

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 this final rule in the **Federal Register**. This final rule is not a "major rule" as defined by 5 U.S.C. 804(2).

**List of Subjects in 40 CFR Part 180**

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: January 7, 2004.

**Lois Rossi,**

*Director, Registration Division, Office of Pesticide Programs.*

■ Therefore, 40 CFR chapter I is amended as follows:

**PART 180—[AMENDED]**

■ 1. The authority citation for part 180 continues to read as follows:

**Authority:** 21 U.S.C. 321(q), 346(a) and 371.

■ 2. In section 180.950, the table in paragraph (e) is amended by adding alphabetically the following entries to read as follows:

**§ 180.950 Tolerance exemptions for minimal risk active and inert ingredients.**

\* \* \* \* \*  
(e) \* \* \* \*

Chemical Name	CAS No.
* * *	* *
Lactic acid, n-butyl ester, (S) .....	34451-19-9
Lactic acid, ethyl ester,(S) .....	687-47-8
* * *	* *

[FR Doc. 04-1447 Filed 1-27-04; 8:45 am]

**BILLING CODE 6560-50-S**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 300**

[FRL 7615-1]

**National Oil and Hazardous Substance Pollution Contingency Plan; National Priorities List**

**AGENCY:** Environmental Protection Agency.

**ACTION:** Direct final notice of deletion of the Tyler Refrigeration Pit Superfund Site from the National Priorities List.

**SUMMARY:** The Environmental Protection Agency (EPA) Region III is publishing a direct final notice of deletion of the Tyler Refrigeration Pit Superfund Site (Site), located in Smyrna (Kent County), Delaware, from the National Priorities List (NPL).

The NPL, promulgated pursuant to Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA), is appendix B of 40 CFR part 300, which is the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). This direct final notice of deletion is being published by EPA with the concurrence of the State of Delaware, through the Department of Natural Resources and Environmental Control (DNREC), because EPA has determined that all appropriate response actions under CERCLA have been completed and, therefore, further remedial action pursuant to CERCLA is not appropriate.

**DATES:** This direct final deletion will be effective March 29, 2004 unless EPA receives adverse comments by February 27, 2004. If adverse comments are received, EPA will publish a timely withdrawal of the direct final deletion in the **Federal Register** informing the public that the deletion will not take effect.

**ADDRESSES:** Comments may be mailed to: Matthew T. Mellon, Remedial Project Manager, U.S. EPA Region III (3HS23), 1650 Arch Street, Philadelphia, PA 19103-2029, (215) 814-3168.

**INFORMATION REPOSITORIES:** Comprehensive information about the Site is available for viewing and copying at the Site information repositories located at: U.S. EPA Region III, Regional Center for Environmental Information (RCEI), 1650 Arch Street (2nd Floor), Philadelphia, PA 19103-2029, (215) 814-5254, Monday through Friday, 8 a.m. to 5 p.m.; and in Delaware at the Delaware Department of Natural Resources and Environmental Control, Site Investigation and Restoration Branch, 391 Lukens Drive, New Castle, DE 19720, (302) 395-2600, Monday through Friday, 8 a.m. to 4 p.m.

**FOR FURTHER INFORMATION CONTACT:** Matthew T. Mellon, Remedial Project Manager, U.S. EPA Region III (3HS23), 1650 Arch Street, Philadelphia, PA 19103-2029, (215) 814-3168 or 1-800-553-2509.

**SUPPLEMENTARY INFORMATION:**

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**I. Introduction**

EPA Region III is publishing this direct final notice of deletion of the Tyler Refrigeration Pit Superfund Site from the NPL.

The EPA identifies sites that appear to present a significant risk to public health or the environment and maintains the NPL as the list of those sites. As described in § 300.425(e)(3) of the NCP, sites deleted from the NPL remain eligible for remedial actions if conditions at a deleted site warrant such action.

