordination with Tribal Governments*

Executive Order 13175 took effect on January 6, 2001, and revoked Executive Order 13084 (Tribal Consultation) as of that date. EPA developed the proposed rule, however, during the period when Executive Order 13084 was in effect. Thus, EPA addressed tribal considerations under Executive Order 13084. Executive Order 13175, Consultation and Coordination with Tribal Governments, requires federal agencies to adhere to certain fundamental principles and policy making criteria when formulating or implementing policies with tribal implications and to establish a process to ensure that tribal officials have the opportunity to provide meaningful and timely input into regulatory policies that have tribal implications. Tribal governments are not subject to this rulemaking. Thus, neither Executive Order 13084 nor Executive Order 13175 apply to this rule.

*I. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks*

Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks," (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. This final rule is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

*J. Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution and Use*

Executive Order 13211 requires federal agencies to prepare a Statement of Energy Effects and to submit such statements to the Office of Management and Budget. This final rule is not subject to Executive Order 13211 because it does not significantly affect energy supply, distribution or use.

*K. Submission to Congress and the Comptroller General of the United States*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that, before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective on January 7, 2002.

**List of Subjects in 40 CFR Part 8**

Environmental protection, Antarctica, Environmental impact statements, Penalties, Reporting and recordkeeping requirements.

Dated: November 29, 2001.

**Christine Todd Whitman,**  
*Administrator.*

Therefore, for the reasons set forth in the Preamble, EPA hereby amends title 40 chapter 1 of the Code of Federal Regulations by revising part 8 to read as follows:

**PART 8—ENVIRONMENTAL IMPACT ASSESSMENT OF NONGOVERNMENTAL ACTIVITIES IN ANTARCTICA**

Sec.

- 8.1 Purpose.
- 8.2 Applicability and effect.
- 8.3 Definitions.
- 8.4 Preparation of environmental documents, generally.
- 8.5 Submission of environmental documents.
- 8.6 Preliminary environmental review.
- 8.7 Initial environmental evaluation.
- 8.8 Comprehensive environmental evaluation.

- 8.9 Measures to assess and verify environmental impacts.
- 8.10 Cases of emergency.
- 8.11 Prohibited acts, enforcement and penalties.
- 8.12 Coordination of reviews from other Parties.

**Authority:** 16 U.S.C. 2401 *et seq.*, as amended, 16 U.S.C. 2403a.

**§ 8.1 Purpose.**

(a) This part is issued pursuant to the Antarctic Science, Tourism, and Conservation Act of 1996. As provided in that Act, this part implements the requirements of Article 8 and Annex I to the Protocol on Environmental Protection to the Antarctic Treaty of 1959 and provides for:

(1) The environmental impact assessment of nongovernmental activities, including tourism, for which the United States is required to give advance notice under paragraph 5 of Article VII of the Antarctic Treaty of 1959; and

(2) Coordination of the review of information regarding environmental impact assessment received by the United States from other Parties under the Protocol.

(b) The procedures in this part are designed to: ensure that nongovernmental operators identify and assess the potential impacts of their proposed activities, including tourism, on the Antarctic environment; that operators consider these impacts in deciding whether or how to proceed with proposed activities; and that operators provide environmental documentation pursuant to the Act and Annex I of the Protocol. These procedures are consistent with and implement the environmental impact assessment provisions of Article 8 and Annex I to the Protocol on Environmental Protection to the Antarctic Treaty.

**§ 8.2 Applicability and effect.**

(a) This part is intended to ensure that potential environmental effects of nongovernmental activities undertaken in Antarctica are appropriately identified and considered by the operator during the planning process and that to the extent practicable, appropriate environmental safeguards which would mitigate or prevent adverse impacts on the Antarctic environment are identified by the operator.

(b) The requirements set forth in this part apply to nongovernmental activities for which the United States is required to give advance notice under paragraph 5 of Article VII of the Antarctic Treaty of 1959: All nongovernmental expeditions to and within Antarctica

organized in or proceeding from its territory.

(c) This part does not apply to activities undertaken in the Antarctic Treaty area that are governed by the Convention on the Conservation of Antarctic Marine Living Resources or the Convention for the Conservation of Antarctic Seals. Persons traveling to Antarctica are subject to the requirements of the Marine Mammal Protection Act, 16 U.S.C. 1371 *et seq.*

**§ 8.3 Definitions.**

As used in this part:

*Act* means 16 U.S.C. 2401 *et seq.*, Public Law 104–227, the Antarctic Science, Tourism, and Conservation Act of 1996.

