availability of these stocks for subsistence uses, and would result in the least practicable impact on the stocks, NMFS has determined that the requirements of section 101(a)(5)(D) have been met and the authorization can be issued.

Authorization

For the above reasons, NMFS has issued an incidental harassment authorization for approximately 30 days between June 10 and July 5, 1996 for the above described experiment provided the above mentioned mitigation, monitoring and reporting requirements are undertaken.

Dated: June 7, 1996.

Patricia A. Montanio,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 96–15060 Filed 6–12–96; 8:45 am]

BILLING CODE 3510–22–F

[I.D. 060796C]

Endangered Species; Permits

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

ACTION: Issuance of modification 3 to permit 900 (P770#66), modification 2 to permit 946 (P770#68), and modification 1 to permit 905 (P45L).

SUMMARY: Notice is hereby given that NMFS has issued modifications to permits that authorize takes of Endangered Species Act-listed species for the purpose of scientific research, subject to certain conditions set forth therein, to the Coastal Zone and Estuarine Studies Division of the Northwest Fisheries Science Center, NMFS at Seattle, WA (CZESD) and the National Biological Service at Cook, WA (NBS).

ADDRESSES: The applications and related documents are available for review in the following offices, by appointment:

Office of Protected Resources, F/PR8, NMFS, 1315 East-West Highway, Silver Spring, MD 20910–3226 (301-713-1401); and

Environmental and Technical Services Division, 525 NE Oregon Street, Suite 500, Portland, OR 97232–4169 (503–230–5400).

SUPPLEMENTARY INFORMATION: The modifications to permits were issued under the authority of section 10 of the Endangered Species Act of 1973 (ESA) (16 U.S.C. 1531–1543) and the NMFS regulations governing ESA-listed fish and wildlife permits (50 CFR parts 217–222).

Notice was published on February 27, 1996 (61 FR 7241) that an application had been filed by CZESD (P770#66) for modification 3 to scientific research permit 900. Modification 3 to permit 900 was issued on June 5, 1996. Permit 900 authorizes CZESD a direct take of juvenile, threatened, naturally-produced and artificially-propagated, Snake River spring/summer chinook salmon (*Oncorhynchus tshawytscha*) and an incidental take of juvenile, threatened, Snake River fall chinook salmon (*Oncorhynchus tshawytscha*) and juvenile, endangered, Snake River sockeye salmon (*Oncorhynchus nerka*) associated with three scientific research studies. For modification 3, CZESD is authorized to supplement their annual take of ESA-listed fish associated with Study 1, a dam and reservoir passage survival study, with juvenile, ESA-listed, Snake River spring/summer chinook salmon captured as an indirect take by NBS under the authority of scientific research permit 817. Permit 817 authorizes NBS takes of ESA-listed juvenile fish associated with a fall chinook salmon study. In addition, CZESD is authorized a take of ESA-listed juvenile fish associated with an additional project designed to evaluate the new surface collector at Lower Granite Dam on the Snake River in WA and to release the ESA-listed juvenile fish to be captured and handled for Study 1 in the free-flowing Snake River upstream of Lower Granite Reservoir. Modification 3 is valid for the duration of Study 1 of the permit. Study 1 of permit 900 expires on December 31, 1998.

Notice was published on February 27, 1996 (61 FR 7241) that an application had been filed by CZESD (P770#68) for modification 2 to scientific research permit 946. Modification 2 to permit 946 was issued on June 4, 1996. Permit 946 authorizes CZESD takes of juvenile, threatened, naturally-produced and artificially-propagated, Snake River spring/summer chinook salmon (*Oncorhynchus tshawytscha*); juvenile, threatened, Snake River fall chinook salmon (*Oncorhynchus tshawytscha*); and juvenile, endangered, Snake River sockeye salmon (*Oncorhynchus nerka*) associated with two survival studies related to barge transportation. For modification 2, CZESD is authorized an increase in their takes of juvenile, endangered, Snake River sockeye salmon to adjust for an increase in the anticipated annual juvenile sockeye salmon outmigration numbers. Annual sockeye salmon outmigration numbers are expected to be higher due to greater numbers of smolt releases in and near Redfish Lake from the Idaho Department of Fish and Game's captive broodstock program. Modification 2 is valid for the duration of the permit. Permit 946 expires on December 31, 1999.

Notice was published on February 29, 1996 (61 FR 7776) that an application had been filed by NBS (P45L) for modification 1 to scientific research permit 905. Modification 1 to permit 905 was issued on June 6, 1996. Permit 905 authorizes a direct take of juvenile, threatened, Snake River fall chinook salmon (*Oncorhynchus tshawytscha*) and an indirect take of juvenile, threatened, Snake River spring/summer chinook salmon (*Oncorhynchus tshawytscha*) associated with four dam and reservoir passage survival studies on the Snake River. For modification 1, NBS is authorized to expand their sampling locations to include all of the Snake River dams and McNary Dam on the Columbia River. The sampling location expansion is needed to acquire the desired sample size of juvenile ESA-listed fish currently authorized to be taken for electrophoretic genetic research. NBS is also authorized to capture, handle, and release a greater number of ESA-listed juvenile fish: 1) to obtain non-lethal tissue samples from run-at-large juvenile spring chinook salmon and fall chinook salmon yearlings for genetic analysis, and 2) to acquire non-lethal gill samples from juvenile fall chinook salmon for a new study designed to relate passage survival to physiological development. Modification 1 is valid for the duration of the permit. Permit 905 expires on December 31, 1996.