Because EPA considers this action to be noncontroversial and routine, EPA is taking it without prior publication of a notice of intent to delete. This action will be effective March 29, 2004 unless EPA receives adverse comments by February 27, 2004 on this notice or the parallel notice of intent to delete published in the "Proposed Rules" section of today's **Federal Register**. If adverse comments are received within the 30-day public comment period on this notice or the notice of intent to delete, EPA will publish a timely withdrawal of this direct final notice of deletion before the effective date of the deletion and the deletion will not take effect. EPA will, as appropriate, prepare a response to comments and continue with the deletion process on the basis of the notice of intent to delete and the comments already received. There will be no additional opportunity to comment.

Section II of this document explains the criteria for deleting sites from the NPL. Section III discusses procedures that EPA is using for this action. Section IV discusses the Tyler Refrigeration Pit Superfund Site and demonstrates how it meets the deletion criteria. Section V discusses EPA's action to delete the Site from the NPL unless adverse comments are received during the public comment period.

**II. NPL Deletion Criteria**

Section 300.425(e) of the NCP provides that releases may be deleted from the NPL where no further response is appropriate. In making a determination to delete a Site from the NPL, EPA shall consider, in consultation with the State, whether any of the following criteria have been met:

- i. responsible parties or other persons have implemented all appropriate response actions required;

ii. all appropriate Fund-financed (Hazardous Substance Superfund Response Trust Fund) response under CERCLA has been implemented, and no further response action by responsible parties is appropriate; or

iii. the remedial investigation has shown that the release poses no significant threat to public health or the environment and, therefore, the taking of remedial measures is not appropriate.

Even if a site is deleted from the NPL, where hazardous substances, pollutants, or contaminants remain at the deleted site above levels that allow for unlimited use and unrestricted exposure, CERCLA § 121(c), 42 U.S.C. 9621(c), requires that a subsequent review of the site be conducted at least every five years after the initiation of the remedial action at the deleted site to ensure that the action remains protective of public health and the environment. If new information becomes available which indicates a need for further action, EPA may initiate remedial actions. Whenever there is a significant release from a site deleted from the NPL, the deleted site may be restored to the NPL without application of the hazard ranking system.

### III. Deletion Procedures

The following procedures apply to deletion of the Site:

(1) EPA consulted with the State of Delaware on the deletion of the Site from the NPL prior to developing this direct final notice of deletion.

(2) The State of Delaware concurred with deletion of the Site from the NPL.

(3) Concurrently with the publication of this direct final notice of deletion, a notice of the availability of the parallel notice of intent to delete published today in the "Proposed Rules" section of the **Federal Register** is being published in a major local newspaper of general circulation at or near the Site and is being distributed to appropriate federal, state, and local government officials and other interested parties; the newspaper notice announces the 30-day public comment period concerning the notice of intent to delete the Site from the NPL.

(4) EPA placed copies of documents supporting the deletion in the Site information repositories identified above.

(5) If adverse comments are received within the 30-day public comment period on this notice or the companion notice of intent to delete also published in today's **Federal Register**, EPA will publish a timely notice of withdrawal of this direct final notice of deletion before its effective date and will prepare a

response to comments and continue with the deletion process on the basis of the notice of intent to delete and the comments already received.

Deletion of a site from the NPL does not itself create, alter, or revoke any individual's rights or obligations. Deletion of a site from the NPL does not in any way alter EPA's right to take enforcement actions, as appropriate. The NPL is designed primarily for informational purposes and to assist EPA management. Section 300.425(e)(3) of the NCP states that the deletion of a site from the NPL does not preclude eligibility for future response actions, should future conditions warrant such actions.

### IV. Basis for Site Deletion

The following information provides EPA's rationale for deleting the Site from the NPL:

#### *Executive Summary of the Basis for Site Deletion*

The Tyler Refrigeration Pit Superfund Site was the location of refrigeration manufacturing from the 1940s until 1976, with wastes disposed of in two unlined lagoons. These lagoons were excavated, the material removed, and the holes backfilled sometime between 1973 and 1975. From 1978 through 1995, Metal Masters Food Service Equipment Company ("Metal Masters") manufactured restaurant supplies (such as metal cabinetry and countertops) at the Site. The Site was the focus of two Remedial Investigations (one performed by Clark Equipment Company ("Clark"), overseen by EPA, and one performed by Metal Masters, overseen by the State) and a Record of Decision (ROD). The conclusions of the investigations and subsequent ROD were that the former lagoons presented no substantial elevated level of contaminant or additional risk, but that the loading dock area of the Metal Masters facility appeared to be a source of a trichloroethane (TCA) plume discovered in ground water on-site. Furthermore, it was found that the ground water at the Site did not present any current elevated risk because there was no current exposure (due to a State-implemented Ground Water Management Zone (GMZ) that prohibits the installation of wells), but that there was the potential for future elevated risk. Therefore, a monitoring program was implemented to ensure that levels of contaminants on-site continue to diminish, and that no contaminants are leaving the Site or the area of the GMZ.