*Annex I* refers to Annex I, Environmental Impact Assessment, of the Protocol.

*Antarctic environment* means the natural and physical environment of Antarctica and its dependent and associated ecosystems, but excludes social, economic, and other environments.

*Antarctic Treaty area* means the area south of 60 degrees south latitude.

*Antarctic Treaty Consultative Meeting (ATCM)* means a meeting of the Parties to the Antarctic Treaty, held pursuant to Article IX(1) of the Treaty.

*Antarctica* means the Antarctic Treaty area; i.e., the area south of 60 degrees south latitude.

*Comprehensive Environmental Evaluation (CEE)* means a study of the reasonably foreseeable potential effects of a proposed activity on the Antarctic environment, prepared in accordance with the provisions of this part and includes all comments received thereon. (See: § 8.8.)

*Environmental document or environmental documentation (Document)* means a preliminary environmental review memorandum, an initial environmental evaluation, or a comprehensive environmental evaluation.

*Environmental impact assessment (EIA)* means the environmental review process required by the provisions of this part and by Annex I of the Protocol, and includes preparation by the operator and U.S. government review of an environmental document, and public access to and circulation of environmental documents to other Parties and the Committee on Environmental Protection as required by Annex I of the Protocol.

*EPA* means the Environmental Protection Agency.

*Expedition* means any activity undertaken by one or more nongovernmental persons organized



within or proceeding from the United States to or within the Antarctic Treaty area for which advance notification is required under Paragraph 5 of Article VII of the Treaty.

*Impact* means impact on the Antarctic environment and dependent and associated ecosystems.

*Initial Environmental Evaluation (IEE)* means a study of the reasonably foreseeable potential effects of a proposed activity on the Antarctic environment prepared in accordance with § 8.7.

*More than a minor or transitory impact* has the same meaning as the term "significantly" as defined in regulations under the National Environmental Policy Act at 40 CFR 1508.27.

*Operator or operators* means any person or persons organizing a nongovernmental expedition to or within Antarctica.

*Person* has the meaning given that term in section 1 of title 1, United States code, and includes any person subject to the jurisdiction of the United States except that the term does not include any department, agency, or other instrumentality of the Federal Government.

*Preliminary environmental review* means the environmental review described under that term in § 8.6.

*Preliminary Environmental Review Memorandum (PERM)* means the documentation supporting the conclusion of the preliminary environmental review that the impact of a proposed activity will be less than minor or transitory on the Antarctic environment.

*Protocol* means the Protocol on Environmental Protection to the Antarctic Treaty, done at Madrid October 4, 1991, and all annexes thereto which are in force for the United States.

*This part* means 40 CFR part 8.

#### **§ 8.4 Preparation of environmental documents, generally.**

(a) *Basic information requirements.* In addition to the information required pursuant to other sections of this part, all environmental documents shall contain the following:

- (1) The name, mailing address, and phone number of the operator;
- (2) The anticipated date(s) of departure of each expedition to Antarctica;
- (3) An estimate of the number of persons in each expedition;
- (4) The means of conveyance of expedition(s) to and within Antarctica;
- (5) Estimated length of stay of each expedition in Antarctica;
- (6) Information on proposed landing sites in Antarctica; and

(7) Information concerning training of staff, supervision of expedition members, and what other measures, if any, that will be taken to avoid or minimize possible environmental impacts.

(b) *Preparation of an environmental document.* Unless an operator determines and documents that a proposed activity will have less than a minor or transitory impact on the Antarctic environment, the operator will prepare an IEE or CEE in accordance with this part. In making the determination what level of environmental documentation is appropriate, the operator should consider, as applicable, whether and to what degree the proposed activity:

- (1) Has the potential to adversely affect the Antarctic environment;
- (2) May adversely affect climate or weather patterns;
- (3) May adversely affect air or water quality;
- (4) May affect atmospheric, terrestrial (including aquatic), glacial, or marine environments;
- (5) May detrimentally affect the distribution, abundance, or productivity of species, or populations of species of fauna and flora;
- (6) May further jeopardize endangered or threatened species or populations of such species;
- (7) May degrade, or pose substantial risk to, areas of biological, scientific, historic, aesthetic, or wilderness significance;
- (8) Has highly uncertain environmental effects, or involves unique or unknown environmental risks; or
- (9) Together with other activities, the effects of any one of which is individually insignificant, may have at least minor or transitory cumulative environmental effects.

