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The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 831 and 842

RIN 3206–A125

Voluntary Early Retirement Authority

AGENCY: Office of Personnel Management.

ACTION: Interim rule with request for comments.

SUMMARY: The Office of Personnel Management (OPM) is issuing revised interim regulations to extend current voluntary early retirement program procedures affecting agency requests, OPM approval, and agency offers of voluntary early retirement as well as several eligibility requirements for early retirement during a major reorganization, major reduction in force, or major transfer of function.

DATES: These regulations are effective October 4, 1999. Comments must be received by December 3, 1999.

ADDRESSES: Send written comments to Mary Lou Lindholm; Associate Director for Employment; Office of Personnel Management; Room 6500; 1900 E Street, NW; Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: Charles Gray, 202–606–0960, FAX 202–606–2329, e-mail cwgray@opm.gov.

SUPPLEMENTARY INFORMATION: This revised interim regulation makes a conforming revision to 5 CFR 831.114 and 842.213 necessitated by the enactment of the Treasury and General Government Appropriations Act for Fiscal Year 2000.

5 U.S.C. 8336(d)(2) and 8414(b)(1)(B) provide that OPM may approve voluntary early retirement authority for agencies undergoing a major reorganization, major reduction in force, or major transfer of function. 5 U.S.C. § 8336(d)(2) authorizes the voluntary early retirement of employees under the Civil Service Retirement System (CSRS), while 5 U.S.C. 8414 section (b)(1)(B) authorizes the voluntary early retirement of employees under the Federal Employees Retirement System (FERS).

Section 7001 of Public Law 105–174, the Supplemental Appropriations and Rescissions Act, FY 1998 (112 Stat. 91), enacted May 1, 1998, provided authority for OPM and agencies to apply special provisions affecting the manner in which voluntary early retirements may be administered and approved for the period from May 1, 1998 through September 30, 1999. The law restored management flexibilities impacted by a United States Court of Appeals for the Federal Circuit decision in *Torres* v. *OPM* (124 F.3d 1287, September 12, 1997).

Under section 7001 of Public Law 105–174, agencies may request a determination from the Office of Personnel Management that the agency or agency component(s) is undergoing a major reorganization, major reduction in force, or major transfer of function that could lead to the separation or downgrading of a significant percentage of the employees in the agency or agency component(s).

Public Law 105–174 allowed OPM to prescribe regulations which permit the agency, after OPM approval, to determine the scope of voluntary early retirement offers on the basis of one or more organizational units; one or more occupational series or levels; one or more geographic locations; other similar nonpersonal factors; or any appropriate combination of such factors.

On September 29, 1999, the President enacted the Treasury and General Government Appropriations Act for Fiscal Year 2000. Section 651 of that Act amended section 7001 of Public Law 105–174, making permanent the flexibilities restored May 1, 1998.

These interim regulations revise OPM regulations issued June 15, 1998, which give affect to the flexibilities provided in Public Law 105–174 (as amended). In particular, these regulations remove the September 30, 1999, sunset date which was in the June 15, 1998, regulations and make the regulations at 5 CFR 831.114 and 842.213 permanent. Additionally, old voluntary early retirement authority regulations at 5 CFR 831.108 and 842.205 are deleted. Those sections were suspended from June 15, 1998, through September 30, 1999, in lieu of the temporary authority in Public Law 105–174, and the interim regulations at 5 CFR 831.114 and 842.213.

As revised, interim regulations at 5 CFR 831.114 and 842.213 describe agencies' requests to OPM for approval of a voluntary early retirement authority; the manner in which agencies may offer voluntary early retirements; the responsibilities of agencies in managing approved voluntary early retirement authorities; eligibility of employees for voluntary early retirement; and agencies' required reports to OPM on use of the authorities.

The new voluntary early retirement law does not affect the existing basic statutory age and service requirements in 5 U.S.C. 8336(d) or 8414(b)(1). As in the past, in order to be eligible for voluntary early retirement, an individual must have completed 25 years of service or have reached age 50 and completed 20 years of service and must meet other certain basic eligibility requirements.

Waiver of Notice of Proposed Rulemaking and Delay in Effective Date

Pursuant to 5 U.S.C. 553(b)(3)(B), I find that good cause exists for waiving the general notice of proposed rulemaking because it would be contrary to the public interest. Also, pursuant to 5 U.S.C. 553(d)(3), I find that good cause exists to make this amendment effective in less than 30 days. The general notice of proposed rulemaking and delay in the effective date are being waived because these regulations allow OPM to immediately implement statutory language in § 651 of the Treasury and General Government Appropriations Act for Fiscal Year 2000 governing voluntary early retirements which was effective May 1, 1998, and to give full effect to benefits extended by that statute.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it only affects Federal employees.

Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

List of Subjects in 5 CFR Parts 831 and 842

Administrative practice and procedure, Air traffic controllers, Alimony, Claims, Disability benefits, Firefighters, Government employees, Income taxes, Intergovernmental relations, Law enforcement officers, Pensions, Reporting and recordkeeping requirements, Retirement.

Office of Personnel Management.

Janice R. Lachance,

Director.

Accordingly, OPM is amending parts 831 and 842 of title 5, Code of Federal Regulations, as follows:

PART 831—RETIREMENT

1. The authority citation for part 831 is revised to read as follows:

Authority: 5 U.S.C. 8347; § 831.102 also issued under 5 U.S.C. 8334; § 831.106 also issued under 5 U.S.C. 552a; § 831.114 also issued under 5 U.S.C. 8336(d)(2), Pub. L. 105–174, 112 Stat. 91; § 831.201(b)(1) also issued under 5 U.S.C. 8347(g); § 831.201(b)(6) also issued under 5 U.S.C. 7701(b)(2); § 831.201(g) also issued under sections 11202(f), 11232(e), and 11246(b) of Pub. L. 105–33, 111 Stat. 251; § 831.204 also issued under section 102(e) of Pub. L. 104–8, 109 Stat. 102, as amended by section 153 of Pub. L. 104–134, 110 Stat. 1321; § 831.303 also issued under 5 U.S.C. 8334(d)(2); § 831.502 also issued under 5 U.S.C. 8337; § 831.502 also issued under section 1(3), E.O. 11228, 3 CFR 1964–1965 Comp.; § 831.663 also issued under 5 U.S.C. 8339(j) and (k)(2); §§ 831.663 and 831.664 also issued under section 11004 (c)(2) of Pub. L. 103–66, 107 Stat. 412; § 831.682 also issued under section 201(d) of Pub. L. 99–251, 100 Stat. 23; subpart S also issued under 5 U.S.C. 8345(k); subpart V also issued under 5 U.S.C. 8343a and section 6001 of Pub. L. 100–203, 101 Stat. 1330–275; § 831.2203 also issued under section 7001(a)(4) of Pub. L. 101–508, 104 Stat. 1388–328.

Subpart A—Administration and General Provisions

§ 831.108 [Removed]

2. Section 831.108 is removed.

3. In § 831.114, paragraphs(b)(4) and (c)(2)(iii) are revised to read as follows:

§ 831.114 Early retirement-major reorganization, major reduction in force, or major transfer of function

* * * * *

(b) * * *

(4) OPM may approve an agency's request for voluntary early retirement authority to cover the entire period of the major reduction in force, major reorganization, or major transfer of function; or through the end of each fiscal year, whichever is less.

(c) * * *

(2) * * *

(iii) The time period during which voluntary early retirement will be offered. At the agency's discretion, the agency may request voluntary early retirement authority to cover the entire period of the major reduction in force, major reorganization, or major transfer of function; or through the end of the fiscal year, whichever is less.

* * * * *

PART 842—FEDERAL EMPLOYEES RETIREMENT SYSTEM—BASIC ANNUITY

4. The authority citation for part 842 is revised to read as follows:

Authority: 5 U.S.C. 8461(g); §§ 842.104 and 842.106 also issued under 5 U.S.C. 8461(n); § 842.105 also issued under 5 U.S.C. 8402(c)(1) and 7701(b)(2); § 842.106 also issued under section 102(e) of Pub. L. 104–8, 109 Stat. 102, as amended by section 153 of Pub. L. 104–134, 110 Stat. 1321; § 842.107 also issued under sections 11202(f), 11232(e), and 11246(b) of Pub. L. 105–33, 111 Stat. 251; § 842.213 also issued under 5 U.S.C. 8414(b)(1)(B), Pub. L. 105–174, 112 Stat. 91; §§ 842.604 and 842.611 also issued under 5 U.S.C. 8417; § 842.607 also issued under 5 U.S.C. 8416 and 8417; § 842.614 also issued under 5 U.S.C. 8419; § 842.615 also issued under 5 U.S.C. 8418; § 842.703 also issued under section 7001(a)(4) of Pub. L. 101–508; § 842.707 also issued under section 6001 of Pub. L. 100–203; § 842.708 also issued under section 4005 of Pub. L. 101–239 and section 7001 of Pub. L. 101–508; subpart H also issued under 5 U.S.C. 1104.

Subpart B—Eligibility

§ 842.205 [Removed]

5. Section 842.205 is removed.

8. In § 842.213,paragraphs (b)(4) and (c)(2)(iii) are revised to read as follows:

§ 842.213 Early retirement-major reorganization, major reduction in force, or major transfer of function

* * * * *

(b) * * *

(4) OPM may approve an agency's request for voluntary early retirement authority to cover the entire period of the major reduction in force, major reorganization, or major transfer of function; or through the end of each fiscal year, whichever is less.

(c) * * *

(2) * * *

(iii) The time period during which voluntary early retirement will be offered. At the agency's discretion, the agency may request voluntary early retirement authority to cover the entire period of the major reduction in force, major reorganization, or major transfer of function; or through the end of the fiscal year, whichever is less.