Issuance of the modifications, as required by the ESA, was based on a finding that such actions: (1) Were requested in good faith, (2) will not operate to the disadvantage of the ESA-listed species that are the subject of the permits, and (3) is consistent with the purposes and policies set forth in section 2 of the ESA and the NMFS regulations governing ESA-listed species permits.

Dated: June 7, 1996.

Robert C. Ziobro,

Acting Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 96–15059 Filed 6–12–96; 8:45 am]

BILLING CODE 3510–22–F

Patent and Trademark Office

[Docket No. 951019254–6136–02]

RIN 0651–XX05

Change in Procedure Relating to an Application Filing Date

AGENCY: Patent and Trademark Office, Commerce.

ACTION: Notice of change in procedure.

SUMMARY: The Patent and Trademark Office (PTO) is implementing a change in procedure relating to the treatment of applications filed without all the pages of the specification or without all of the figures of the drawings. Under this new procedure, the PTO will accord a filing date to any application that contains something that can be construed as a written description, any necessary drawing, and, in a nonprovisional application, at least one claim, regardless of whether the application is filed without all the pages of the specification or without all of the figures of the drawings. Applications filed without all the pages of the specification or without all of the figures of the drawings will be treated by mailing a notice indicating that the application has been accorded a filing date, but is missing pages of the specification of figures of drawings.

The notice will indicate that failure to timely (37 CFR 1.181(f)) file a petition under 37 CFR 1.53(c) of 1.182 in response to such notice will result in the PTO treating the original application papers (the original disclosure of the intention) as including only those application papers present in the PTO on the date of deposit.

EFFECTIVE DATE: July 22, 1996.

FOR FURTHER INFORMATION CONTACT: Robert W. Bahr by telephone at (703) 305–9285, by facsimile at (703) 308–6916, or Jeffrey V. Nase by telephone at (703) 305–9285, or by mail addressed to Box Comments—Patents, Assistant Commissioner for Patents, Washington, D.C. 20231.

SUPPLEMENTARY INFORMATION: The PTO is implementing a change in procedure relating to the treatment of applications filed without all the pages of the specification (Section 608.01 of the Manual of Patent Examining Procedure (MPEP)) (*e.g.,* with page numbering revealing that page(s) are missing), or without all of the figures of the drawings (MPEP 608.02) (*e.g.,* without drawing figures that are mentioned in the specification). The procedure set forth in this notice will be incorporated into the next revision of the MPEP.

The current treatment of applications that fail to identify the names of the actual inventor(s) (*e.g.,* an application naming the inventorship only as ''Jane Doe *et al.*'') as required by 37 CFR 1.41(a) and 1.53(b) is not affected by the adoption of the procedure set forth in this notice.

In a Notice entitled ''Proposed Changes in Procedures Relating to an Application Filing Date'' (Filing Date Notice), published in the Federal Register at 60 FR 56982–84 (November 13, 1995), and in the PTO *Official Gazette* at 1181 *Off. Gaz. Pat. Office* 12–13 (December 5, 1995), the PTO proposed a change in procedure relating to the treatment of applications filed without all the pages of the specification or without all of the figures of the drawings. In view of the comments received in response to the Filing Date Notice, the PTO is adopting the proposed change.

The adopted procedure for the treatment of applications filed without all the pages of the specification or without all of the figures of the drawings is set forth below.

Applications Filed Without All Pages of Specification

The Initial Application Examination Division reviews application papers to determine whether all of the pages of the specification are present in the application. If the application is filed without all of the page(s) of the specification, but containing something that can be construed as a written description, at least one drawing figure, if necessary under 35 U.S.C. 113, the names of all the inventors, and, in a nonprovisional application, at least one claim, the Initial Application Examination Division will mail a ''Notice of Omitted Items'' indicating that the application papers so deposited have been accorded a filing date, but are lacking some page(s) of the specification.

The mailing of a ''Notice of Omitted Items'' will permit the applicant to either: (1) Promptly establish prior receipt in the PTO of the page(s) at issue (generally by way of a date-stamped postcard receipt (MPEP 503)), or (2) promptly submit the omitted page(s) in a nonprovisonal application and accept the date of such submission as the application filing date. An applicant asserting that the page(s) was in fact deposited in the PTO with the application papers must file a petition under 37 CFR 1.53(c) (and the petition fee under 37 CFR 1.17(i) (37 CFR 1.17(q) in a provisional application), which will be refunded if it is determined that the page(s) was in fact received by the PTO with the application papers deposited on filing) with evidence of such deposit within two months of the date of the ''Notice of Omitted Items'' (37 CFR 1.181(f)). An applicant desiring to submit the omitted page(s) in a nonprovisional application and accept the date of such submission as the application filing date must file any omitted page(s) with an oath or declaration in compliance with 37 CFR 1.63 and 1.64 referring to such page(s) and a petition under 37 CFR 1.182 (with the petition fee under 37 CFR 1.17(h)) requesting the later filing date within two months of the date of the ''Notice of Omitted Items'' (37 CFR 1.181(f)).