The No Action remedy was determined in the 2002 Five Year Review of the Site to be protective of

human health and the environment. Since the ground water beneath and near the Site is not currently in use and is not migrating off-site, there is no current risk to human health or the environment. The GMZ implemented over the area of the Site by DNREC prevents the installation of wells, and therefore prevents any future exposure to ground water, thereby eliminating any future risk to human health or the environment. The monitoring program will continue to verify that no contaminants are migrating off-site. The only work remaining at the Site is to continue the monitoring program, which is to be taken over by Metal Masters pursuant to an Administrative Order on Consent that became effective June 4, 2002.

#### *Site History and Characteristics*

##### *Land and Resource Use*

The Tyler Refrigeration Pit Site (Site) is located on a 3-acre parcel of property at 655 Glenwood Avenue, Smyrna, Delaware. This property is currently owned by the State of Delaware and occupied by a tenant of Metal Masters, but was formerly owned by the Tyler Refrigeration Corporation and subsequently by Clark. The Site is approximately 1/2 mile southwest of the center of the town of Smyrna.

The Site includes an area which formerly contained two wastewater lagoons in the northeast portion of the property. Based on aerial photographs, the two lagoons were approximately 70 feet × 70 feet and 60 feet × 60 feet, and existed on the property from as early as 1954. The lagoons received wastewater from manufacturing operations at the property. Sometime between 1973 and 1975, Clark excavated and removed the contents of the lagoons. The lagoons were then backfilled and graded, and are currently maintained as parts of a lawn and an asphalt parking lot.

The land use in the area surrounding the Site is predominantly residential with some light industry and farming. Properties to the north of the Site across Glenwood Avenue include commercial properties, several residences and agricultural lands. To the west-northwest of the Site are several residences along Glenwood Avenue. To the south and southwest of the lagoons are the Metal Masters building and property and a grain elevator/silo structure. The area to the south-southeast of the Site is mainly residential.

#### **History of Contamination**

In the late 1940s, a plant was constructed on the property to

manufacture refrigerators by Wilson Refrigeration, Inc. Prior to this time the property was owned by the John E. Wilson, Jr. and Bertha M. Wilson and Wilson Cabinet Company. In 1951, Tyler Refrigeration Corporation (Tyler) leased the property from the Wilsons until 1956 when the title of the property was passed to Tyler. Based on existing aerial photographs, the two lagoons were constructed in the northeast portion of the property sometime prior to 1954. These lagoons were apparently constructed to receive wastewater from the refrigeration manufacturing operations at the Site, although little information is available as to their operation. The wastewater reportedly contained paints, paint-related waste, and solvents including trichloroethylene (TCE). In 1963, Tyler became part of the refrigeration division of Clark. Clark manufactured refrigeration equipment at the property until 1976. Wastewater discharges from the manufacturing operation were connected to a municipal sewage system in 1969. Sometime between 1973 and 1975, Clark excavated and removed the contents of the lagoons, and then backfilled the lagoons. In 1978, Metal Masters took possession of the property. At approximately the same time, pursuant to a financing arrangement in connection with this transaction, the Delaware Department of Community Affairs and Economic Development took title to the property.

In 1977, during routine monitoring, the Town of Smyrna's two municipal water supply wells were found to contain trichloroethene (TCE). Investigations by DNREC, the Delaware Division of Public Health and the Town of Smyrna identified a number of potential sources of TCE in the Smyrna area, including the Site. In 1982, Smyrna installed Granular Activated Carbon (GAC) units on its two municipal water supply wells. The GAC units effectively reduced TCE concentrations in the drinking water supplies to safe levels.