* * * * *

[FR Doc. 99–25707 Filed 10–1–99; 8:45 am]

BILLING CODE 6325–01–U

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 50 and 72

RIN 3150–AF94

Changes, Tests, and Experiments

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its regulations concerning the authority for licensees of production or utilization facilities, such as nuclear reactors, and independent spent fuel storage facilities, and for certificate holders for spent fuel storage casks, to make changes to the facility or procedures, or to conduct tests or experiments, without prior NRC approval. The final rule clarifies the specific types of changes, tests, and experiments conducted at a licensed facility or by a certificate holder that require evaluation, and revises the criteria that licensees and certificate holders must use to determine when NRC approval is needed before such changes, tests, or experiments can be implemented. The final rule also adds definitions for terms that have been subject to differing interpretations, and reorganizes the rule language for clarity. Additionally, the final rule grants in part and denies in part, a petition for rulemaking (PRM–72–3) submitted by Ms. Fawn Shillinglaw on December 9, 1995. This notice constitutes final NRC action on this petition.

EFFECTIVE DATE: The amendments to sections 72.3, 72.9, 72.24, 72.56, 72.70, 72.80, 72.86, 72.244, 72.246, 72.248 of this rule are effective February 1, 2000. Sections 50.59, 50.66, 50.71(e), and 50.90 become effective 90 days after issuance of applicable regulatory guidance. The NRC will publish a document in the **Federal Register** that announces the issuance of the regulatory guidance and specifies that the final rule becomes effective in 90 days. Section 72.212 and the amendments to 72.48 are effective April 5, 2001.

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I. Background

The existing requirements governing the authority of production and utilization facility licensees to make changes to their facilities and procedures, or to conduct tests or experiments, without prior NRC approval are contained in 10 CFR 50.59. Comparable provisions exist in § 72.48 for licensees of facilities for the independent storage of spent nuclear fuel and high-level radioactive waste. These regulations provide that licensees may make changes to the facility or procedures as described in the safety analysis report (SAR), or conduct tests or experiments not described in the safety analysis report, without prior Commission approval, unless the proposed change, test, or experiment involves a change to the Technical Specifications (TS) incorporated in the license or an unreviewed safety question. Section 50.59(a)(2), as codified, states the following:

> A proposed change, test, or experiment shall be deemed to involve an unreviewed safety question (i) if the probability of occurrence or the consequences of an accident or malfunction of equipment important to safety previously evaluated in the safety analysis report may be increased; or (ii) if a possibility for an accident or malfunction of a different type than any evaluated previously in the safety analysis report may be created; or (iii) if the margin of safety as defined in the basis for any technical specification is reduced.

The rule also specifies recordkeeping and reporting requirements associated with such changes, tests, or experiments.

Section 50.59 was promulgated in 1962 to allow licensees to make certain changes that affect systems, structures, components (SSC), or procedures described in the SAR without prior approval, provided certain conditions were met. In 1968, the rule was revised to modify some of the criteria for determining whether prior NRC approval was required. The intent of the § 50.59 process is to permit licensees to make changes to the facility, provided the changes maintain acceptable levels of safety as documented in the SAR. The process was thus structured around the licensing approach of design basis events (anticipated operational occurrences and accidents), safety-related mitigation systems, and consequence calculations for the design basis accidents.

On October 21, 1998 (63 FR 56098), the NRC published a proposed rule to revise §§ 50.59 and 72.48 to address a number of issues concerning implementation of the current rule, and suitability of the criteria used to determine when an unreviewed safety question exists. Conforming changes were proposed in other portions of the regulations, including §§ 50.66, 50.71(e), and 50.90 for production and utilization facilities licensed under part 50. Conforming changes were also proposed in § 72.212(b)(4).

The Commission proposed to make similar changes to appendices A and B of part 52, the standard design certifications for the ABWR and CE System 80+ designs respectively. These regulations contain a change control process similar to that in § 50.59. As noted in Section N, ''Part 52 changes'' below, the Commission has decided to defer consideration of any changes to part 52 until a later date.

In addition, the Commission proposed to make parallel changes applicable to independent spent fuel storage installations (ISFSIs) licensed in accordance with part 72. As part of the proposed changes to part 72, the Commission also proposed to extend the change control authority granted to ISFSI or monitored retrievable storage (MRS) license holders (in § 72.48) to holders of NRC Certificates of Compliance (CoC) for a spent fuel storage cask design.

II. Comments and Resolution on Proposed Rule Topics

The 60-day comment period for the proposed rule closed on December 21, 1998. Comments were received from 60 organizations or individuals. Copies of the comments are available for public inspection and copying for a fee at the Commission's Public Document Room, located at 2120 L Street, NW., Washington DC. All comments were considered in formulating the final rule. The comments were submitted by 35 utilities with power reactor facilities; 2 representatives of nonpower reactor licensees; 3 law firms representing several utilities; 2 submittals from the Nuclear Energy Institute (NEI); the U. S. Enrichment Corporation; a nuclear industry group; 6 nuclear utility vendors, service companies or consultants; 4 vendors or service companies for spent fuel storage casks; and 6 individuals. Forty commenters endorsed (sometimes with further comments) the NEI comments. NEI stated in its comment letter that it generally supports the Commission's intent of the proposed rule but had a number of comments or modifications for certain specific provisions of the rule that it wished the Commission to consider in preparing the final rule. Of those commenters who did not endorse the NEI comments, most supported the concept of the proposed rule, and made recommendations to enhance or modify certain elements of the rule. A few commenters stated that the rule revision was unnecessary and presented supporting arguments. These commenters felt that the Commission should endorse NEI 96–07 ''Guidelines for 10 CFR 50.59 Safety Evaluations,'' as being sufficient to satisfy the existing rule requirements. Many of the other comments related to the content of regulatory guidance, suggesting that

examples be provided to amplify particular points.

In the following sections, the NRC presents a discussion and resolution of the public comments, and the final rulemaking language in a form that parallels the order of discussion of issues in the proposed rulemaking. The organizational changes are discussed first, followed by discussion of the revised provisions in the rule. Although the discussion of many of the topics specifically focuses upon § 50.59, these matters are equally applicable to § 72.48, except as noted. Topics not related to particular rule sections are at the end of this discussion.

A. Organization of the Rule Requirements

(1) Definitions

In the proposed rule, the Commission added a new paragraph (a) to § 50.59 that contains a number of definitions for terms used in the rule. The Commission sought comment on the need for definitions as well as on the specific definitions offered for the terminology. Most commenters did not explicitly address whether they thought definitions were needed. One commenter thought that adding definitions only added confusion. Another stated that although the terms in the rule need to be defined, having them in the rule means that any subsequent changes in interpretation would require rulemaking. The Commission believes that having the definitions in the rule adds clarity that improves implementation of the rule, and, in some cases, are necessary for completeness of requirements. Therefore the Commission has retained several definitions in the final rule in §§ 50.59(a) and 72.48(a). The specific definitions are discussed in subsequent sections.

(2) Applicability

The Commission proposed to place all of the provisions concerning applicability of the rule presently contained in several subsections into § 50.59(b), which is clearly labeled ''Applicability.'' The rule applies to: production and utilization facilities (including power and non-power reactors) that are authorized to operate, and reactors (both power and non-power) that have permanently ceased operations. The few commenters who addressed this topic were supportive of this proposal. The final rule is unchanged from the proposed rule in this regard (except that § 72.48 now explicitly has a section with this designation for consistency).

(3) Form of Prior Commission Approval

In the proposed rule, the Commission combined §§ 50.59 (a) and (c) and revised the regulation to state more clearly that a licensee must apply for and obtain a license amendment, pursuant to § 50.90, before implementing changes, tests, or experiments that involve either a change to the TS or that satisfy any of the criteria listed in new section 50.59(c)(2). In addition, the Commission proposed relocating an existing provision that refers to changes to the TS not associated with a change, test, or experiment from § 50.59 to § 50.90. Parallel changes to § 72.48 and § 72.56 were also proposed.

One aspect of the proposed rule that drew comment concerned the requirement to obtain a license amendment before implementing a change that involves a change to TS or meets § 50.59(c)(2) criteria. In particular, for those instances in which a licensee wishes to make a modification to the facility, the use of which would require a TS change (or meet one of the other criteria), the commenters believe that it is acceptable for a licensee to install and test such a modification, as long as such activities themselves do not place the facility in a condition for which NRC review is needed, and as long as the modification is not actually used until the amendment review has been completed. These commenters believe that waiting for NRC approval for use of such modifications before beginning any installation activity is unduly restrictive. Typically this question arises for plant modifications and installations or complex engineering changes which may take months or years to complete.

In the Commission's view, the acceptability of such activities depends upon the meaning of ''implementation'' and of which aspect of the change requires NRC approval. If installing the modification, or testing it after installation would violate a TS, NRC approval (of both the modification and the revised TS) would be needed before the change is implemented. In addition, the licensee would need to determine whether the test itself meets the criteria in § 50.59 so that prior NRC approval of the test is not required. For changes that are not inconsistent with existing TS, but for which the licensee plans to submit an amendment to later revise TS to allow use of the modification (as for instance a modification that may permit less restrictive TS requirements), proceeding with the installation, before the approval is received, is at the licensee's own risk with respect to whether the Commission will approve use of the modification. If the NRC finds the proposed TS or the modification unacceptable, the licensee would need to appropriately revise the modification or may be unable to reap the expected benefits. If the licensee establishes that installation and testing of a modification do not require approval, but its use in facility operations would, NRC approval would be needed before the modification could be put into effect. With these clarifications, the Commission accepts the comments on this aspect. The final rule text is unchanged from that offered in the proposed rule.