An applicant willing to accept the application as deposited in the PTO need not respond to the ''Notice of Omitted Items,'' and the failure to file a petition under 37 CFR 1.53(c) or 1.182 (and the requisite petition fee) as discussed above within two months of the date of the ''Notice of Omitted Items'' (37 CFR 1.181(f)) will be treated as constructive acceptance by the applicant of the application as deposited in the PTO. Amendment of the specification is required in a nonprovisional application to renumber the pages consecutively and cancel any incomplete sentences caused by the absence of the omitted pages. Such amendment should be by way of preliminary amendment submitted prior to the first Office action to avoid delays in the prosecution of the application.

If the application does not contain anything that can be construed as a written description, the Initial Application Examination Division will mail a Notice of Incomplete Application (PTO–1123) indicating that the application lacks the specification required by 35 U.S.C. 112. The applicant may file a petition under 37 CFR 1.53(c) (and the petition fee under 37 CFR 1.17(i) (37 CFR 1.17(q) in a provisional application)) asserting that: (1) the missing specification was submitted, or (2) the application papers as deposited contain an adequate written description under 35 U.S.C. 112. The petition under 37 CFR 1.53(c) must be accompanied by sufficient evidence (37 CFR 1.181(b)) to establish the applicant's entitlement to the requested filing date (*e.g.,* a date-stamped postcard receipt (MPEP 503) to establish prior receipt in the PTO of the missing specification). Alternatively, the applicant may submit the omitted specification, including at least one claim in a nonprovisional application, accompanied by an oath or declaration in compliance with 37 CFR 1.63 and 1.64 referring to the specification being submitted and accept the date of such submission as the application filing date.

Original claims form part of the original disclosure and provide their own written description *See In re Anderson,* 471 F.2d 1237, 176 USPQ 331 (CCPA 1973). As such, an application that contains at least one claim, but dues not contain anything which can be construed as a written description of such claim(s), would be unusual.

Nonprovisional Applications Filed Without at Least One Claim

35 U.S.C. 111(a)(2) requires that an application for patent include, *inter alia,* ''a specification as prescribed by section 112 of this title,'' and 35 U.S.C. 111(a)(4) provides that the ''filing date of an application shall be the date on which the specification and any required drawing are received in the Patent and Trademark Office.'' 35 U.S.C. 112, first paragraph, provides, in part, that ''[t]he specification shall contain a written description of the invention,'' and 35 U.S.C. 112, second paragraph, provides that ''[t]he specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.'' Also, the Court of Appeals for the Federal Circuit stated in *Litton Systems, Inc. v. whirlpool Corp.:*

> Both statute, 35 U.S.C. 111[(a)], and federal regulations, 37 CFR 1.151[(a)(1)], make clear the requirement that an application for a patent must include * * * a specification and claims. * * * The omission of any *one* of these component parts makes a patent application incomplete and thus not entitled to a filing date.

728 F.2d 1423, 1437, 221 USPQ 97, 105 (Fed. Cir. 1984) (citing *Gearon v. United States,* 121 F.Supp 652, 654, 101 USPQ 460, 461 (Ct. Cl. 1954), *cert. denied,* 348 U.S. 942, 104 USPQ 409 (1955)) (emphasis in the original).

Therefore, in an application filed under 35 U.S.C. 111(a), a claim is a statutory requirement for according a filing date to the application. 35 U.S.C. 162 and 171 make 35 U.S.C. 112 applicable to plant and design applications, and 35 U.S.C. 162 specifically requires the specification in a plant patent application to contain a claim. 35 U.S.C. 111(b)(2), however, provides that ''[a] claim, as required by the second through fifth paragraphs of section 112, shall not be required in a provisional application.'' Thus, with the exception of provisional applications filed under 35 U.S.C. 111(b), any application filed without at least one claim is incomplete and not entitled to a filing date.

If a nonprovisional application does not contain at least one claim, a ''Notice of Incomplete Application'' will be mailed to the applicant(s) indicating that no filing date has been granted and setting a period for submitting a claim. The filing date will be the date of receipt of at least one claim. *See In re Mattson,* 208 USPQ 168 (Comm'r Pats. 1980).

As 37 CFR 1.53(b)(2)(ii) permits the conversion of an application filed under 35 U.S.C. 111(a) to an application under 35 U.S.C. 111(b), an applicant in an application, other than for a design patent, filed under 35 U.S.C. 111(a) on or after June 8, 1995, without at least one claim has the alternative of filing a petition under 37 CFR 1.53(b)(2)(ii) to convert such application into an application under 35 U.S.C. 111(b), which does not require a claim to be entitled to its date of deposit as a filing date. Such a petition, however, must be filed prior to the expiration of twelve months after the date of deposit of the application under 35 U.S.C. 111(a), and comply with the other requirements of 37 CFR 1.53(b)(20(ii).

Applications Filed Without Any Drawings

35 U.S.C. 111(a)(2)(B) and 111(b)(2)(B) each provide, in part, that an ''application shall include * * * a drawing as prescribed by section 113 of this title'' and 35 U.S.C. 111(a)(4) and 111(b)(4) each provide, in part, that the ''filing date * * * shall be the date on which * * * any required drawing are received in the Patent and Trademark Office.'' 35 U.S.C. 113 in turn provides that an ''applicant shall furnish a drawing where necessary for the understanding of the subject matter sought to be patented.''