In 1982, EPA, performed a Preliminary Assessment/Site Inspection at the Site. Low levels of trichloroethane (TCA) and dichloroethane (DCA) were detected in one soil sample and toluene was detected in another soil sample. In December 1983, DNREC performed a Preliminary Site Assessment at the Site and concluded that TCE concentrations in the Smyrna wells appeared to be decreasing. Consequently, the GAC units were no longer necessary, and were later removed.

In June 1985, EPA reviewed the available information for the Site and concluded that it was one of several

possible sources of the TCE found in the Smyrna municipal wells. On May 7, 1986, EPA collected a total of 10 ground water samples from domestic wells in the vicinity of the Site. The samples were analyzed for volatile organic compounds (VOCs). The only VOCs detected were low levels of chloroform in two of the samples.

On June 10, 1986, EPA formally proposed adding the Site to the National Priorities List (NPL). Significant comments were then submitted to EPA regarding the Hazard Ranking System (HRS) score (29.41) and opposing the inclusion of the Site onto the NPL. As a result, EPA commissioned DNREC to perform a follow-up inspection of the Site. Under this investigation, DNREC installed and sampled six (6) monitoring wells located across Glenwood Avenue from the Site. Based on the ground water sampling results, three substances of concern were identified in connection with the Site: 1,1,1-TCA, 1,1-dichloroethene (1,1-DCE) and chromium. Using the ground water sampling data collected by DNREC, EPA revised the HRS score for the Site in 1989, increasing the score to 33.94. The Site was formally added to the NPL on February 20, 1990.

In March 1991, EPA and Clark entered into an Administrative Order on Consent whereby Clark agreed to perform a Remedial Investigation (RI) and Feasibility Study at the Site.

In the spring of 1995, Metal Masters ceased operations and the property is currently leased and for sale.

#### *Physical Characteristics*

##### *Geology*

The Site lies within the Atlantic Coastal Plain physiographic province. Directly underlying the Site are sediments of the Pleistocene-aged Columbia Formation. The Columbia Formation sediments in the vicinity of the Site are comprised of light brown to orange brown colored coarse to fine grained sand with some gravel and gravel layers. Underlying the Columbia Formation beneath the Site are the Miocene age sediments of the Chesapeake Group which consist of dark gray silty clay.

The Columbia Formation sediments underlying the Site form a productive regional water table aquifer. The Chesapeake Group sediments form a confining layer beneath the water table aquifer. Potable water supplies in the vicinity of the Site are obtained from ground water and are provided primarily through municipal water systems. The Town of Smyrna operates two public water supply wells. Well

numbers 1 and 2 are 1600 feet and 4600 feet east of the Site, respectively. The town of Clayton operates three public water supply wells. The closest of these wells, Well number 3, is located approximately 3300 feet southwest of the Site. All three of the Clayton wells are located in the upgradient ground water flow direction from the Site. The Smyrna municipal wells draw water from the Columbia Formation aquifer while the Clayton municipal wells draw water from the deeper Rancocas aquifer. In the Smyrna area, the Columbia and Rancocas aquifers are separated by the Calvert and Nanjemoy formations. These formations are 200 feet thick in the Smyrna area and act as a confining unit above the Rancocas aquifer.

Based on the well inventory conducted during the RI, several wells in the Smyrna-Clayton area are classified as domestic water wells. However, none of these wells is located in a downgradient ground water flow direction from the Site.

Ground water flow direction in the Columbia Aquifer was determined based on a four-month water level study conducted during the Clark RI (referred to herein as "the RI"). The ground water flow direction from the Site is generally to the northeast. An eight-day water level study conducted during the RI indicated that pumping at Smyrna Well number 1 does not influence the water levels at the Site, although the Site may be within the capture zone of Smyrna Well number 1 under steady-state, long-term conditions.