(4) Criteria for Needing Commission Approval of Changes, Tests, and Experiments and Unreviewed Safety Question (USQ) Designation

In the proposed rule, the Commission proposed to remove the reference to the term ''unreviewed safety question'' and instead refer to the need to obtain a license amendment. The Commission concluded that this terminology has sometimes led to confusion about the purpose of the evaluation required by § 50.59. The purpose is to identify possible changes that might affect the basis for licensing the facility so that any changes that might pose a safety concern are reviewed by NRC to confirm their safety before implementation. To avoid confusion between a determination of safety and a determination of the need for NRC approval, the Commission is removing the term ''unreviewed safety question.'' In addition, the Commission proposed to list the criteria (in the new § 50.59(c)(2)) that, if met, would require prior Commission approval for a proposed change, which would be in the form of a license amendment. In the proposed rule, the compound statements contained within the evaluation criteria of the current rule were separated into several individual criteria. The deletion of the term ''unreviewed safety question'' also required a number of conforming changes to other parts of the regulations.

Commenters generally supported these proposed changes. A few commenters stated that the supplementary information should explain that existing guidance referring to ''USQ'' (such as Generic Letter 91–18, Revision 1), is still applicable. Further, commenters stated that a simple process should be established by which licensee technical specifications that use the term ''USQ'' could be revised.

The Commission agrees that the term USQ was used as a convenience to describe those changes that met the rule criteria for prior NRC review and

approval, and that any guidance referring to the same category of plant changes is equally valid for describing plant changes that would require prior NRC review and approval under the revised § 50.59(c)(2).

The Commission considered the merits of including specific language in § 50.59 that would address this point, but ultimately did not include such language for a number of reasons. First, the NRC official record copy would not be modified if licensees made changes on their own (in accordance with the rule language). Second, the intent of the specific provision would be to permit such changes; however, the fact that the provision is contained in the rule may make it a requirement to do so. This is clearly an unintended consequence and argues against including such language. Finally, since there is no practical effect of the wording as contained within the TS, there is no compelling reason why licensees would need to promptly conform the wording of their TS. For administrative convenience, the NRC requests that upon such occasion as those sections of the TS require NRC approval for other reasons or a licensee is requesting a license amendment in some other area of the TS, the licensee should include any necessary changes to the existing TS language to bring the plant-specific technical specifications into conformance with the rule language. Such changes could be made at any time if a general formulation of the requirement is used, as for example, replacing ''USQ'' with ''requires NRC approval pursuant to § 50.59.'' Since these are viewed as editorial changes only, effectiveness of the existing TS is not impacted. The implementation period of the rule will give reasonable opportunity to assure that the technical specifications are appropriately modified without the need to file a separate amendment request.

(5) Changes in the Scope of the Rule

The Commission solicited public comment on the need to revise the scope of the rule in the notice for the proposed rule. Specifically, the Commission asked whether the scope of the rule should be linked to the final safety analysis report (FSAR), as updated, or should the focus of the rule be linked to another set of regulatory requirements.

Only a few commenters indicated interest in a redefinition of the scope of the rule. These commenters suggested that any attempt to redefine the scope of the rule should be considered as part of a longer term revision that might be part of staff efforts to make the rule more risk informed. Therefore, the NRC is not revising the scope of the rule as part of the final rule. The NRC will reconsider the scope of the rule as part of its ongoing initiatives to improve its regulations to make them more risk informed.

B. Change to the Facility as Described in the Safety Analysis Report

In the proposed rule, the Commission created a new § 50.59(a) to contain definitions for terms such as ''change'' and ''facility as described in the final safety analysis report (as updated).'' The definitions in § 50.59 of ''change'' and of ''facility as described in the final safety analysis report (as updated)'' were written to more explicitly establish that evaluation is required for changes to the analyses and bases for the facility as well as for physical or hardware changes to the facility. The proposed rule also explicitly stated that additions were changes under the rule.

B.1 Definition of Change

In the proposed rule, the Commission concluded that a ''change'' is a modification of an existing provision (*e.g.*, structure, system, or component design requirement, analysis method or parameter), an addition or a removal (physical removals or non-reliance on a system to meet a requirement) to the facility (or procedure) as described in the FSAR.

Comment Summary: A number of comments related to the definition of change. The major topic areas of the comments are summarized below. The Commission's resolution of these matters follows.

(a) Screening: Most of the commenters were seeking revision of the definition to allow screening of changes that would not affect design functions. For instance, some commenters, while agreeing that additions should be considered changes, also noted that additions, if not limited by qualifiers such as ''inconsistent with FSAR or changing operation'', could mean that even trivial additions to the facility or to a procedure would require evaluations. A few commenters thought that additions should instead be treated as ''tests or experiments,'' so that evaluations would be needed only if the additions were inconsistent with the FSAR or outside the design basis.

(b) Replacement components or maintenance: Other commenters sought clarification as to whether particular activities, such as the installation of ''equivalent'' components, or maintenance activities are considered to be changes requiring evaluation against the criteria. For instance, replacement equipment should only require review if the replacement component has characteristics that are different from those described in the FSAR. For maintenance, commenters stated that taking SSC out of service for maintenance is adequately covered by maintenance rule requirements or TS, and that a § 50.59 evaluation should not be required. Other commenters wanted clarification that requirements for environmental qualification of electrical equipment were covered by § 50.49, such that equipment replacements that are qualified per § 50.49 are not ''reductions in margin of safety'' under § 50.59.

(c) Interdependent changes: A number of comments concerned ''interdependent'' changes, that is, under what circumstances can more than one change be considered together rather than individually. A few commenters stated that the Commission should adopt a position with respect to interdependent changes that multiple changes to the facility or its procedures may be evaluated collectively if: (1) They are interdependent as in the case where a modification to a system or component necessitates additional changes to other systems or procedures in order for the modified system to perform its function or comply with its design or licensing basis; (2) they are performed collectively to address a design or operational issue; or, (3) they are otherwise planned as elements of a single project undertaken to restore, maintain or improve plant performance or safety. Several commenters also stated that examples would be helpful to illustrate how closely related the changes needed to be in order to be viewed as interdependent.

(d) Removal: One commenter stated that the term ''removal'' should be clarified to include removal from service, physical removal, retirement in place, discontinued availability, removal from the FSAR text or tables, and removal from FSAR figures.

(e) De Facto Changes: One commenter stated that the NRC should modify the definition or other rule language to explicitly state that the requirements apply only to ''proposed'' changes and not to so-called ''de facto'' changes.[1] Another commenter thought the rule language should explicitly codify the resolution process under Generic Letter

[1] Under the NRC enforcement policy, § 50.59 is sometimes used to form the basis for a violation for circumstances under which the as-built facility differs from the FSAR, in that the existing condition is a ''change'' from the ''as-described FSAR condition'', and no evaluation was performed supporting why the change could be made without prior NRC approval. Such situations are referred to as ''de facto'' changes.

(GL) 91–18, by including language in the rule such that the respective requirements of Appendix B, criterion 16 and § 50.59 do not interfere.

(f) Changes made in response to NRC communications: Two commenters asked if a proposed change that is the direct result of a response to issues raised in generic communications requires evaluation under § 50.59 to determine the need for NRC approval, or if it is already approved by the NRC. The Commission notes that this subject was also raised by NEI during a meeting on guidance for minimal increases with respect to changes being made to conform with changes to regulations.

Resolution: The Commission has modified the proposed rule language for ''change'' to be responsive to the issues raised by these comments. In particular, for comment (a), the Commission has incorporated into the definition of ''change'' the phrase ''that affects design function, method of performing or controlling a function, or an evaluation that demonstrates that intended functions will be accomplished.'' The Commission concluded that with this revision, other comments about ''additions'' and ''removals'' have been addressed (as for instance comment (d)). The definition of change language will allow licensees to eliminate the need to further assess specific changes against the criteria in the rule because the nature of the change would never meet the criteria of the rule and require prior NRC review before implementation (known in the industry as a screening review). The capability to perform such screening reviews for such minor changes will reduce the burden of the review process.

With respect to comment (b) about whether specific types of activities are ''changes'', the Commission agrees that clarification would be useful and will work with affected stakeholders to address the specific needs for regulatory guidance to successfully implement the final rule. In particular, the Commission finds that guidance would be useful on when ''replacement'' components must be treated as a change, as for instance because the replacement component has characteristics different from those described in the FSAR, compared to one that is ''equivalent'' and thus not a change. The Commission also agrees that simply removing a component from service for maintenance does not require a § 50.59 evaluation, but notes that prolonged removal from service appears indistinguishable in its effect from a change that removes the component from the facility. Further, there may be circumstances under which maintenance activities would place the facility in a configuration not previously considered, or require disabling of barriers or movement of heavy loads to accomplish. The Commission further agrees that acceptability of environmental qualification requirements would be determined with respect to § 50.49. However, use of different equipment would also require a § 50.59 review with respect to meeting the evaluation criteria as now defined in the rule (as discussed elsewhere, the criterion on ''margin'' is being removed). The Commission notes that for certain changes, such as a change that affects post-accident containment conditions, although § 50.49 may be the applicable regulation for equipment qualification, other aspects (containment pressure) would need to be evaluated under § 50.59.

The Commission's previous comments on interdependent changes arises from concern that if multiple changes were considered in a single evaluation, certain aspects of the ''combined'' change could offset other aspects and lead to a conclusion that the set of changes did not require approval. Certain of the other changes being made to the final rule alleviate much of the Commission's concern about this practice. In particular, the Commission has described in section J how changes to methods, input parameters, and facility changes should be evaluated in determining whether the evaluation criteria are met. Although the Commission agrees with many of the ideas offered by the commenters for interdependent changes, the Commission further believes that providing further discussion and examples in guidance on this point would be useful.

The Commission did not modify the rule language to specifically address comment (e) on ''de facto'' changes or GL 91–18 guidance, believing that changes were not needed to allow the process under GL 91–18 to be implemented. The Commission did not revise the rule language to specifically state that ''changes'' resulting from corrective actions under Appendix B do not fall under the ''obtain amendment prior to implementing'' requirement as suggested by the commenter. The Commission acknowledges that in those instances of ''de facto'' changes, it is not possible for the licensee to obtain NRC approval prior to implementing a change that has already occurred. In these cases, the ''proposed change'' that the licensee wishes to make is to its FSAR such that it reflects the ''as-found'' condition of the plant. The prior approval specified in § 50.59 is the NRC's agreement with the resolution of the nonconformance before the issue is closed. For these instances, the Commission views ''implementing the change'' as meaning closeout of the corrective action. Further, the Commission does not plan to revise its enforcement policy concerning de facto changes (see also section Q below for more discussion on enforcement for § 50.59).