Applications filed without drawings are initially inspected to determine whether a drawing is referred to in the specification, and if not, whether a drawing is necessary for an understanding of the invention. 35 U.S.C. 113.

In general, it has been PTO practice to treat an application that contains at least one process or method claim as an application for which a drawing is not necessary for an understanding of the invention under 35 U.S.C. 113. The same practice has been followed in composition applications. Other situations in drawings are usually not considered necessary for an understanding of the invention under 35 U.S.C. 113 are:

I. *Coated articles or products:* where the invention resides solely in coating or impregnating a conventional sheet (*e.g.,* paper or cloth, or an article of known and conventional character with a particular composition), unless significant details of structure or arrangement are involved in the article claims;

II. *Articles made from a particular material or composition:* where the invention consists in making an article of a particular material or composition, unless significant details of structure or arrangement are involved in the article claims;

III. *Laminated Structures:* where the claimed invention involves only laminations of sheets (and coatings) of specified material unless significant details of structure or arrangement (other than the mere order of the layers) are involved in the article claims; or

IV. *Articles, apparatus or systems where sole distinguishing feature is presence of a particular material:* where the invention resides solely in the use of a particular material in an otherwise old article, apparatus or system recited broadly in the claims, for example:

a. A hydraulic system distinguished solely by the use therein of a particular hydraulic fluid;

b. Packaged sutures wherein the structure and arrangement of the package are conventional and the only distinguishing feature is the use of a particular material.

A nonprovisional application having at least one claim, or a provisional application having at least some disclosure, directed to the subject matter discussed above for which a drawing is usually not considered essential for a filing date, not describing drawing figures in the specification, and filed without drawings will usually be processed for examination, so long as the application contains something that can be construed as a written description and the names of all the inventors. A nonprovisional application having at least one claim, or a provisional application having at least some disclosure, directed to the subject matter discussed above for which a drawing is usually not considered essential for a filing date, describing drawing figure(s) in the specification, but filed without drawings will be treated as an application filed without all of the drawing figures referred to in the specification as discussed below, so long as the application contains something that can be construed as a written description and the names of all the inventors. In a situation in which the appropriate examining group determines that drawings are necessary under 35 U.S.C. 113 the filing date issue will be reconsidered on reference from the examining group.

If a nonprovisional application does not have at least one claim, or a provisional application does not have at

least some disclosure, directed to the subject matter discussed above for which a drawing is usually not considered essential for a filing date, and is filed without drawings, the Initial Application Examination Division will mail a ''Notice of Incomplete Application'' indicating that the application lacks drawings and that 35 U.S.C. 113 requires a drawing where necessary for the understanding of the subject matter sought to be patented.

The application may file a petition under 37 CFR 1.53(c) (and the petition fee under 37 CFR 1.17(i) (37 CFR 1.17(q) in a provisional application) asserting that (1) the drawing(s) at issue was submitted, or (2) the drawing(s) is not necessary under 35 U.S.C. 113 for a filing date. The petition must be accompanied by sufficient evidence to establish the applicant's entitlement to the requested filing date (*e.g.*, a date-stamped postcard receipt (MPEP 503) to establish prior receipt in the PTO of the drawing(s) at issue). Alternatively, the applicant may submit drawing(s) accompanied by an oath or declaration in compliance with 37 CFR 1.63 and 1.64 referring to the drawing(s) being submitted and accept the date of such submission as the application filing date.

In design applications, the Initial Application Examination Division will mail a ''Notice of Incomplete Application'' indicating that the application lacks the drawings required under 35 U.S.C. 113. The applicant may: (1) Promptly file a petition under 37 CFR 1.53(c) (and the petition fee under 37 CFR 1.17(i)) asserting that the missing drawing(s) was submitted, or (2) promptly submit drawing(s) accompanied by an oath or declaration in compliance with 37 CFR 1.63 and 1.64 and accept the date of such submission as the application filing date. 37 CFR 1.154(a) provides that the claim in a design application ''shall be in formal terms to the ornamental design for the article (specifying name) as shown, or as shown and described.'' As such, petitions under 37 CFR 1.53(c) asserting that drawings are unnecessary under 35 U.S.C. 113 for a filing date in a design application will not be found persuasive.

Applications Filed Without All Figures of Drawings

The Initial Application Examination Division reviews application papers to determine whether all mentioned drawing figures in the specification are present in the application. If the application is filed without all of the drawing figure(s) referred to in the specification, and the application contains something that can be construed as a written description, at least one drawing, if necessary under 35 U.S.C. 113, the names of all the inventors, and, in a nonprovisional application, at least one claim, the Initial Application Examination Division will mail a ''Notice of Omitted Items'' indicating that the application papers so deposited have been accorded a filing date, but are lacking some of the drawings described in the specification.