(c) *Type of environmental document.* The type of environmental document required under this part depends upon the nature and intensity of the environmental impacts that could result from the activity under consideration. A PERM must be prepared by the operator to document the conclusion of the operator's preliminary environmental review that the impact of a proposed activity on the Antarctic environment will be less than minor or transitory. (See § 8.6.) An IEE must be prepared by the operator for proposed activities which may have at least (but no more than) a minor or transitory impact on the Antarctic environment. (See § 8.7.) A CEE must be prepared by the operator if an IEE indicates, or if it is otherwise determined, that a proposed activity is likely to have more than a minor or

transitory impact on the Antarctic environment (See § 8.8.)

(d) *Incorporation of information, consolidation of environmental documentation, and multi-year environmental documentation.* (1) An operator may incorporate material into an environmental document by referring to it in the document when the effect will be to reduce paperwork without impeding the review of the environmental document by EPA and other federal agencies. The incorporated material shall be cited and its content briefly described. No material may be incorporated by referring to it in the document unless it is reasonably available to the EPA.

(2) Provided that environmental documentation complies with all applicable provisions of Annex I to the Protocol and this part and is appropriate in light of the specific circumstances of the operator's proposed expedition or expeditions, an operator may include more than one proposed expedition within one environmental document and one environmental document may also be used to address expeditions being carried out by more than one operator provided that the environmental document indicates the names of each operator for which the environmental documentation is being submitted pursuant to obligations under this part.

(e) *Multi-year environmental documentation.* (1) Provided that environmental documentation complies with all applicable provisions of Annex I to the Protocol and this part, an operator may submit environmental documentation for proposed expeditions for a period of up to five consecutive austral summer seasons, provided that the conditions described in the multi-year environmental document, including the assessment of cumulative impacts, are unchanged and meets the provisions of paragraphs (e)(1)(i) through (iii) of this section.

(i) The operator shall identify the environmental documentation submitted for multi-year documentation purposes in the first year it is submitted. If the operator, or operators, fail to make this initial identification to EPA, this provision shall not be in effect although subsequent years' submissions by the operator, or operators, may use this environmental documentation as provided in paragraphs (d) (1) and (2) of this section.

(ii) In subsequent years, up to a total maximum of five years, the operator, or operators, shall reference the multi-year documentation identified initially if it is necessary to update the basic

information requirements listed in paragraph (a) of this section.

(iii) An operator, or operators, may supplement a multi-year environmental document for an additional activity or activities by providing information regarding the proposed activity in accordance with the appropriate provisions of this part. The operator, or operators, shall identify this submission as a proposed supplement to the multi-year documentation in effect. Addition of the supplemental information shall not extend the period of the multi-year environmental documentation beyond the time period associated with the documentation as originally submitted.

(2) Multi-year environmental documentation may include more than one proposed expedition within the environmental document and the multi-year environmental document may also be used to address expeditions being carried out by more than one operator provided that the environmental document indicates the names of each operator for which the environmental documentation is being submitted pursuant to obligations under this part.

(3) The schedules for multi-year environmental documentation depend on the level of the environmental document and shall be the same as the schedules for comparable environmental documentation submitted on an annual basis; *e.g.*, a multi-year PERM shall comply with the schedule in § 8.6, a multi-year IEE shall comply with the schedule in § 8.7, and a multi-year CEE shall comply with the schedule in § 8.8. These schedules apply to the operator's submission of the initial multi-year environmental document; the operator's subsequent annual submissions pursuant to paragraphs (e)(1) (ii) and (iii) of this section; EPA's review, in consultation with other interested federal agencies, and comment on the multi-year environmental documentation and subsequent annual submissions; and a finding the EPA may make, with the concurrence of the National Science Foundation, that the environmental documentation submitted does not meet the requirements of Article 8 and Annex I of the Protocol and the provisions of this part.