##### *Surface Drainage*

The topography at the Site is nearly level. The entire Site is at an elevation of approximately 40 feet above sea level. Surface drainage from the parking lot area at and adjacent to the Site is conveyed via storm drains to a shallow drainage ditch and retention basin, with no outlet, located east of the Site. The drainage ditch and retention basin were constructed by Metal Masters after the closure of the lagoons in conjunction with the construction of the parking lot. A scrub/shrub-emergent wetland area is located within the retention basin. Since this area is only intermittently saturated as a result of storm water runoff from blacktop areas and building roofs, it is not considered to be a functional wetland.

Surface water bodies in the general area include Greens Branch, Duck Creek, Lake Como, and Mill Creek. Greens Branch is located approximately 1500 feet west of the Site and flows in a northeasterly direction into Duck Creek. Duck Creek is located approximately 4000 feet to the north of

the Site and flows east to its confluence with the Smyrna River. The Smyrna River flows to the northeast and discharges to the Delaware Bay. Lake Como is located approximately 4000 feet to the southeast of the Site and is used for recreational purposes.

#### Subsurface Soils

Three distinct layers were encountered in the soil borings taken during the RI in the locations of the former lagoons: (1) A surficial material consisting predominantly of silty sand to sandy silt, probable backfill material; (2) a soft, dark gray colored silt to sandy silt material containing some organic material. This most likely marks the bottom of the lagoons; and (3) native Columbia Formation sediments. Former Lagoon 1 is approximately 11.5 feet deep at its deepest point. The sandy silt material at what appears to be the bottom of Former Lagoon 1 is approximately 2 to 5.5 feet thick. In Former Lagoon 2, the sandy silt material is thinner and less aerially extensive.

As part of the RI, surface soil samples were collected from nine (9) locations. In general, the surface soil samples did not show the presence of elevated concentrations of contaminants of concern. No volatile organic compounds (VOCs) were detected in the surface soil samples other than methylene chloride, which is most likely an analytical laboratory contaminant, and no semivolatile organic compounds (SVOCs) were found. In addition, no inorganic substances were detected in any of the surface soil samples at concentrations significantly above background levels. One of the surface soil samples, however, contained several pesticides (0.93 micrograms per kilogram (ug/kg) dieldrin, 0.49 ug/kg lindane, 0.57 ug/kg Heptachlor, 0.38 ug/kg DDE, 1.4 ug/kg DDT, and 0.91 ug/kg endrin). The presence of pesticides at this location may be attributable to the use of fill that was deposited on the property from a neighboring agricultural area. Several of the pesticides detected, including DDT, have been banned for as long as twenty years, indicating that the pesticides have resided in the soils for a considerable amount of time.

A total of 23 subsurface soil samples were collected from 10 soil borings to assess subsurface soil quality in the area within, adjacent to and below the former lagoons. VOCs were detected in 4 of the 23 subsurface soil samples analyzed. These compounds included acetone (10 to 46 ug/kg), xylene (6 to 950 ug/kg), carbon disulfide (8 ug/kg), 1,1,2-TCA (8 ug/kg), 2-butanone (22 ug/kg), and ethylbenzene (140 ug/kg). None of the VOCs of concern in the ground

water (1,1-TCE, 1,1,1-TCA and 1,1-DCE) was detected. Semivolatile organic compounds were detected in 3 of the 23 samples. These compounds are 2-ethylhexyl phthalate (56 to 130 ug/kg) and diethyl phthalate (330 ug/kg). Pesticides were detected in 3 of the 23 samples including dieldrin (0.28 ug/kg), DDE (0.26 to 0.86 ug/kg), DDT (0.75 ug/kg), and DDD (0.38 ug/kg). Finally, chromium and zinc were detected at levels above background samples from 2 of the borings. Chromium concentrations ranged from 159 to 385 ug/kg and zinc concentrations ranged from 628 to 982 ug/kg.

#### Ground Water

Ground water samples were collected from 12 monitoring wells in the vicinity of the Site. VOCs were detected in 5 of the 12 wells sampled. The highest concentrations of VOCs were 1,1,1-TCA and 1,1-DCE which were detected in monitoring well S-1 at 720 ug/l and 33 ug/l, respectively. TCE was not detected in any of the ground water samples. In addition, no vinyl chloride was detected. Low levels of SVOCs were detected in samples from 5 of the 12 wells. Low levels of pesticides were also detected in samples from 5 of the 12 wells during the RI, including dieldrin, lindane, endrin and ketone. Chromium was detected at levels above background levels in four of the twelve wells. The highest total chromium concentration was detected at 87.2 ug/l. Zinc was not detected above background levels in any ground water samples collected.