With respect to item (f), the licensee has an obligation to comply with the regulations (including any changes), and to respond appropriately to any generic communication. The licensee must examine the facility changes being made to determine how the facility will function with the change and identify any potential impacts on safety. A rule or generic communication may specify a requirement to be satisfied, or the nature of a change to meet a particular intent, but rarely is the specific issue presented at a level of detail necessary for installation. For some facilities, or some configurations, the ''generic'' solution intended by the rule or generic communication may not achieve the expected results, or there may be alternative ways that would avoid other problems. These issues can be pursued in the licensee's response to the generic communication or requirement.

The question about the need for NRC approval for the specific means of implementation of an action prompted by NRC initiative (rule, order, or generic communication) is less clear. As an example, NRC has issued a rule requiring the licensee to cope with a station blackout. Suppose that the means a licensee selects to meet the requirement is to cross-connect a new non-safety-related diesel to safety-related buses. Before implementing this modification, the licensee must evaluate the change to determine whether the particular method of satisfying the rule has created other circumstances that would warrant NRC review, such as if the change would increase the likelihood of malfunction of the buses. Given these considerations, the NRC concludes that changes made in response to rules and generic communications must be evaluated in the same way as other changes a licensee may wish to make, with the conduct of § 50.59 evaluations and submittal of license amendment requests as needed. Where there are conflicts in requirements or schedules resulting from these situations, the NRC has an obligation to take timely and appropriate action on the licensee's submittals. To the extent that the impacts of the generic communication or rule are within the range of what the NRC had considered in its deliberations

on the rule or communication, the approval of the licensee's submittal will be straightforward.

In summary, the Commission has included a definition of change as meaning a modification or addition to, or removal from the facility or procedures that affects a design function, method of performing or controlling the function, or an evaluation that demonstrates that intended functions will be accomplished. Other points raised by the commenters, such as providing examples, will be handled in the regulatory guidance to be developed.

B.2 Definition of Facility

In the proposed rule, the Commission concluded that changes to information such as performance requirements, methods of operation, the bases upon which the requirements have been established, and the evaluations should be considered to constitute a change to the ''facility as described in the FSAR (as updated)''. The Commission concludes that changes to methods and other requirements in the FSAR, even if not physical changes to the facility, require evaluation under § 50.59. If changes to methods and performance requirements were not so controlled, a licensee might revise its analyses or other information, update its FSAR, and then subsequently conclude that a later facility change does not require NRC approval because the revised analysis or acceptance requirement can still be satisfied with the facility change (that otherwise would have met the criteria as requiring approval). Thus, the proposed definition specifically itemized these points.

Comment Summary: A few commenters stated that it should be clarified that changes, whether to analysis methods or to the physical facility, are only subject to § 50.59 requirements if they are described in the FSAR. Other commenters stated that if the level of discussion within the FSAR is unaffected by the change, there should be no need for an evaluation.

NEI (as endorsed by other commenters) stated that ''methods of operation'' should be removed from the definition of facility, as this was better suited to the definition of ''procedures.''

Some commenters also were concerned that the phrase ''required to be included in the FSAR'' used in the definition of facility was an attempt to require licensees to look beyond the FSAR, or to undertake actions to add information to its FSAR. These commenters thought such matters were better handled as part of agency actions concerning guidance for updating FSARs (see for instance, Draft Regulatory Guide DG–1083 and NEI 98–03, ''Guidelines for Updating Final Safety Analysis Reports'').

The Commission had included these words in the rule as an attempt to limit what part of the FSAR needed to be considered for purposes of § 50.59 evaluations. If information was not required to be in the FSAR, then as discussed under NEI 98–03, it could be removed from the FSAR. On the other hand, a licensee may wish to retain such information in its FSAR for purposes of completeness; then this part of the definition would allow the licensee to screen out changes to the information that does not meet the definition of facility as described. In view of the confusion surrounding this phrase, and in light of other proposed changes to these definitions, the Commission has deleted this phrase from the final rule.

A commenter stated that such administrative changes as organizational information, reporting relationships, and job titles should be excluded from the scope of § 50.59.

Resolution: The Commission considered these comments in selecting the language that allows screening as to whether a change to the facility affects the content of the FSAR. As previously noted in implementation guidance, some SSC or subcomponents may not be explicitly described in the FSAR, but they have the potential to affect the function of an SSC that is described. The approach chosen by the Commission for defining ''change'' as relating to those additions, modifications, and removals that affect functions, methods of performing or controlling functions and evaluation methods also accomplishes an important purpose for these issues. Some changes a licensee may wish to make to a component or procedure could affect the functions or performance requirements of other SSC. Depending upon the level of detail contained in the FSAR, the particular component being changed may not be explicitly described. If a modification to that (non-described) component could affect any SSC design function or performance requirements that are described, that modification affects the design function, and thus is a change as defined by § 50.59(a) and thus requires evaluation under § 50.59. For example, the bearings on a pump may not be specifically mentioned or described in the FSAR. However, the pump function and performance requirement is described. A change being made to the bearings would need to be evaluated to determine if it affects the function or performance requirements of the pump, and if so, whether the criteria in 50.59 (c) are met.

Changes to the definition of ''facility'' were made in response to the concerns noted above from the commenters, such as deletion of the phrases ''required to be included * * *,'' and ''methods of operation.'' The Commission has retained ''methods of evaluation'' as being within the definition of ''facility,'' and as discussed under a later section, added an evaluation criterion specifically designed to provide a standard for evaluation of such changes.

The Commission believes that the definitions provided in the rule for facility and procedures exclude the indicated administrative type of changes from § 50.59, and further notes that many of these details would be part of a licensee's quality assurance plan that is governed by the requirements of § 50.54(a), and therefore excluded from the purview of § 50.59 by virtue of § 50.59(c)(4).

The definition of facility includes performance requirements and evaluations included in the FSAR which demonstrate that functions will be accomplished. In part 54, ''Requirements for Renewal of Operating Licenses for Nuclear Power Plants,'' § 54.21(d) states that each renewal application must contain an FSAR supplement that contains a summary description of the programs and activities for managing the effects of aging and the evaluation of time-limited aging analyses for the period of extended operation. As discussed in the Statement of Considerations for the final part 54, inclusion of the program descriptions and analyses in the FSAR provides the appropriate regulatory oversight such that subsequent changes are controlled by § 50.59. The Commission concludes that these summary descriptions fall within the definition of ''facility'' as demonstrating that functions will be accomplished in light of potential aging effects from the period of extended operation. Therefore changes that affect this information require evaluation under § 50.59. The Commission further finds that supplemental guidance or examples for implementation specific to part 54 would be beneficial and NRC intends to consider this as part of regulatory guidance.

C. Change to the Procedures as Described in the Safety Analysis Report

The Commission also proposed a definition of ''procedures as described in the safety analysis report'' in order to have definitions in the rule for all the major terms and criteria. This definition includes the evaluations demonstrating

that requirements are met, such as assumed operator actions and response times.

Commenters on the definition primarily expressed concern with the phrase ''conduct of operations'' because licensees were concerned that this language would inappropriately bring administrative procedures within the scope of the rule. Other commenters suggested wording changes to clarify the definition.

The Commission has decided to remove the phrase ''conduct of operations'' from the definition. The Commission agrees that administrative procedures are not intended to be within the scope of the rule, and has made other minor wording changes to the final rule for clarity.

Changes Governed by Other Regulatory Processes

In the proposed rule, the Commission proposed to exclude from the scope of § 50.59 review, specific types of changes to procedures where other requirements and criteria have been established by regulation for controlling these changes, through a proposed provision in § 50.59(c)(1).

Commenters supported this proposal, and suggested it be clarified to also refer to plant changes in addition to procedure changes. As an example, emergency response facilities are considered as part of the emergency plans that are subject to § 50.54(q). If also described in the FSAR, there is a potential for confusion as to whether both a § 50.54(q) and § 50.59 evaluation would be needed for a change to an emergency response facility.

The Commission revised the rule language to make the requested clarification. Further, this section was relocated to new § 50.59(c)(4) in the final rule. This language refers to situations, such as §§ 50.54(a) and 50.54(q), where the regulations explicitly define how changes are to be reviewed, documented, and reported; and thus, where a § 50.59 evaluation would be duplicative. Another example would be § 50.46, which establishes criteria for reporting and for action for changes involving methods for loss-of-coolant analyses. A specific list of regulations was not included in the rule so that if other such rule sections become available, § 50.59 would not need to be revised. The § 50.59 obligation can only be replaced in situations in which other rule requirements specify the governing change process, in order to prevent duplication of reviews, not as a means of avoiding change control requirements.

A few commenters stated that clarification should be included concerning applicability of § 50.59 for certain documents controlled by a variety of processes (*e.g.*, Core Operating Limit Reports contained in TS; Technical Requirements Manual and other matters (*e.g.*, offsite dose calculation manual (ODCM)) that have been relocated from TS to other controlled documents such as the FSAR; and vendor topical reports, etc.).

The Commission notes that in NEI 98–03, which the NRC has proposed to endorse through a regulatory guide, there is discussion about incorporation by reference of other documents (such as ODCM, fire protection plan, etc) into the FSAR. As discussed in Generic Letter 86–10, ''Implementation of Fire Protection Requirements,'' licensees were encouraged to consolidate their fire protection program documents and incorporate them by reference into the FSAR. Then, by the terms of a modified license condition, licensees could make changes to their fire protection program. The vast majority of licensees have made this change so that the program description is incorporated into the FSAR and program changes can be made without NRC approval provided the changes do not adversely affect the ability to achieve and maintain safe shutdown in the event of a fire (or require an exemption). The Commission sees no need to provide additional clarification as the processes for control of most of these documents are already defined.