#### **§ 8.5 Submission of environmental documents.**

(a) An operator shall submit environmental documentation to the EPA for review. The EPA, in consultation with other interested federal agencies, will carry out a review to determine if the submitted environmental documentation meets the requirements of Article 8 and Annex I

of the Protocol and the provisions of this part. The EPA will provide its comments, if any, on the environmental documentation to the operator and will consult with the operator regarding any suggested revisions. If EPA has no comments, or if the documentation is satisfactorily revised in response to EPA's comments, and the operator does not receive a notice from EPA that the environmental documentation does not meet the requirements of Article 8 and Annex I of the Protocol and the provisions of this part, the operator will have no further obligations pursuant to the applicable requirements of this part provided that any appropriate measures, which may include monitoring, are put in place to assess and verify the impact of the activity. Alternatively, following final response from the operator, the EPA, in consultation with other federal agencies and with the concurrence of the National Science Foundation, will inform the operator that EPA finds that the environmental documentation does not meet the requirements of Article 8 and Annex I of the Protocol and the provisions of this part. If the operator then proceeds with the expedition without fulfilling the requirements of this part, the operator is subject to enforcement proceedings pursuant to sections 7, 8, and 9 of the Antarctic Conservation Act, as amended by the Act; 16 U.S.C. 2407, 2408, 2409, and 45 CFR part 672.

(b) The EPA may waive or modify deadlines pursuant to this part where EPA determines an operator is acting in good faith and that circumstances outside the control of the operator created delays, provided that the environmental documentation fully meets deadlines under the Protocol.

#### **§ 8.6 Preliminary environmental review.**

(a) Unless an operator has determined to prepare an IEE or CEE, the operator shall conduct a preliminary environmental review that assesses the potential direct and reasonably foreseeable indirect impacts on the Antarctic environment of the proposed expedition. A Preliminary Environmental Review Memorandum (PERM) shall contain sufficient detail to assess whether the proposed activity may have less than a minor or transitory impact, and shall be submitted to the EPA for review no less than 180 days before the proposed departure of the expedition. The EPA, in consultation with other interested federal agencies, will review the PERM to determine if it is sufficient to demonstrate that the activity will have less than a minor or transitory impact or whether additional environmental documentation, *i.e.*, an

IEE or CEE, is required to meet the obligations of Article 8 and Annex I of the Protocol. The EPA will provide its comments to the operator within fifteen (15) days of receipt of the PERM, and the operator shall have seventy-five (75) days to prepare a revised PERM or an IEE, if necessary. Following the final response from the operator, EPA may make a finding that the environmental documentation submitted does not meet the requirements of Article 8 and Annex I of the Protocol and the provisions of this part. This finding will be made with the concurrence of the National Science Foundation. If EPA does not provide such notice within thirty (30) days, the operator will be deemed to have met the requirements of this part provided that any required procedures, which may include appropriate monitoring, are put in place to assess and verify the impact of the activity.

(b) If EPA recommends an IEE and one is prepared and submitted within the seventy-five (75) day response period, it will be reviewed under the time frames set out for an IEE in § 8.7. If EPA recommends a CEE and one is prepared, it will be reviewed under the time frames set out for a CEE in § 8.8.

#### **§ 8.7 Initial environmental evaluation.**

(a) *Submission of IEE to the EPA.* Unless a PERM has been submitted pursuant to § 8.6 which meets the environmental documentation requirements under Article 8 and Annex I to the Protocol and the provisions of this part or a CEE is being prepared, an IEE shall be submitted by the operator to the EPA no fewer than ninety (90) days before the proposed departure of the expedition.

(b) *Contents.* An IEE shall contain sufficient detail to assess whether a proposed activity may have more than a minor or transitory impact on the Antarctic environment and shall include the following information:

(1) A description of the proposed activity, including its purpose, location, duration, and intensity; and

(2) Consideration of alternatives to the proposed activity and any impacts that the proposed activity may have on the Antarctic environment, including consideration of cumulative impacts in light of existing and known proposed activities.