The mailing of a ''Notice of Omitted Items'' will permit the applicant to either: (1) Promptly establish prior receipt in the PTO of the drawing(s) at issue (generally by way of a date-stamped postcard receipt (MPEP 503)), or (2) promptly submit the omitted drawing(s) in a nonprovisional application and accept the date of such submission as the application filing date. An applicant asserting that the drawing(s) was in fact deposited in the PTO with the application papers must file a petition under 37 CFR 1.53(c) (and the petition fee under 37 CFR 1.17(i) (37 CFR 1.17(q) in a provisional application), which will be refunded if it is determined that the drawing(s) was in fact received by the PTO with the application papers deposited on filing) with evidence of such deposit within two months of the date of the ''Notice of Omitted Items'' (37 CFR 1.181(f)). An applicant desiring to submit the omitted drawings in a nonprovisional application and accept the date of such submission as the application filing date must file any omitted drawing(s) with an oath or declaration in compliance with 37 CFR 1.63 and 1.64 referring to such drawing(s) and a petition under 37 CFR 1.182 (with the petition fee under 37 CFR 1.17(h)) requesting the later filing date within two months of the date of the ''Notice of Omitted Items'' (37 CFR 1.181(f)).

An applicant willing to accept the application as deposited in the PTO need not respond to the ''Notice of Omitted Items,'' and the failure to file a petition under 37 CFR 1.53(c) or 1.182 (and the requisite petition fee) as discussed above within two months of the date of the ''Notice of Omitted Items'' (37 CFR 1.181(f)) will be treated as constructive acceptance by the applicant of the application as deposited in the PTO. Amendment of the specification is required in a nonprovisional application to cancel all references to the omitted drawing, both in the brief and detailed descriptions of the drawings and including any reference numerals shown only in the omitted drawings. In addition, a separate letter is required in nonprovisional application to renumber the drawing figures consecutively (showing the proposed changes in red ink), if necessary, and amendment of the specification is required to correct the references to the drawing figures to correspond with any relabelled drawing figures, both in the brief and detailed descriptions of the drawings. Such amendment and correction to the drawing figures, if necessary, should be by way of preliminary amendment submitted prior to the first office action to avoid delays in the prosecution of the application.

Subsequent Treatment of Application

In instances in which a ''Notice of Incomplete Application'' has been mailed, further action by the applicant is necessary for the application to be accorded a filing date. As such, the application will be retained in the Initial Application Examination Division to await such action. Unless the applicant either completes the application or files a petition under 27 CFR 1.53(c) (and the petition fee under 37 CFR 1.17(i) or 1.17(q)) within the period set in the ''Notice of Incomplete Application,'' the application will be processed as an incomplete application under 37 CFR 1.53(c).

In instances in which a ''Notice of Omitted Items'' has been mailed, the application will be retained in the Initial Application Examination Division for a period of two months from the mailing date of ''Notice of Omitted Items'' to permit the applicant to either: (1) Establish prior receipt in the PTO of the page(s) or drawing(s) at issue, or (2) promptly submit the omitted page(s) or drawing(s) in a nonprovisional application and accept the date of such submission as the application filing date. Extensions of time under 37 CFR 1.136 will not be applicable to this two-month time period.

The grant of a petition under 37 CFR 1.182 to accept the omitted page(s) or drawing(s) in a nonprovisional application and accord the date of such submission as the application filing date will be indicated by the issuance of a new filing receipt indicating the filing date accorded the application.

Unless the applicant timely files a petition under 37 CFR 1.53(c) or 1.182 (and the requisite petition fee), the application will maintain the filing date as of the date of deposit of the application papers in the PTO, and the original application papers (*i.e.*, the original disclosure of the invention) will include only those application papers present in the PTO on the date of deposit. Nonprovisional applications that are complete under 35 CFR

1.51(a)(1) will then be forwarded to the appropriate examining group for examination of the application. Provisional applications that are complete under 35 CFR 1.51(a)(2) will then be forwarded to Files Repository. The current practice for treating applications that are not complete under 37 CFR 1.51(a) will remain unchanged (37 CFR 1.53(d)).

Any petition under 37 CFR 1.53(c) or 1.182 not filed within this two-month period may be dismissed as untimely. 37 CFR 1.181(f). Under the adopted procedure, the PTO may strictly adhere to the two-month period set forth in 37 CFR 1.181(f), and dismiss as untimely any petition not filed within this two-month period. This strict adherence to the two-month period set forth in 37 CFR 1.181(f) is justified as such applications will now be forwarded for examination at the end of this two-month period. It is further justified in instances in which the applicant seeks to submit the omitted page(s) or drawing(s) in a nonprovisional application and request the date of such submission as the application filing date since: (1) According the application a filing date later than the date of deposit may affect the date of expiration of any patent issuing on the application due to the changes to 35 U.S.C. 154 contained in Public Law 103–465, § 532, 108 Stat. 4809 (1994), and (2) the filing of a continuation-in-part application is a sufficiently equivalent mechanism for adding additional subject matter to avoid the loss of patent rights.

The submission of omitted page(s) or drawing(s) in a nonprovisional application and acceptance of the date of such submission as the application filing date is tantamount to simply filing a new application. Thus, applicants should consider filing a new application as an alternative to submitting a petition under 37 CFR 1.182 (with the petition fee under 37 CFR 1.17(h)) with any omitted page(s) or drawing(s), which is a cost-effective alternative in instances in which an nonprovisional application is deposited without filing fees. Likewise, in view of the relatively low filing fee for provisional applications, and the PTO's desire to minimize the processing of provisional applications, the PTO will not grant petitions under 37 CFR 1.182 to accept omitted page(s) or drawing(s) and accord an application filing date as of the date of such submission. Instead, the applicant should simply refile the complete provisional application.