D. Tests and Experiments Not Described in the Safety Analysis Report

The Commission proposed a definition for ''tests and experiments not described in the final safety analysis report (as updated)'' to be included in § 50.59. The intent of the requirement is that tests that put the facility in a situation that has not previously been evaluated or that could affect the capability of SSC to perform their intended functions should be evaluated before they are conducted. Thus, the definition focused upon the facility being outside its design basis values or inconsistent with the safety analyses in the FSAR.

A few comments were made on this topic, with some indicating that a definition was not needed, and with some noting that certain terms were unclear or stating that the term ''activity'' should be used instead of condition, to avoid confusion between planned tests and identification of degraded or nonconforming conditions. (Note: because of administrative error, the proposed rule text used the term ''condition,'' although in the proposed rule supplementary information, the term used was ''activity.'')

The Commission agrees with the commenters and has used ''activity'' in the final rule. Further, the Commission believes that the phrase ''reactor, or any of its structures, systems or components'' is sufficiently clear to reflect the intent that the determination as to whether the activity is a test not described in the FSAR, is not affected by whether it is limited to only one component, or involves a wider set, up to and including the entire facility. Therefore, the final rule has been revised to contain a definition of ''test or experiment not described in the final safety analysis report (as updated)'' which has minor changes from the definition offered in the proposed rule.

E. Safety Analysis Report

The Commission proposed to revise the rule language to add a definition of the ''final safety analysis report (as updated)'' and to clarify in the evaluation criteria that evaluations need to account for changes made through other processes that have not yet been included in an update to the FSAR. Thus, each of the evaluation criteria contained a phrase referring to evaluations and analyses performed since the last FSAR update was submitted. The rule referred to FSAR (as updated), rather than to updated FSAR to account for both non-power reactors who are not required to submit updates to their FSARs, and to any reactors between the time of initial licensing and the first required update. The definition also refers to Final Hazards Summary Report, because a few facilities were licensed before the rules were revised to require submittal of FSARs.

Commenters generally supported the idea that the FSAR changes since the last update submittal needed to be considered in the § 50.59 evaluations, but sought clarification on a few details. Further, commenters thought the rule language could be simplified by defining in one place that ''FSAR (as updated)'' includes such information, rather than including in each evaluation criterion the phrase ''or in evaluations performed pursuant to this section and safety analyses performed pursuant to § 50.90 after the last final safety analysis report was updated pursuant to § 50.71 of this part.''

The Commission has modified the rule text in response to these comments by adding a new paragraph (c)(3) to explicitly state that the ''FSAR (as updated)'' for purposes of implementing this paragraph, also includes the FSAR update pages resulting from analyses

and evaluations performed since the last update was submitted. Accordingly, the statements of the individual evaluation criterion have been simplified.

Two commenters were concerned that the requirement to consider other evaluations since the last update submittal would require a review of all past evaluations to find the most conservative result as the baseline for these evaluations.

The Commission does not believe that the rule requires such action. The Commission's intent in stating that for purposes of implementation of § 50.59, the FSAR (as updated) is considered to include FSAR changes resulting from evaluations of changes made since the FSAR update is to ensure that decisions about particular changes are made with the most complete and accurate information. If other changes did not impact upon the accuracy of the FSAR, they would not need to be examined. If as a result of other changes, the licensee will need to revise the FSAR at the next update because the present information is no longer accurate following that change, that information may be relevant to evaluation of a future change that involves that part of the FSAR. Indeed, for nonpower reactors, this process has already been necessary because these facilities are not required to submit updates to their safety analysis report. Nevertheless, they must ensure that proposed changes are judged with respect to the existing facility, not the facility as originally described in the FSAR at time of licensing. This requirement does not make these evaluations part of the updated FSAR pursuant to § 50.71(e); that rule requires that the FSAR be updated to reflect the effects of the changes and evaluations, not that the evaluations themselves become part of the updated FSAR. Rather, the intent of the requirement is that the changes that were the subject of these evaluations be considered in the process of determining what the ''facility as described'' now is such that the reference for subsequent evaluations is complete and accurate.

One commenter stated that it should be made clear that the FSAR (as updated) includes the TS and bases because these documents sometimes contain information, such as applicable operating modes, not in the FSAR that is relevant to the evaluation process. A few other commenters thought the definition for ''FSAR'' should include other documents such as staff safety evaluations, selected commitments and other licensing documents.

The Commission does not agree that these documents fall within the required scope of the rule, or that they are part of the FSAR. However, as noted in existing guidance, licensees are free to refer to other documents to assist in understanding the implications of the change, but the rule language does not require such reviews.

F. Minimal Increase Principle

Strict interpretation of the existing rule language related to the probability of an accident or a malfunction has lead to significant burden to the industry with no clear safety benefits. Therefore, in the proposed rule, the Commission relaxed the standard for which prior NRC review would be required by revising existing paragraph § 50.59(a)(2)(i) of the rule. The specific proposal was to replace the phrase ''may be increased'' with ''would result in more than a minimal increase.'' As previously discussed, the present § 50.59(a)(2)(i) is being expanded into four separate criteria, two for occurrence of accidents and malfunctions and two for consequences.

The information that can be revised under § 50.59 is limited to that which does not require review under any other sections of the regulations; thus, it is information is of less direct importance to public health and safety. In consideration of the conservatisms in NRC design and analysis requirements and acceptance criteria, ''minimal'' variations in probability of occurrence or consequences of accidents and malfunctions should not affect the basis for the previous licensing decision. During the plant licensing process, accident probabilities were assessed in relative frequencies (such as likely to occur more than once, likely to occur once during the life of the plant, or limiting fault that is not likely to occur during the life of the plant). System train and equipment failures were generally postulated to gauge the robustness of the design, without estimating their likelihood of occurrence. In this light, minimal increases in probability would not significantly change the licensing basis of the facility and could not impact the conclusions reached about acceptability of the facility design.

Further, the limits for radiological consequences established in the regulations and in the Standard Review Plan are conservatively chosen, so that minimal increases also would not impact the safety determination if demonstrated by a suitably conservative analysis. The Commission therefore concluded that the proposed criteria would provide reasonable assurance that those changes that would affect the NRC's basis for licensing would be identified as requiring NRC approval before implementation. The proposed revisions to the § 50.59 criteria would provide some degree of flexibility for licensees to make changes with smaller impacts without the need to obtain a license amendment.

On the other hand, the Commission intends to limit the amount of increase in probability or consequences of accidents such that it remains substantially less than a ''significant increase'' as referred to in § 50.92. In accordance with § 50.92, a license amendment involving a significant increase in the probability or consequences of an accident previously evaluated would be categorized as a ''significant hazards considerations'' and any hearing must be completed prior to issuance of the amendment.

Although the final rule allows minimal increases, licensees still must meet applicable regulatory limits and other acceptance criteria to which they are committed (such as are contained in Regulatory Guides and nationally recognized industry consensus standards, *e.g.*, the ASME B&PV Code and IEEE Standards). Further, departures from the design, fabrication, construction, testing, and performance requirements as outlined in the General Design Criteria (appendix A to part 50) are not compatible with a ''no more than minimal increase'' standard. Because the ''no more than minimal'' standard allows for there to be some increase compared to the current requirement, which would have required any increase to be submitted for prior staff review, NRC needs to establish a point beyond which one would conclude that the increase is not minimal. Application of the ''minimal increase'' concept to the specific criteria in the revised final rule is discussed in the next sections.

G. Section 50.59 (c)(2) Criteria on Increases in Probability or Consequences

For each of the four evaluation criteria replacing existing § 50.59(a)(i), the Commission presented language in the proposed rule reflecting the ''minimal increase'' principle. Resolution of each of these criteria is discussed below, including consideration of the public comments.

For each criterion proposed, the Commission had presented guidance on how the rule could be met, including values as to when the Commission would conclude that each revised criterion is not met. Comments received on this guidance are discussed below. The Commission also notes that regulatory guidance will be provided that is derived from this discussion.

As the rule provides a qualitative standard of ''no more than minimal,'' quantitative calculations are not required except for those instances in which a licensee decides to offer quantitative arguments as part of its evaluation. This is expected to occur for some instances involving increases in consequences, where licensees may perform calculations of the predicted dose from postulated accidents.

(i) More Than a Minimal Increase in the Frequency of Occurrence of an Accident Previously Evaluated

For criterion (i), the final rule requires prior NRC approval if the change results in more than a minimal increase in the frequency of occurrence of an accident previously evaluated in the FSAR (as updated). Several commenters agreed with the premise that ''minimal'' increases in probability of accidents should not require prior NRC approval. No specific comments were received on the rule language itself. Issues about guidance are discussed below.

The only change made by the Commission in the final rule language from the proposed rule is the substitution of ''frequency'' for ''probability.'' This was done to provide a better representation of the attribute of concern, that is, occurrence over some period of time, and to emphasize that what is of interest is whether the proposed change has the effect of making the accident occur more often.

Guidance for Frequency of Accidents

In the proposed rule, the Commission offered guidance concerning ''minimal'' with respect to increases in probability (now frequency). Several comments were received on certain of these statements, as noted below.

First, the Commission had noted that the current guidance in NEI 96–07 stating: ''Where a change in probability is so small or the uncertainties in determining whether a change in probability has occurred are such that it cannot be reasonably concluded that the probability has actually changed (i.e. there is no clear trend towards increasing the probability), the change need not be considered an increase in probability'' satisfies the proposed NRC standard for increases in frequency of an accident. Commenters agreed with the characterization that this guidance would satisfy the rule, but also noted that the rule language provides more flexibility than is presently afforded by the NEI guidance.