The ground water and soils data presented in the RI indicate that the lagoons are not the primary source of the 1,1,1-TCA and the 1,1-DCE detected in monitoring well S-1. Neither of these contaminants was detected in any of the soils within or below the former lagoons. In addition, the pattern of contaminants detected in the ground water suggests the existence of a source unrelated to the lagoons and located to the south and upgradient of well S-1. Finally, the increase in 1,1,1-TCA concentrations in the samples from well S-1 collected in 1988 and 1992 indicates that a release of 1,1,1-TCA may have recently occurred from a source upgradient of well S-1 or recently migrated from such an upgradient source. Since 1,1-DCE is a breakdown product of 1,1,1-TCA, the same source is most likely responsible for the presence of both contaminants.

These conclusions are further supported by the findings of the Metal Masters RI [Metal Masters Food Services Company, Inc., Remedial Investigation Report (Groundwater Technology, June 1995)] conducted pursuant to an order

with DNREC. The Metal Masters' RI identified three possible source areas: (1) a loading dock where drums of TCA were received, (2) a TCA Storage Area and (3) an underground sanitary sewer holding tank. Surface and subsurface soil samples were taken from these areas. Three additional monitoring wells were installed downgradient of these areas to study the ground water. The distribution of contamination in the soil and ground water indicated that the historic source of the 1,1,1-TCA and 1,1-DCE was near the TCA Storage Area. The Metal Masters' RI concluded that the TCA Storage Area, however, does not likely represent a continuing potential source because little contamination remains in the soil and Metal Masters discontinued operations in the spring of 1995.

In July of 2003, EPA conducted the final sampling event to be performed by EPA. The purpose of the sampling was to determine if a recently understood contaminant—1,4-dioxane—was present at or near the Site, and if so, at what levels. The compound 1,4-dioxane is a stabilizer present in TCA. The nearest municipal water supply well was also checked for this compound. The results of this sampling event showed very low concentrations of 1,4-dioxane (<1 part per billion). At such low levels, this contaminant does not pose any significant risk. Future monitoring will, however, include monitoring for 1,4-dioxane. In addition, the 2003 sampling results showed continued stable or decreasing levels of other site contaminants.

Despite the slightly elevated levels of contaminants found at the Site, these investigations found that there was no elevated risk at present because all residents near the Site are serviced by the municipal water supply. The potential for a future elevated risk existed because of the possibility that drinking water wells could be installed in the future that would draw contaminated water from the Site. The GMZ that encompasses the Site protects residents that might have otherwise installed wells from the slightly elevated contaminant levels.

#### Community Involvement

Public participation activities have been satisfied as required in CERCLA 113(k), 42 U.S.C. 9613(k), and CERCLA 117, 42 U.S.C. 9617. Documents in the deletion docket which EPA relied on for recommendation of the deletion from the NPL are available to the public in the information repositories.

## V. Deletion Action

One of the criteria for site deletions, set forth in Section 300.425(e)(1)(i) of the NCP, specifies that EPA may delete a site from the NPL if “[r]esponsible parties or other persons have implemented all appropriate response actions required.” EPA, with the concurrence of the State of Delaware, believes that this criterion has been met. Therefore, EPA is deleting the Site from the NPL.

Because EPA considers this action to be noncontroversial and routine, EPA is taking it without prior publication of a notice of intent to delete. This action will be effective March 29, 2004 unless EPA receives adverse comments by February 27, 2004 on this notice or the parallel notice of intent to delete published in the “Proposed Rules” section of today’s **Federal Register**. If adverse comments are received within the 30-day public comment period, EPA will publish a timely withdrawal of this direct final notice of deletion before the effective date of the deletion and it will not take effect and EPA will also prepare a response to comments and continue with the deletion process on the basis of the notice of intent to delete and the comments already received. There will be no additional opportunity to comment.