Response to Comments

Thirteen comments were received in response to the Filing Date Notice. Nine comments expressly supported the proposed change, while the remaining four comments simply made additional comments or suggested additional changes, but did not oppose the proposed change. The written comments have been analyzed, and responses to the comments follow.

Comment (1): One comment suggested that the PTO should, by rulemaking, permit the addition of subject matter in a foreign application for which priority is claimed.

Response: Where an application includes in the papers deposited on filing with the application a certified copy of a foreign application for which priority is claimed, the PTO will grant a timely petition under 37 CFR 1.182 requesting that: (1) the corresponding sheets of drawings in the foreign priority application be accepted for any omitted sheets of drawings in the application, or (2) the foreign priority application be accepted as the application as filed, which may result in the treatment of the foreign priority application as an application filed in a non-English language (37 CFR 1.52(d)).

In instances in which the foreign priority application was not present among the papers deposited on filing with the application, any addition of subject matter from the foreign priority application into the application must be considered as new matter under 35 U.S.C. 132 (and, as such, will not be permitted by petition), unless the application-as-filed specifically incorporates the foreign priority application by reference.

Drawing figures do not require translation of the subject matter shown therein and individual drawing figures are sufficiently segregated that it is considered appropriate to permit, by petition under 37 CFR 1.182, the acceptance of the corresponding sheets of drawings in the foreign priority application for any omitted sheets of drawings in the application. The specification of a foreign priority application, however, is generally subject to translation and revision prior to its filing in the PTO as the specification of an application. As such, it is considered appropriate to permit, by petition under 37 CFR 1.182, the acceptance of a foreign priority application as the application as filed, but it is not considered acceptable to permit the acceptance of a translation of portions of the foreign priority application for omitted pages of the specification.

Finally, the occurrence of situations in which it is necessary for an applicant to request that the corresponding sheets of drawings in the foreign priority application be accepted for any omitted sheets of drawings in the application, or the foreign priority application be accepted as the application as filed is relatively rare. In addition, the treatment of these few applications on an *ad hoc* basis pursuant to 37 CFR 1.182 and 1.183 has proven acceptable.

Comment (2): One comment suggested that the PTO should consider requiring a declaration from the attorney averring that the omitted matter was inadvertently omitted.

Response: First, in view of a registered practitioner's responsibilities as set forth in 37 CFR Part 10, the PTO does not generally require verification of statements by registered practitioners. *See, e.g.,* 37 CFR 1.125 and 1.137. Second, as there is no apparent benefit to omitting material from an application as deposited in the PTO, there appears to be little justification for requiring even a statement that the omitted matter was inadvertently omitted.

Comment (3): One comment questioned whether the change would be applicable to applications filed under 37 CFR 1.60 or 1.62.

Response: The adopted procedure applies to applications filed under 37 CFR 1.53.

37 CFR 1.60 requires, *inter alia,* that the application be a true copy of the prior application (37 CFR 1.60(b)(2)), and a copy that omits pages of specification or sheets of drawings from the prior application is not a true copy of the prior application. As such, a copy that omits pages of specification or sheets of drawings from the prior application is an improper application under 37 CFR 1.60, and cannot be accorded a filing date as an application under 37 CFR 1.60 until the filing error is corrected.

The PTO considers 37 CFR 1.60 to be unnecessary in view of changes to 37 CFR 1.4(d), and a trap for the unwary. The PTO has previously proposed to eliminate 37 CFR 1.60 (*See* notice of proposed rulemaking entitled ''Changes to Implement 20-Year Patent Term and Provisional Application'' (20-Year Term Notice of Proposed Rulemaking) published in the Federal Register at 59 FR 63951 (December 12, 1994), and in the Patent and Trademark Office *Official Gazette* at 1170 *Off. Gaz. Pat. Office* 377 (January 3, 1995)), and will again propose to eliminate 37 CFR 1.60, as well as 37 CFR 1.62, in an impending rulemaking to implement the Administration's regulatory reform initiative.

A continuation or divisional application may be filed under 35 U.S.C. 111(a) using the procedures set forth in 37 CFR 1.53(b)(1), by providing

a copy of the prior application, including a copy of the oath or declaration in such prior application, as filed. The patent statutes and rules of practice do not require that an oath or declaration include a recent date of execution, and the Examining Corps has been directed not to object to an oath or declaration as lacking either a recent date of execution or any date of execution. This change in examining practice will appear in the next revision of the MPEP. As is currently the situation under 37 CFR 1.60 and 1.62, the applicant's duty of candor and good faith including compliance with the duty of disclosure requirements of § 1.56 is continuous and applies to the continuation or divisional application, notwithstanding the lack of a newly executed oath or declaration.

37 CFR 1.60(b)(4) and 1.62(a) currently permit the filing of a continuation or divisional application by less than all of the inventors named in a prior application without a newly executed oath or declaration. The oath or declaration in an application filed under 37 CFR 1.53(b), however, must identify the inventorship of such application. Thus, unless it is necessary to file a continuation or divisional application under 37 CFR 1.60 to name less than all of the inventors named in a prior application, applicants are encouraged to file continuing applications under 37 CFR 1.53(b) (*i.e.*, omit any reference to 37 CFR 1.60 in the application papers) to avoid an inadvertent failure to comply with all of the requirements of 37 CFR 1.60.

An application under 37 CFR 1.62 uses the content of the prior application, and is itself only a request for an application under 37 CFR 1.62. As such, there is no concern that an application under 37 CFR 1.62 will be filed without all the pages of the specification or without all of the figures of the drawings.