Second, the Commission had stated that in order to be considered as a minimal increase, the resulting frequency of occurrence (considering the change, test, or experiment) must still satisfy the event frequency classification provided in the licensee's FSAR (as updated). Typically, these would be anticipated operational occurrence (expected once a year) or design basis accidents (not expected during life of plant, but sufficiently credible to require mitigation). The use of frequency classifications will not apply for all facilities subject to §§ 50.59 or 72.48, but is included here because it was a consideration in the licensing of most operating power plants. Some commenters sought clarification as to whether increases that remain within the frequency classification would satisfy the ''no more than minimal increase'' criterion. Changes that result in a change in classification do not meet the standard; however, remaining within the classification is not sufficient to conclude that no more than a minimal increase has occurred because qualitative judgments are not as rigorous as quantitative assessments and the accident categories and their uncertainties may be large. The Commission agrees that the effect of the change on the frequency of the accident must be discernible and attributable to the change in order to exceed the ''more than minimal'' increase standard, as compared to uncertainty about the existing frequency value and how it might be quantified.

Some commenters stated that the ''minimal increase in probability'' standard was too vague and sought more explicit criteria. Others requested quantitative standards for determining minimal increases in probability, and in particular, guidance for using risk insights or probabilistic risk analysis to determine when a more than minimal increase in probability has occurred. For instance, commenters thought that the values for changes in core damage frequency or large early release frequency in Regulatory Guide (RG) 1.174, ''An Approach for Using Probabilistic Risk Assessment in Risk-Informed Decisions on Plant-Specific Changes to the Licensing Basis,'' might be used. However, this RG was developed for the purpose of guiding changes to the licensing basis where the staff was reviewing and approving the change, not for changes made under § 50.59. The Commission concludes that if use is to be made of PRA in § 50.59, more fundamental changes to the rule would be necessary to provide a coherent set of requirements, in that § 50.59 deals with design basis events, and RG 1.174 deals with risk including that from severe accidents beyond the design basis. In addition, RG 1.174 is specifically dealing with operating power reactors. Applicability to other facilities would need to be examined. The Commission acknowledges that it may be possible to develop more guidance that could be used in a quantitative sense to judge minimal increases. As part of development of the guidance, the NRC will consider using the values developed as part of the revised oversight process (SECY–99–07), so that if the resultant likelihood of occurrence remains well within the acceptable ranges given for initiating events, that the increase is ''minimal.''

(ii) Minimal Increase in Likelihood of Malfunction of Structures, Systems or Components

In the proposed rule, § 50.59(c)(2)(ii) would require NRC approval for a change that would result in ''more than a minimal increase in the probability of malfunction of equipment important to safety previously evaluated in the FSAR (as updated).'' Similar changes were proposed in § 72.48(c)(2)(ii), except for use of the term ''structures, systems, and components'' (SSCs) rather than equipment. These differences in wording reflected differences between existing language in §§ 50.59 and 72.48. Commenters supported the idea that ''minimal'' increases should not require approval. Commenters also suggested that the terminology in §§ 50.59 and 72.48 should be made more consistent between the two sections.

In the final rule, the Commission has revised the criterion in § 50.59 by referring to SSC rather than to equipment. The Commission concludes that the term ''SSC'' is commonly used in both parts 50 and 72 and is well understood, and that ''equipment'' was an older term that does not have a unique meaning requiring its use. For the final rule, the Commission has also substituted the term ''likelihood'' for ''probability.'' This change was made to acknowledge that while the criterion refers to ''minimal'' increases, the Commission is not implying that quantitative assessments are expected. The Commission concludes that the word ''likelihood'' is more generally understood to represent qualitative judgments.

Guidance for Likelihood of Occurrence of Malfunction

In the proposed rule, the Commission discussed the following positions as guidance for implementing the criterion of a ''more than minimal'' increase in probability (now likelihood) of a malfunction of equipment (now SSC).

First, the Commission noted that the existing guidance in NEI 96–07 states:

''Where a change in probability is so small or the uncertainties in determining whether a change in probability has occurred are such that it cannot be reasonably concluded that the probability has actually changed (*i.e.* there is no clear trend towards increasing the probability), the change need not be considered an increase in probability.'' Continued use of this guidance for a determination of whether criterion (i) has been met is satisfactory. Commenters agreed with this guidance, but also believe that this does not represent the outer bound of what would be acceptable to meet the rule. The Commission agrees with this comment.

Second, the Commission concluded that the likelihood of malfunction of SSC important to safety previously evaluated in the FSAR (as updated) would not be more than minimally increased if ''design bases'' assumptions and requirements are still satisfied (*i.e.*, the seismic or wind loadings, qualification specifications, etc). Thus, for instance, a change that would cause piping stresses to exceed their code allowable values would be more than a minimal increase in likelihood of malfunction. Commenters stated that if design basis requirements are met, there is no increase in probability. The Commission agrees with the essence of this comment, but was attempting to help licensees comply with the rule language by offering ways of demonstrating that the criterion is satisfied. Changes that would invalidate specific commitments made for redundancy, diversity, separation, and other such design characteristics, would be considered as ''more than a minimal increase in likelihood of malfunction,'' and thus would require prior NRC approval.

In the proposed rule, the Commission stated that for purposes of determining whether this criterion has been satisfied, the probability of malfunction would be no more than minimally increased if a new failure mode *as likely as* existing modes is introduced. Some commenters indicated that the presence of new failure modes should not be a determinant as to whether probability of malfunction has increased; rather, it is whether the effects of the failure modes have previously been considered that would determine the need for NRC review consistent with § 50.59(c)(2)(vi). The Commission finds that the question of likelihood is not addressed if new failure modes are only examined with respect to criterion (vi), since that criterion looks only at whether the effects of the failure are bounded, not how likely it is to occur. However, since likelihood can be increased regardless of whether new failure modes are involved, the Commission has deleted this statement as proposed guidance for assessing increases in likelihood.

Additions of components to a system (cabling, manual valves, protective features) would not generally be viewed as more than a minimal increase in likelihood of malfunction, provided that applicable design and quality standards are followed. For example, adding protective devices to breakers, or installing an additional drain line (with appropriate isolation capability) would not be increases in likelihood of malfunction. However, there could be situations where such additions would impact upon how a system performs its functions that might not satisfy the § 50.59 criteria (for example, a cross-connect between trains that is not suitably isolated).

Substitution of one type of component for another (as for instance, an air-operated valve for a motor-operated valve), would also be viewed as no more than a minimal increase in likelihood of malfunction, provided requirements for redundant motive force, quality, and other requirements are met (and of course that any new failure modes are already bounded by the analysis).

(iii) and (iv) Minimal Increases in Consequences of Accident or Malfunction

In the proposed rule, the Commission revised the existing criterion concerning increases in consequences from a standard of ''may be increased'' to ''more than minimally increased,'' and separated the two statements on consequences within § 50.59(a)(2)(i) into separate criteria. Only a few comments were received concerning the rule language itself. One commenter stated that the two criteria on consequences should not be separate, since consequences would only result from accidents, and having another criterion might force evaluators either to duplicate their documentation, or struggle to explain why consequences were not increased for malfunctions. The Commission concludes that having separate criteria provides greater clarity and is consistent with common practice. Further, the criteria cover different types of changes, that is, some that arise from malfunctions (such as failure of a waste tank or filter systems), and others that might arise from changes in source term or timing of mitigation systems, that are more pertinent to ''accidents.'' Licensees may combine their responses to questions and reference other sections when preparing evaluations.

Commenters requested two areas of clarification. First, they asked if consequences refers only to radiological consequences (dose), and second whether consequences refers only to those associated with accidents and not from normal operations or anticipated operational occurrences. The rule reference to consequences is intended to relate directly to radiological consequences, and not to other outcomes that are covered by the remaining criteria. Secondly, the Commission notes that 10 CFR part 20 establishes requirements for protection against radiation during normal operations. For anticipated occupational occurrences, NRC requirements are such that there should not be any radiological consequences. However, the Commission also wishes to clarify that ''consequences of accidents'' includes not only offsite exposure, but also dose to operators in the control room (in accordance with General Design Criterion 19 of appendix A to 10 CFR part 50) or other onsite personnel, resulting from accidents and malfunctions previously evaluated in the FSAR.

The language in the rule for criterion (iii) was unchanged from the proposed rule; for criterion (iv), the term ''systems, structures, or components'' was substituted for ''equipment'' as it was for criterion (ii), for the reasons already discussed.

Guidance for Minimal Increase in Consequences

In the proposed rule, the Commission had discussed several positions that might be helpful in developing guidance that would successfully implement the revised rule. First, the Commission agreed with the guidance in NEI 96–07 which states: ''Where a change in consequences is so small or the uncertainties in determining whether a change in consequences has occurred are such that it cannot be reasonably concluded that the consequences have actually changed (*i.e.*, there is no clear trend towards increasing the consequences), the change need not be considered an increase in consequences.'' No specific comments were received on this point.

Second, if a licensee has performed an analysis with certain bounding assumptions, and the change would increase a specific parameter from its present value to a different value that is still bounded by the value assumed in the analysis, the NRC concludes that such a change satisfies the criterion of ''no more than a minimal increase in consequences.'' In fact, as noted by some of the comments, this is no

increase in consequences, because the bounding analysis is what determines the value from which a change is being judged.

Third, if a licensee would need to change its design basis assumptions or analytical methods, or both, to demonstrate that the change in consequences satisfies this guidance, then the NRC does not view the change as minimal and would expect the licensee to submit a license amendment for such a change. This position is consistent with the logic presented as the basis for implementing new criterion § 50.59(c)(2)(viii), which will be discussed in greater detail below. Some commenters thought that adopting methodologies that have been approved by NRC in certain contexts (such as use of International Conference on Radiation Protection (ICRP) dose conversion factors, or credit for suppression pool scrubbing) should be allowable under § 50.59. New criterion (viii), discussed in section J below, specifies under what conditions changes to evaluation methods can be changed without prior NRC approval.