(c) *Further environmental review.* (1) The EPA, in consultation with other interested federal agencies, will review an IEE to determine whether the IEE meets the requirements under Annex I to the Protocol and the provisions of this part. The EPA will provide its comments to the operator within thirty (30) days of receipt of the IEE, and the

operator will have forty-five (45) days to prepare a revised IEE, if necessary. Following the final response from the operator, EPA may make a finding that the documentation submitted does not meet the requirements of Article 8 and Annex I of the Protocol and the provisions of this part. This finding will be made with the concurrence of the National Science Foundation. If such a notice is required, EPA will provide it within fifteen (15) days of receiving the final IEE from the operator or, if the operator does not provide a final IEE, within sixty (60) days following EPA's comments on the original IEE. If EPA does not provide notice within these time limits, the operator will be deemed to have met the requirements of this part provided that any required procedures, which may include appropriate monitoring, are put in place to assess and verify the impact of the activity.

(2) If a CEE is required, the operator must adhere to the time limits applicable to such documentation. (See: § 8.8.) In this event EPA, at the operator's request, will consult with the operator regarding possible changes in the proposed activity which would allow preparation of an IEE.

#### **§ 8.8 Comprehensive environmental evaluation.**

(a) *Preparation of a CEE.* Unless a PERM or an IEE has been submitted and determined to meet the environmental documentation requirements of this part, the operator shall prepare a CEE. A CEE shall contain sufficient information to enable informed consideration of the reasonably foreseeable potential environmental effects of a proposed activity and possible alternatives to that proposed activity. A CEE shall include the following:

(1) A description of the proposed activity, including its purpose, location, duration and intensity, and possible alternatives to the activity, including the alternative of not proceeding, and the consequences of those alternatives;

(2) A description of the initial environmental reference state with which predicted changes are to be compared and a prediction of the future environmental reference state in the absence of the proposed activity;

(3) A description of the methods and data used to forecast the impacts of the proposed activity;

(4) Estimation of the nature, extent, duration and intensity of the likely direct impacts of the proposed activity;

(5) A consideration of possible indirect or second order impacts from the proposed activity;

(6) A consideration of cumulative impacts of the proposed activity in light of existing activities and other known planned activities;

(7) Identification of measures, including monitoring programs, that could be taken to minimize or mitigate impacts of the proposed activity and to detect unforeseen impacts and that could provide early warning of any adverse effects of the activity as well as to deal promptly and effectively with accidents;

(8) Identification of unavoidable impacts of the proposed activity;

(9) Consideration of the effects of the proposed activity on the conduct of scientific research and on other existing uses and values;

(10) An identification of gaps in knowledge and uncertainties encountered in compiling the information required under this section;

(11) A non-technical summary of the information provided under this section; and

(12) The name and address of the person or organization which prepared the CEE and the address to which comments thereon should be directed.

(b) *Submission of Draft CEE to the EPA and Circulation to Other Parties.*

(1) Any operator who plans a nongovernmental expedition that would require a CEE must submit a draft of the CEE by December 1 of the preceding year. Within fifteen (15) days of receipt of the draft CEE, EPA will: send it to the Department of State which will circulate it to all Parties to the Protocol and forward it to the Committee for Environmental Protection established by the Protocol, and publish notice of receipt of the CEE and request for comments on the CEE in the **Federal Register**, and will provide copies to any person upon request. The EPA will accept public comments on the CEE for a period of ninety (90) days following notice in the **Federal Register**. The EPA, in consultation with other interested federal agencies, will evaluate the CEE to determine if the CEE meets the requirements under Article 8 and Annex I to the Protocol and the provisions of this part and will transmit its comments to the operator within 120 days following publication in the **Federal Register** of the notice of availability of the CEE.

(2) The operator shall send a final CEE to EPA at least seventy-five (75) days before commencement of the proposed activity in the Antarctic Treaty area. The CEE must address and must include (or summarize) any comments on the draft CEE received from EPA, the public, and the Parties. Following the final response from the operator, the EPA will inform

the operator if EPA, with the concurrence of the National Science Foundation, makes the finding that the environmental documentation submitted does not meet the requirements of Article 8 and Annex I of the Protocol and the provisions of this part. This notification will occur within fifteen (15) days of submittal of the final CEE by the operator if the final CEE is submitted by the operator within the time limits set out in this section. If no final CEE is submitted or the operator fails to meet these time limits, EPA will provide such notification sixty (60) days prior to departure of the expedition. If EPA does not provide such notice, the operator will be deemed to have met the requirements of this part provided that procedures, which include appropriate monitoring, are put in place to assess and verify the impact of the activity. The EPA will transmit the CEE, along with a notice of any decisions by the operator relating thereto, to the Department of State which shall circulate it to all Parties no later than sixty (60) days before commencement of the proposed activity in the Antarctic Treaty area. The EPA will also publish a notice of availability of the final CEE in the **Federal Register**.

