

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 Occupational Safety and Health Act of 1970 (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 adding the CNP REDON fit testing protocol to its Respiratory Protection Standard at 29 CFR 1910.134 because the problems addressed by these requirements are national in scope. In this regard, the proposal offers hundreds of thousands of employers across the nation an opportunity to adopt an additional protocol to use in assessing respirator fit among their employees. Therefore, the proposal would provide employers in every state with an alternative means of complying with the fit testing requirements specified in paragraph (f) of OSHA's Respiratory Protection Standard.

Should OSHA adopt the proposed fit testing protocol in a final rulemaking, section 18(c)(2) of the OSH Act (29 U.S.C. 667(c)(2)) requires State-plan States to adopt the same protocol, or develop an alternative that is at least as effective as that protocol. However, compliance with the new fit testing protocol would only provide employers with an alternative to the existing requirements for fit testing protocols specified in its Respiratory Protection Standard; therefore, the alternative is not, itself, a mandatory standard. Accordingly, State-plan States are not obligated to adopt the final provisions that result from this rulemaking. Nevertheless, OSHA strongly

encourages them to adopt the final provisions to provide compliance options to employers in their states.

#### E. State Plans

The Agency strongly encourages the 24 states and two territories with their own OSHA-approved occupational safety and health plans to revise their current Respiratory Protection Standard should the Agency adopt the proposed fit testing protocol based on this rulemaking. OSHA believes that such a revision would provide employers in the State-plan States with any economic benefits that may accrue from its enactment, while protecting the safety and health of employees who use respirators against airborne hazardous substances in the workplace. These states and territories are: Alaska, Arizona, California, 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. Connecticut, New Jersey, and New York have OSHA-approved State Plans that apply to state and local government employees only.

#### F. Unfunded Mandates

OSHA reviewed the proposal 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 IV.B (Preliminary Economic Analysis and Regulatory Flexibility Certification) of this preamble, the Agency has made a preliminary determination that the proposal imposes no additional costs on any private or public sector entity. The substantive content of the proposal applies only to employers whose employees use respirators for protection against airborne workplace contaminants, and compliance with the proposal would be strictly optional for these employers. Accordingly, the proposal 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 proposal 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 proposal does not mandate that state, local, and tribal governments adopt new, unfunded regulatory obligations.

#### G. Applicability of Existing Consensus Standards

When OSHA promulgated its original respirator fit testing protocols on January 8, 1998 under Appendix A of its final Respiratory Protection Standard (29 CFR 1910.134), no national consensus standards addressed these protocols. However, the American National Standards Institute (ANSI) subsequently developed a national consensus standard on fit testing protocols as an adjunct to its respiratory protection program, ANSI Z88.2–1992. ANSI approved this national consensus standard, entitled "Respirator Fit Testing Methods," on June 8, 2001 as ANSI Z88.10–2001.

Paragraph 7.3 of ANSI Z88.10–2001 provides the requirements for conducting the CNP fit test, including requirements for test instrumentation and administering the fit test; these requirements are consistent with the CNP fit test requirements specified in 1998 by OSHA in Part I.C.4 of its Respiratory Protection Standard. In addition, section 9 and Table 1 of ANSI Z88.10–2001 describe the exercises required during CNP fit testing; these required exercises duplicate the exercises described in this CNP REDON proposal, except that the second respirator redonning is optional under the ANSI standard.<sup>2</sup> However, paragraph 9.2 of the ANSI standard specifies that one optional exercise must be included with the required exercises.

OSHA concludes that the CNP REDON fit testing protocol proposed in this rulemaking closely matches the requirements of the recent ANSI Z88.10–2001 standard. The proposed CNP REDON protocol relies on the CNP test procedures and instrumentation described in paragraphs (a) and (c) of Part I.C.4 in Appendix A of the Respiratory Protection Standard, which are similar to requirements specified in paragraph 7.3 of the ANSI standard. Any differences between these OSHA requirements and the provisions of the ANSI standard appear to be minor. In addition, the fit testing exercises in the proposed CNP REDON protocol are the same exercises in the ANSI standard when a second respirator redonning is selected as the optional exercise.

<sup>2</sup> Other optional exercises include deep breathing, side-to-side head movement, up-and-down head movement, stepping up and down, a second normal breathing exercise, grimacing followed by normal breathing, painter or sand-blaster movements, and other job-specific movements.