In the proposed rule, the Commission proposed a graduated approach, consistent with the concept of ''minimal'' being small enough so as not to impact the basis for the acceptability of the previous licensing decision. The Commission proposed that when the facility is far from the limit, a larger increase could be accommodated without concern about impact on the basis for acceptability. The Commission did not believe that allowing increases up to the regulatory values without approval was consistent with a ''minimal'' increase standard, and was not consistent with the purpose of the rule, that is, to allow the NRC the opportunity to confirm the adequacy of the licensee's review of the change before it is implemented.

The proposed rule offered three different ways to define what would constitute a minimal increase in consequences. Most commenters favored the third method (10% of the difference between the calculated value and the regulatory guidelines) over the other two. Other commenters thought the limits themselves should be the point at which NRC review would be needed, or offered other suggestions, such as allowing 20 percent of the difference. Comments were also received about the use of Standard Review Plan guideline values [2] as they are not in the regulations and that for some plants, the existing analysis may exceed the guideline such that no changes would be allowed. Some commenters also expressed concern about the criterion for those situations where a previous change may have resulted in a decrease in consequences, and a subsequent change that increased consequences would exceed the 10 percent difference, but would not have done so if the first change had not occurred.

During the comment period, some commenters were concerned that as the rule is currently planned to be implemented, they would have no flexibility under the rule if their calculated consequence values were already in excess of the current SRP guidelines. In general, the Commission agrees that for cases where a licensee is licensed with calculated consequences in excess of the established SRP guidelines, only limited flexibility under this provision of the revised rule would exist for changes that increased the calculated radiological consequences of accidents. In this regard, the Commission does view differences of about 0.1 rem as being within the error or uncertainty of design basis-type radiological consequences analysis such that NRC review of such changes is not needed.

The Commission has taken these comments into account in revising the ''minimal'' increases in consequences aspects of the final rule. The Commission will conclude that the requirements of the rule are met if the calculated doses from a change at a facility would be less than 10 percent of the remaining margin between current calculated dose values and acceptance values in the regulations [3] (*e.g.*, GDC 19 or part 100) for the particular accident. Under this approach, the threshold for what constitutes a minimal change varies as a licensee approaches the regulatory limit. The amount of change allowed would decrease as the limit is approached, and the limit could not be exceeded without prior NRC review. Specifically, it is no more than a minimal increase in consequences if the increase is less than or equal to the more limiting of either 10 percent of the difference between the existing calculated value and the regulatory guideline value (10 CFR part 100 or GDC 19 as applicable), or has reached the SRP guideline value for the particular design basis event.

Examples

The Commission has selected several examples to illustrate the implementation of this criterion. In each example, the Commission assumes that the calculated consequences do not include changes in methodology. As discussed later, changes in methodology used to calculate radiological consequences would fail new criterion (viii) of the revised rule and require prior NRC review regardless of how small the increase would be in the calculated radiological consequences.

Example 1 involves a case in which a licensee has a calculated fuel handling accident (FHA) dose of 50 rem to the thyroid at the exclusion area boundary. Because of some change in the facility, the calculated FHA dose increases to 70 rem. Under the revised final rule, ten percent of the difference between the calculated value and the regulatory limits is 25 rem (10% of 250). The SRP acceptance guideline is 75 rem. Since the calculated increase is less than 25 rem and the total is less than the SRP acceptance guidelines, then the revised § 50.59 consequence criterion would not trigger the need for a prior NRC review and a licensee may make the change to the facility.

Example 2 involves a case in which the calculated consequences for a steam generator tube rupture accident are 25 rem at the exclusion area boundary. Because of a change in the plant, the calculated consequences increase to 29 rem. The implementation of the revised rule language would permit these changes to occur because the new calculated doses do not exceed the established SRP acceptance criteria nor does the incremental change in consequences (4 rem) exceed 10 percent of the difference between the previous calculated value and the regulatory limit of 300 rem. Ten percent of the difference between the acceptance criteria (300 rem) and the calculated value (25) is 27.5 (10% of 275) rem;

[2] In the Standard Review Plan, NUREG–0800, the NRC established acceptance criteria for certain events that are considered of greater likelihood than the limiting accidents as a small fraction of the part 100 guidelines. Thus, for instance, for a steam generator tube rupture, the SRP guideline is that the dose be 10 percent of the part 100 value. For the postulated accident with an assumed preaccident iodine spike in the reactor coolant at the time the tube rupture occurs, the full part 100 value is the acceptance criterion.

[3] GDC 19 requires adequate radiation protection to permit access and occupancy of the control room under accident conditions without personnel receiving radiation exposure in excess of 5 rem whole body or its equivalent to any part of the body, for the duration of the accident. Part 100 establishes requirements for exclusion area and low population zones around the reactor so that an individual located at any point on its boundary immediately following onset of the postulated fission product release would not receive a total radiation dose to the whole body in excess of 25 rem or a total radiation dose of 300 rem to the thyroid for iodine exposure. For future applications, as noted in subpart B to 10 CFR part 100, the radiological consequences are to meet the criteria stated in § 50.34(a)(1), which sets a dose of 25 rem total effective dose equivalent (TEDE).

since 4 is less than 27.5, this change satisfies the criterion.

Example 3 involves a case in which the calculated consequences of a fuel handling accident are 25 rem to the thyroid at the exclusion area boundary. Because of a proposed change in the facility, the calculated consequences increase to 65 rem. For this case, the revised calculated consequences are still less than the SRP acceptance guidelines of 75 rem; however, the incremental increase in consequences (40 rem) exceeds the 10 percent of the difference to the regulatory limit of 300 rem (which would be 27.5 rem). For this example, the change results in more than a minimal increase in consequences and thus requires NRC approval pursuant to § 50.59(c)(2)(iii).

If Example 3 had been an event for which no SRP value was specifically established, so that the part 100 guideline was the only applicable standard, the rationale would be that an increase up to 52.5 (25+27.5) rem would meet the ''minimal increase'' criterion.

Example 4 involves a case where the calculated dose to the control room operators following a loss of coolant accident is 4 rem whole body. A change is made to the control room ventilation system such that the calculated dose increases to 4.5 rem. The regulations dictate that the control room doses are to be controlled to less than 5 rem by General Design Criterion 19. Although the new calculated doses are less than the regulatory limits for the operators, the incremental increase in dose (0.5 rem) exceeds the value of 10 percent of the difference between the previously calculated value and the regulatory value (10% of 1 rem = 0.1 rem). This change would require prior NRC review before the licensee could implement the change.

As an example of the ''calculational error'' concept, suppose the existing approved analysis for a fuel handling accident at a plant predicts an offsite dose to the thyroid of 77 rem. The SRP acceptance guideline for this event is 75 rem. The change that a licensee wishes to make would predict an increase in the calculated dose from 77 to 77.1 rem. In this case, the proposed change could be made under § 50.59 because the calculated value, even though greater than the SRP value, is satisfied within the level of uncertainty specified above. However, for this example, the Commission notes that increases in consequences that would increase the calculated consequences to 77.2 rem would require prior NRC review before the specific change could be implemented.

H. Possibility of an Accident of a Different Type From Any Previously Evaluated in the Final Safety Analysis Report (as Updated) Is Created

The Commission had proposed that the language in existing § 50.59(a)(2)(ii), renumbered to § 50.59(c)(2)(v) in the proposed rule, be revised to read ''(would) create the possibility for a design basis accident of a different type from any previously evaluated in the final safety analysis report (as updated).'' This change had two parts—the first, changing from may be created to ''would create'' and the second being the insertion of the phrase ''design basis.'' The purpose of the first change was to provide some flexibility to licensees. Thus, rather than having to prove that an accident had not been created, under this rule language, a licensee would need to request a license amendment only if it could be reasonably concluded that the possibility of an accident of a different type is created by the change, test, or experiment. The intent of the second change was to indicate that in referring to ''accidents'' in §§ 50.59 and 72.48, the Commission had in mind creation of accidents of the likelihood and significance of those that, had the possibility already existed, would have been a design basis accident in the FSAR. Thus, ''accidents'' that would require multiple independent failures or other circumstances in order to ''be created'' would not fall within this criterion.

For an accident to be of a different type, a few commenters thought that the accident must result in a new or greater release path than originally considered, result in a new fission product barrier failure mode, or create a new sequence of events that results in significant cladding failure, ''such that the accident would have been included if the FSAR were being written today.'' The Commission agrees that these are useful considerations for determining whether a change results in an accident of a different type.

One commenter noted that for certain older facilities, the term ''design basis accident'' was only applied to a very small set of events. Other commenters thought that accidents must be ''credible'' to be ''created.'' Another commenter was concerned that a slightly different initiator leading to the same design basis accident might be viewed as an accident of a different type.

One commenter stated that ''accident of a different type'' should be changed to ''accident with a different result,'' for consistency with the criterion on malfunction. However, the Commission also notes the similarity with the criterion in § 50.92 (for no significant hazards consideration determination). Allowing changes that result in an accident of a different type (even if the result has previously been analyzed) appears inconsistent with the criterion in § 50.92.

The Commission has concluded that use of the modifier ''design basis'' with respect to accidents of a different type in the rule language may be confusing because, by the terms of the rule, accidents of a different type are distinct from those (design basis) accidents evaluated in the FSAR. Therefore, in the final rule, the Commission removed the phrase ''design basis.'' The Commission agrees that the accident must be credible in the sense noted above, of having been created within the range of assumptions previously considered (*e.g.*, random single failure, loss of offsite power, no reliance on non-safety-grade equipment, etc.), and that a new initiator of the same accident is not a ''different type'' (but may affect the frequency of that accident under § 50.59(c)(2)(i)).