Comment (4): One comment questioned whether a filing date would be accorded if the name of an inventor were omitted.

Response: 37 CFR 1.41 and 1.53 currently require that an application be filed in the name of the actual inventor or inventors, and this notice does not involve changes to the rules of practice. The PTO will propose to eliminate this requirement in 37 CFR 1.41 and 1.53 in the rulemaking to implement the Administration's regulatory reform initiative.

Comment (5): One comment suggested that the notices be mailed out as soon as possible to avoid a loss of rights for those applicants who require completion or refiling of the application. Another comment suggested that the decision as to whether an application is ''incomplete'' should be made by the Examining Corps, rather than on a formalistic basis by the Initial Application Examination Division.

Response: The efficient pre-examination processing of applications is in the mutual interest of the PTO and applicants. The PTO is currently in the process of modifying its pre-examination processing procedures to avoid any unnecessary delay. This new procedure will not impact the pre-examination processing of applications, in that the Initial Application Examination Division will mail a ''Notice of Incomplete Application,'' ''Notice of Omitted Items,'' and ''Notice to File Missing Parts'' under this new procedure at the time the ''Notice of Incomplete Application'' and ''Notice to File Missing Parts'' are currently mailed.

The adopted procedure replaces formalistic procedures with procedures based upon the requirements for a filing date as set forth in 35 U.S.C. 111, 112, and 113. Filing date issues are ultimately decided by the Office of Petitions in the Office of the Deputy Assistant Commissioner for Patent Policy and Projects (MPEP 1002.02(b)(35)) on the basis of whether and when the application meets the requirements for a filing date as set forth in 35 U.S.C. 111, 112, and 113, and not on the basis of who made the initial decision not to accord a filing date to the application.

It should be recognized that there is tension between the comments objecting to any review of the entitlement of an application to a filing date by the Initial Application Examination Division (arguing that this issue should be considered only the Examining Corps) and the desire for speedy notification to the applicant that a portion of the application appears to have been omitted. To defer all review of the entitlement of an application to a filing date until the application is picked-up for examination would cause a significant delay in any such notification to the applicant.

Comment (6): One comment noted that 35 U.S.C. 111(b) does not require a claim for a provisional application. Several comments suggested that the PTO automatically treat any nonprovisional application filed without at least one claim as a provisional application, if such application is otherwise entitled to a filing date as a provisional application.

Response: A provisional application does not require a claim to be entitled to a filing date. As discussed *supra*, an applicant in an application, other than for a design patent, filed under 35 U.S.C. 111(a) on or after June 8, 1995, without at least one claim has the alternative of filing a petition under 37 CFR 1.53(b)(2)(ii) to convert such application into an application under 35 U.S.C. 111(b). The PTO does not consider it appropriate to ''automatically'' consider an application filed under 35 U.S.C. 111(a) without a claim to be an application under 35 U.S.C. 111(b) (a provisional application), since the applicant may not desire an application under 35 U.S.C. 111(b), and may desire to file a claim to obtain an application filing date as of the date of submission of such claim.

Comment (7): One comment suggested that the MPEP should clearly indicate that applications filed without all the pages of specification or all the figures of drawings described in the specification cannot automatically be treated as defective under 35 U.S.C. 112, but must be considered for compliance with 35 U.S.C. 112 by the subject matter that is present in the application papers.

Response: In an effort to improve the examination of applications, chapter 2100 of the MPEP has been revised to set forth specific guidelines for rejections under 35 U.S.C. 101, 102, 103, and 112. MPEP 2161 *et seq.* set forth the guidelines for rejections under 35 U.S.C. 112, first and second paragraphs, and do not authorize a rejection under 35 U.S.C. 112 based merely upon the fact that pages of specification or figures of drawing were omitted.

Comment (8): One comment questioned whether the proposed procedure for the treatment of applications filed without all the pages of specification or all the figures of drawings described in the specification is applicable to provisional applications, noting that 35 U.S.C. 111(b) provides that a claim is not required in a provisional application.

Response: The adopted procedure applies to applications (both provisional and nonprovisional) filed under 37 CFR 1.53. The procedure recognizes that 35 U.S.C. 111(b) does not require a claim in a provisional application.

Comment (9): One comment suggested that the two-month period for taking action would be unfair in instances in which the PTO prepares and enters the notice into the Patent Application Locating and Monitoring (PALM) system but fails to mail the notice or mails the notice to an incorrect correspondence address.

Response: The ''Notice of Omitted Items'' is not an action within the meaning of 35 U.S.C. 113 to which a response is required to avoid

abandonment. An applicant simply has the opportunity to file a petition, but need not take action, in response to a ''Notice of Omitted Items.'' Thus, the timeliness of any such petition is governed by 37 CFR 1.181(f). 37 CFR 1.181(f) provides that any petition not filed within two months from the action complained of may be dismissed as untimely.