(3) No final decision shall be taken to proceed with any activity for which a CEE is prepared unless there has been an opportunity for consideration of the draft CEE by the Antarctic Treaty Consultative Meeting on the advice of the Committee for Environmental Protection, provided that no expedition need be delayed through the operation of paragraph 5 of Article 3 to Annex I of the Protocol for longer than 15 months from the date of circulation of the draft CEE.

(c) *Decisions based on CEE.* The decision to proceed, based on environmental documentation that meets the requirements under Article 8 and Annex I to the Protocol and the provisions of this part, rests with the operator. Any decision by an operator on whether to proceed with or modify a proposed activity for which a CEE was required shall be based on the CEE and other relevant considerations.

#### **§ 8.9 Measures to assess and verify environmental impacts.**

(a) The operator shall conduct appropriate monitoring of key environmental indicators as proposed in the CEE to assess and verify the potential environmental impacts of activities which are the subject of a CEE. The operator may also need to carry out monitoring in order to assess and verify the impact of an activity for which an IEE has been prepared.

(b) All proposed activities for which an IEE or CEE has been prepared shall include procedures designed to provide a regular and verifiable record of the impacts of these activities, in order, *inter alia*, to:

(1) Enable assessments to be made of the extent to which such impacts are consistent with the Protocol; and

(2) Provide information useful for minimizing and mitigating those impacts, and, where appropriate, information on the need for suspension, cancellation, or modification of the activity.

#### **§ 8.10 Cases of emergency.**

This part shall not apply to activities taken in cases of emergency relating to the safety of human life or of ships, aircraft, equipment and facilities of high value, or the protection of the environment, which require an activity to be undertaken without completion of the procedures set out in this part. Notice of any such activities which would have otherwise required the preparation of a CEE shall be provided within fifteen (15) days to the Department of State, as provided in this paragraph, for circulation to all Parties to the Protocol and to the Committee on Environmental Protection, and a full explanation of the activities carried out shall be provided within forty-five (45) days of those activities. Notification shall be provided to: The Director, The

Office of Oceans Affairs, OES/OA, Room 5805, Department of State, 2201 C Street, NW, Washington, DC 20520–7818.

#### **§ 8.11 Prohibited acts, enforcement and penalties.**

(a) It shall be unlawful for any operator to violate this part.

(b) An operator who violates any of this part is subject to enforcement, which may include civil and criminal enforcement proceedings, and penalties, pursuant to sections 7,8, and 9 of the Antarctic Conservation Act, as amended by the Act; 16 U.S.C. 2407, 2408, 2409, and 45 CFR part 672.

#### **§ 8.12 Coordination of reviews from other Parties.**

(a) Upon receipt of a draft CEE from another Party, the Department of State shall publish notice in the **Federal Register** and shall circulate a copy of the CEE to all interested federal agencies. The Department of State shall coordinate responses from federal agencies to the CEE and shall transmit the coordinated response to the Party which has circulated the CEE. The Department of State shall make a copy of the CEE available upon request to the public.

(b) Upon receipt of the annual list of IEEs from another Party prepared in accordance with Article 2 of Annex I and any decisions taken in consequence

thereof, the Department of State shall circulate a copy to all interested federal agencies. The Department of State shall make a copy of the list of IEEs prepared in accordance with Article 2 and any decisions taken in consequence thereof available upon request to the public.

(c) Upon receipt of a description of appropriate national procedures for environmental impact assessments from another Party, the Department of State shall circulate a copy to all interested federal agencies. The Department of State shall make a copy of these descriptions available upon request to the public.

(d) Upon receipt from another Party of significant information obtained, and any action taken in consequence therefrom from procedures put in place with regard to monitoring pursuant to Articles 2(2) and 5 of Annex I to the Protocol, the Department of State shall circulate a copy to all interested federal agencies. The Department of State shall make a copy of this information available upon request to the public.

(e) Upon receipt from another Party of a final CEE, the Department of State shall circulate a copy to all interested federal agencies. The Department of State shall make a copy available upon request to the public.

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