### List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous waste, Hazardous substances, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Dated: November 18, 2003.

**Donald S. Welsh,**

*Regional Administrator, U.S. EPA Region III.*

■ For the reasons set out in the preamble, 40 CFR part 300 is amended as follows:

### PART 300—[AMENDED]

■ 1. The authority citation for part 300 continues to read as follows:

**Authority:** 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p.351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p.193.

### Appendix B—[Amended]

■ 2. Table 1 of appendix B to part 300 is amended under Delaware (“DE”) by removing the site name “Tyler Refrigeration Pit, Smyrna.”

[FR Doc. 04–1821 Filed 1–27–04; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 76

[CS Docket No. 97–80; PP Docket No. 00–67; FCC 03–329]

### Commercial Availability of Navigation Devices and Compatibility Between Cable Systems and Consumer Electronics Equipment

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In this document, the Commission revised the definition of unencrypted broadcast television adopted in its earlier *Second Report and Order* and *Second Further Notice of Proposed Rulemaking* in this proceeding. This revision clarifies a potential conflict between our stated intent and the scope of the rules. This action is taken to further the digital television transition and the commercial availability of navigation devices pursuant to section 629 of the Communications Act.

**DATES:** Effective February 27, 2004.

**FOR FURTHER INFORMATION CONTACT:** Susan Mort, [susan.mort@fcc.gov](mailto:susan.mort@fcc.gov), (202) 418–1043.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Federal Communications Commission’s *Order on Reconsideration*, FCC 03–329, adopted on December 19, 2003, and released on December 23, 2003. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the Commission’s copy contractor, Qualex International, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: <http://www.fcc.gov>. Alternative formats are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 or TTY (202) 418–7365 or at [Brian.Millin@fcc.gov](mailto:Brian.Millin@fcc.gov).

### Summary of the Order on Reconsideration

1. In our recent *Second Report and Order* and *Second Further Notice of Proposed Rulemaking* in this proceeding, we adopted encoding rules that included, inter alia, a prohibition on the down resolution of unencrypted broadcast programming and caps on the level of copy protection that may apply to various categories of MVPD programming. The copy protection caps

included a prohibition on the imposition of copy restrictions on unencrypted broadcast television. Our stated goal in adopting these encoding rules was to strike a measured balance between the rights of content owners and the home viewing expectations of consumers, while ensuring competitive parity among MVPDs.

2. Following release of the *Second Report and Order* and *Second Further Notice of Proposed Rulemaking*, a potential conflict between our stated intent and the scope of the rules became apparent. The limitation of the encoding rules for broadcast television programming to “Unencrypted Broadcast Television” could inadvertently be interpreted to create a competitive disparity in so far as certain MVPDs encrypt their broadcast signals while others do not. The resulting imbalance could also negatively impact consumers who would otherwise expect to have the same viewing and recording capabilities for broadcast television programming regardless of distribution platform. To prevent this unintended consequence, by our own motion we revise the definition of Unencrypted Broadcast Television in our encoding rules as set forth herein.

3. *Paperwork Reduction Act of 1995 Analysis.* This *Order on Reconsideration* does not contain information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Pub. L. 104–13.

4. *Regulatory Flexibility Act:* As required by the Regulatory Flexibility Act, the Commission has prepared a Supplemental Final Regulatory Flexibility Analysis (“Supplemental FRFA”) relating to this *Order on Reconsideration*. The Supplemental FRFA is set forth within.

5. *Ordering Clauses:* Pursuant to the authority contained in sections 1, 4(i) and (j), 303, 403, 405, 601, 624A and 629 of the Communications Act of 1934, 47 U.S.C 151, 154(i) and (j), 303, 403, 405, 521, 544a and 549, the Commission’s rules are hereby amended as set forth herein, and shall become effective February 27, 2004.

### Supplemental Final Regulatory Flexibility Analysis

6. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”) an Initial Regulatory Flexibility Analysis (“IRFA”) was incorporated in the *Further Notice of Proposed Rulemaking* (“FNPRM”) in this proceeding. The Commission sought written public comment on the proposals in the FNPRM, including comment on the IRFA. Based upon the comments in response to the FNPRM