Establishing prior receipt in the PTO of the page(s) or drawing(s) at issue or submitting the omitted page(s) or drawings(s) and accepting the date of such submission as the application filing date would result in an addition to the papers constituting the original disclosure of the application, and submitting the omitted page(s) or drawings(s) and accepting the date of such submission as the application filing date would result in a change in application filing date. As a change in either the original disclosure or filing date of an application would interfere with the examination of the application for compliance with 35 U.S.C. 102, 103, and 112, the PTO will not forward an application in which a ''Notice of Omitted Items'' has been mailed for examination until it is apparent that the applicant has not responded to the ''Notice of Omitted Items.'' Thus, a nonprovisional application will not be processed for examination, and the examination of the application will be delayed, until the expiration of two months from the mailing date of ''Notice of Omitted Items.'' The two-month period set forth in 37 CFR 1.181(f) is considered an appropriate balance between providing an applicant sufficient time to take action in response to a ''Notice of Omitted Items'' and avoiding unnecessary delays in the examination of the application, which would be undesirable in view of 35 U.S.C. 154 as amended by Public Law 103–465. While an applicant willing to accept a nonprovisional application as deposited in the PTO need not respond to the ''Notice of Omitted Items,'' the filing of an express communication to that effect would permit the PTO to proceed with the processing of the application for examination, and, as such, may reduce the delay in the examination of the application.

While a ''Notice of Omitted Items'' is not an action within the meaning of 35 U.S.C. 133, the principles regarding nonreceipt or delayed receipt of a ''Notice of Omitted Items,'' due either to a failure on the part of the PTO to properly mail such notice or a failure on the part of the U.S. Postal Service to deliver such notice to the correspondence address in a timely manner, are applicable to the nonreceipt or delayed receipt of a ''Notice of Omitted Items.'' Applicants are directed to the Notice entitled ''Withdrawing the Holding of Abandonment when Office Actions Are Not Received,'' published in the PTO *Official Gazette* at 1156, *Off. Gaz. Pat. Office* 53 (November 16, 1993), for the evidence necessary to establish nonreceipt of a ''Notice of Omitted Items,'' and the Notice entitled ''Procedures For Restarting Response Periods,'' published in the PTO *Official Gazette* at 1160 *Off. Gaz. Pat. Office* 14 (March 1, 1994), for the evidence necessary to establish delayed receipt of a ''Notice of Omitted Items.''

Comment (10): One comment suggested that while the proposed procedure is an improvement, it still conflicts with 35 U.S.C. 112 and 113. The comment specifically argues that the sufficiency of an application is a matter for determination by an examiner skilled in the subject matter of the application, in that Congress did not intend that the sufficiency of an application be determined by the Initial Patent Examination Division.

Response: The adopted procedure will accord a filing date to any application that contains something that can be construed as a written description, any necessary drawing, and, in a nonprovisional application, at least one claim. This procedure is consistent with the requirements for a filing date as set forth in 35 U.S.C. 111, 112, and 113. 35 U.S.C. 113, second sentence, contemplates that drawings may be filed after the filing date of an application. 35 U.S.C. 113, however, provides that an ''application shall furnish a drawing where necessary for the understanding of the subject matter sought to be patented,'' and 35 U.S.C. 111(a)(4) and 111(b)(4) each provide, in part, that the ''filing date * * * shall be the date on which * * * any required drawing are received in the Patent and Trademark Office.'' As such, the PTO has the statutory authority, and responsibility, to determine whether a drawing is necessary under 35 U.S.C. 113 in an application filed without drawings prior to according a filing date to that application.

There is nothing in 35 U.S.C. 111, 112, or 113 that limits the authority of the Commissioner to delegate the determination of whether or when any application meets the requirements for a filing date as set forth in 35 U.S.C. 111, 112, and 113. In any event, filing date issues are, as discussed *supra*, ultimately decided by Office of the Deputy Assistant Commissioner for Patent Policy and Projects on the basis of whether and when the application meets the requirements for a filing date as set forth in 35 U.S.C. 111, 112, and 113, and not on the basis of who made the initial decision not to accord a filing date to the application.

Comment (11): One comment suggested that the proposed procedure be adopted by rulemaking. Another comment suggested that the proposed procedure either be adopted by rulemaking or clearly set forth in the MPEP.

Response: 37 CFR 1.53(b)(1) provides that the ''filing date of an application for patent filed under this section, except for a provisional application, is the date on which a specification containing a description pursuant to § 1.71 and at least one claim pursuant to § 1.75; and any drawing required by § 1.81(a), are filed in the Patent and Trademark Office in the name of the actual inventor or inventors as required by § 1.41.'' 37 CFR 1.53(b)(2) provides that the ''filing date of a provisional application is the date on which: a specification as prescribed by 35 U.S.C. 112, first paragraph; and any drawing required by § 1.81(a), are filed in the Patent and Trademark Office in the name of the actual inventor or inventors as required by § 1.41.'' Thus, no change to the rules of practice is necessary to adopt the procedure set forth in this notice.

It should be noted that the MPEP 608.01 sets forth the former procedure for treating an application filed without all of the pages of specification or filed under 35 U.S.C. 111(a) without at least one claim. Likewise, MPEP 608.02 sets forth the former procedure for treating an application filed without drawings or all of the figures of drawings.

The next revision of the MPEP will incorporate the change in procedure set forth in this notice.

Dated: June 5, 1996.

Bruce A. Lehman,

Assistant Secretary of Commerce and Commissioner of Patents and Trademarks.

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COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Adjustment of a Guaranteed Access Levels for Certain Cotton Textile Products Produced or Manufactured in Guatemala

June 6, 1996.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).