

Attn: OMB Desk Officer for OSHA, Office of Management and Budget, Room 10235, 726 Jackson Place, NW., Washington, DC 20503. The Agency also encourages commenters to submit their comments on this paperwork determination to OSHA along with their other comments on the proposed rule.

VII. Federalism

The Agency has reviewed the proposed amendment to its Commercial Diving Operations standards according to the most recent Executive Order on Federalism (Executive Order 13132, 64 FR 43225, August 10, 1999). This Executive Order requires that Federal agencies, to the extent possible, refrain from limiting State policy options, consult with States before taking actions that restrict their policy options, and take such actions only when clear constitutional authority exists and the problem is of national scope. The Executive Order allows Federal agencies to preempt State law only with the expressed consent of Congress; in such cases, Federal agencies must limit preemption of State law to the extent possible.

Under section 18 of the OSH Act, Congress expressly provides OSHA with authority to preempt State occupational safety and health standards to the extent that the Agency promulgates a Federal standard under section 6 of the OSH Act. Accordingly, section 18 of the OSH Act authorizes the Agency to preempt State promulgation and enforcement of requirements dealing with occupational safety and health issues covered by OSHA standards unless the State has an OSHA-approved occupational safety and health plan (*i.e.*, is a State-plan State). (See *Gade v. National Solid Wastes Management Association*, 112 S. Ct. 2374 (1992).) Therefore, with respect to States that do not have OSHA-approved plans, the Agency concludes that this proposal conforms to the preemption provisions of the OSH Act. Additionally, section 18 of the OSH Act prohibits States without approved plans from issuing citations for violations of OSHA standards; the Agency finds that the proposed rulemaking does not expand this limitation.

OSHA has authority under Executive Order 13132 to propose this amendment to its Commercial Diving Operations standards because the problems addressed by these requirements are national in scope. In this regard, the proposed amendment offers thousands of employers across the nation whose divers provide recreational diving instruction and dive-guiding services an opportunity to expand these services into nitrox diving operations, and to do

so without the expense involved in purchasing a decompression chamber. The proposed amendment would provide employers in every State with alternative means of compliance to protect their recreational diving instructors and diving guides from the risks of decompression sickness and arterial gas embolism while using a breathing-gas mixture consisting of a high percentage of oxygen mixed with nitrogen supplied by an open-circuit, semi-closed-circuit, or closed-circuit self-contained breathing apparatus.

Section 18(c)(2) of the OSH Act (29 U.S.C. 667(c)(2)) requires State-plan States to adopt OSHA standards, or develop alternatives, that are at least as effective as the OSHA amendment. The States have already adopted OSHA's Commercial Diving Operations (CDO) standards at 29 CFR 1910, subpart T, in particular, the decompression chamber provisions of paragraphs (b)(2) and (c)(3)(iii) of § 1910.423(b)(2) and paragraph (b)(1) of § 1910.426(b)(1). Compliance with the proposed amendment would only provide employers with an alternative to the requirements of the CDO standards; therefore, the alternative is not, itself, a mandatory standard. Accordingly, State-plan States are not obligated to adopt the final amendment that results from this rulemaking. Nevertheless, OSHA strongly encourages them to adopt to the final amendment to provide compliance options to employers in their States.

VIII. State Plans

The Agency strongly encourages the 23 States and two Territories with their own OSHA-approved occupational safety and health plans to revise their current Commercial Diving Operations standards when the Agency publishes the final amendment that results from this rulemaking. OSHA believes that such a revision would provide employers in the State-plan States the economic benefits that are likely to accrue from its enactment, while protecting the safety and health of recreational diving instructors and diving guides. These States and Territories are: Alaska, Arizona, California, Connecticut, New York (for State and local government employees only), Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington, and Wyoming.

IX. Unfunded Mandates

OSHA reviewed the proposed amendment according to the Unfunded

Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 *et seq.*) and Executive Order 12875. As discussed above in section V ("Preliminary Economic Analysis and Regulatory Flexibility Certification") of this preamble, the Agency has made a preliminary determination that the proposed amendment imposes no additional costs on any private or public sector entity. The substantive content of the proposed amendment applies only to employers of recreational diving instructors and diving guides, and compliance with the proposed amendment would be strictly optional for the employers. Accordingly, the proposed amendment would require no additional expenditures by either public or private employers.

OSHA standards do not apply to State and local governments, except in States that have voluntarily elected to adopt a State plan approved by the Agency. Consequently, the proposed amendment does not meet the definition of a "federal intergovernmental mandate" (see section 421(5) of the UMRA (2 U.S.C. 658(5))). In conclusion, the proposed amendment does not mandate that State, local, and tribal governments adopt new, unfunded regulatory obligations.

X. Applicability of Existing Consensus Standards

OSHA is not aware of any national consensus standards that are similar to the amendment that it is proposing in this rulemaking.

XI. Public Participation

The Agency requests members of the public to submit written comments and other information concerning this proposal. These comments may include objections to the proposal with or without a hearing request, as well as comments that endorse or support the proposed amendment set forth in this notice. OSHA welcomes such comments and information so that the record of this rulemaking will represent a balanced public response on the issues involved. See the sections above titled **DATES** and **ADDRESSES** for information on submitting these comments and information to the Agency. Submissions received within the specified comment period will become part of the record, and will be available for public inspection and copying in the OSHA Docket Office.

Under section 6(b)(3) of the OSH Act and 29 CFR 1911.11, members of the public may request an informal hearing by following the instructions under the section of this **Federal Register** notice titled **ADDRESSES**. These requests must include the objections to the proposal