Therefore, the final rule uses the same language as is currently contained in the existing rule, concerning accidents of a different type, except for changing the phrase ''possibility * * * may be created'' to ''would create the possibility.''

Need for Definition of Accident

In addition, the Commission had requested comment as to the need for a definition of accident, and offered a specific definition for comment. The term ''accident'' also appears in other evaluation criteria, specifically, §§ 50.59(c)(2)(i) and 50.59(c)(2)(iii), in the context of accidents previously evaluated in the FSAR.

Several comments were received on the proposed definition of accident. Most commenters felt that a definition in the rule was not necessary, and most also disagreed with the specific definition offered in some respect. Commenters generally agreed that accidents include design basis accidents (typically analyzed in Chapters 6 and 15 of the FSAR), anticipated occupational occurrences, external events that the plant is required to withstand and other special events that are analyzed to demonstrate safety. Included within the set of accidents are those scenarios for which requirements have been established for the facility either to withstand or cope with the event. Notable examples include pressurized thermal shock events (§ 50.61), anticipated transient without scram (§ 50.62) and station blackout (§ 50.63).

Commenters also noted that external events, such as earthquakes, high winds, floods, and missiles can be treated as causes of malfunctions of SSC, rather than accidents. Some suggested that examples or a list of accidents could be presented in the implementation guidance.

The Commission concludes that a definition of accident is not necessary in the final rule and that examples of accidents are best discussed in rule implementation guidance.

I. Possibility of a Malfunction of Structures, System, or Components Important to Safety With a Different Result From Any Previously Evaluated in the Final Safety Analysis Report (as Updated) is Created

In the proposed rule, the Commission modified the remaining part of existing § 50.59(a)(2)(ii), concerning malfunctions of a different type by creating a new criterion (vi), that would require approval if a change, test, or experiment would ''create a possibility for a malfunction of equipment important to safety with a different result than any evaluated previously in the final safety analysis report (as updated).''

Comments were supportive of the change from ''different type'' to ''different result,'' and of the change from ''may be'' to ''is'' created. Some commenters objected to the insertion of the phrase ''important to safety'' and suggested other phrases, such as ''safety-related'' or ''FSAR-described.'' Others suggested that the terminology in §§ 50.59 and 72.48 should be made consistent (the former refers to equipment; the latter to systems, structures or components).

In the final rule, The Commission has revised the existing criterion to read ''create a possibility for a malfunction of an SSC important to safety with a different result from any previously evaluated in the final safety analysis report (as updated).'' The Commission concludes that the term ''SSC'' is commonly used in both parts 50 and 72 and is well-understood, and that equipment was an older term that does not have a unique meaning requiring its use. The modifier ''important to safety'' was considered as always being part of the criterion in practice, and that its omission from the rule was viewed as editorial and not substantive. Other terms might have the effect of limiting or broadening the scope of SSC to be considered. The Commission notes that since the overall scope of § 50.59 is the facility as described in the FSAR, there is no need to use that phrase in characterizing which SSC need be considered with respect to malfunctions.

Guidance for Malfunction With a Different Result

The proposed rule discussion further stated that this determination should be made either at the component level, or consistent with the failure modes and effects analyses (FMEA), taking into account single failure assumptions, and the level of the change being made. Several commenters stated that this guidance should be revised to refer only to the failure modes and effects analysis in the FSAR, and not to specify the component level. The Commission agrees that this criterion should be considered with respect to the FMEA, but also notes that certain changes may require a new FMEA, which would then need to be evaluated as to whether the effects of the malfunctions are bounding.

J. Replacement Criteria for ''Margin of Safety as Defined in the Basis for Any Technical Specification is Reduced''

The phrases ''margin of safety'' and ''as defined in the basis for any technical specification'' in the third criterion in existing § 50.59(a)(2) have been the subject of differing interpretations for a number of years because § 50.59 does not define what constitutes a margin of safety or a basis for any technical specification in the context of §§ 50.59 and 72.48.

The Commission continues to believe that changes representing a potentially significant decrease in certain margins should require NRC review and approval prior to their implementation. Margins within the plant design and in the established licensing basis exist on many levels. There are margins from the assumptions of initial conditions, conservatisms such as computer modeling and codes to account for uncertainties, allowances for instrument drift and system response time, redundancy and independence of components. Margins are built into the facility to account for routine plant fluctuations and transients and response to accident conditions. Margins also exist in the established regulatory acceptance criteria to be met for response to various accidents and transients. The acceptance criteria are established at a value that accounts for uncertainty about physical properties and other variability. As a result, substantial margins are provided by the regulatory envelope within which a plant has demonstrated its ability to respond to a spectrum of design basis accidents. In sum, not every margin is important to assuring safety such that changes in that margin must be reviewed and approved by the NRC prior to their implementation. However, the Commission recognizes that precisely delineating the margins for which changes would require prior NRC review and approval is a difficult task. A change criterion which does not directly refer to margins, but which nonetheless indirectly assures that important design and licensing basis margins are not changed without prior NRC review and approval, is an acceptable alternative that would meet the Commission's goal of assuring regulatory review of potentially significant changes to certain margins. Such an approach avoids having to describe in the rule the margins of regulatory interest, and the nature of the change in margin for which prior NRC review and approval would be required.

In the proposed rule, the Commission solicited public comment on several options. The Commission also requested the public to provide alternative means for control of margin.

Option 1 in Proposed Rule

The first option in the proposed rule was to control inputs to analyses and the methods and criteria that establish TS. Under this option, the Commission would conclude that the analyses and information in the FSAR establish the basis for the margins of safety for the TS. Thus, the Commission's proposal would have added a definition for ''reduction in margin of safety associated with any technical specification'' and conformed the criterion for needing a license amendment in new § 50.59(c)(2). Although this option would maintain the safety analyses that underlie the TS, this approach also would have the effect of giving all input values and assumptions within the FSAR the weight of TS (even though they are not included in the TS), which is inconsistent with the philosophy in § 50.36. In many instances, changes to inputs can be accommodated by other available margins so that the licensing envelope is preserved. Several comments expressed strong concern that this option would be too restrictive, for the reasons noted above. The Commission agrees with these concerns and concludes that the approach is not consistent with the intent of the original rule. In this light, this option of requiring prior NRC approval for any change to input parameters associated with TS was rejected as an approach for the final rule.

Option 2 in Proposed Rule

The proposed rule contained a second option that was a proposal to delete the ''margin of safety'' criterion completely. Instead, the Commission would rely upon the other criteria in § 50.59, as well as the regulatory requirement that all changes to TS be reviewed and approved by the NRC, to assure that there are no significant adverse changes to margins in design and operation. If this option were adopted, the Commission would argue that there is no need for prior review of changes that do not satisfy any of the other evaluation criteria in view of ''risk-informed'' insights and greater understanding of the margins that exist through meeting the body of regulatory requirements. The Commission also sought comment on whether any of the other evaluation criteria should be revised if this approach were adopted.

A significant number of comments were received in support of the proposal to delete margin of safety as an evaluation criterion. In support of their position, commenters noted that TS and the other six evaluation criteria, in conjunction with other regulatory requirements for design, testing, and operation, make the margin question moot. The Commission did not adopt this proposal because of the variability in existing TS, and uncertainties about how licensees might gauge the other evaluation criteria for specific changes.

Option 3 in Proposed Rule

In the **Federal Register** notice, the NRC also offered a set of options that focused on control of margins associated with results of analyses. Instead of focusing on the inputs to safety analyses, these options would focus on the results of the safety analyses in order to determine whether changes to operational characteristics or other information described in the FSAR (as updated) would reduce the level of protection reflected by the results of safety analyses.

In developing which results would be governed by this evaluation criterion, the Commission considered what aspects of the facility safety are controlled by other requirements and thus what other information might a ''margin'' criterion be intended to capture. As part of the licensing review for a facility, the NRC established a level of required performance (which will be referred to in this discussion as acceptance criteria) for certain physical parameters, such as those that define the integrity of the fission product barriers (*e.g.*, fuel cladding, reactor coolant system boundary, and containment). Satisfying these acceptance criteria produces a margin of safety to loss of barrier integrity. The safety analyses presented in the FSAR (as updated) demonstrate that the response of the barriers to the postulated accidents, transients, and malfunctions meets the acceptance criteria. Thus, in constructing the options for comment, the Commission suggested a more explicit linkage between when ''margin of safety'' needed to be preserved to the response of the fission product barriers relied upon to provide protection from uncontrolled release of radioactivity.

In the range of options, the Commission also suggested that certain mitigation system capability, as, for instance engineered safety feature performance parameters (flow rates, efficiencies, etc.) also might be considered with respect to margin, and asked for comment whether there were other parameters that should be explicitly accounted for in any criterion on ''margin of safety.''

As part of these options, the Commission also offered different approaches to how much flexibility should be allowed, as for instance, minimal reductions, or use of limits as the point at which reductions in margin would be determined. Also, as discussed later, the Commission asked in the proposed rule whether changes to evaluation methods should also be controlled.

Comment Summary for Option 3: The Commission received a large number of comments on the various suboptions under Option 3 concerning results of analyses. With respect to the identification of those parameters to control, many of the commenters who supported a ''margin'' concept based upon limits for results, believed that the parameters should be limited to those that directly affect fission product barriers and for which there are clearly defined limits. One commenter thought that a criterion on margin is not needed for a reactor that was being decommissioned. Commenters also thought that mitigation system performance was best controlled by other criteria, such as those concerning malfunction of SSC, or consequences of accidents. It was also noted that important characteristics of mitigation systems are governed by TS. With respect to parameters that might be used under part 72, commenters stated that these should be those with the potential to increase the likelihood or the amount of offsite release, specifically, such things as fuel and cladding temperature, cask temperature and internal pressure, and cask stresses.

For the question as to when NRC approval is needed, comments can be grouped into two main themes: those that are supporting the position currently included in NEI 96–07 related to acceptance limits as being the point of departure for reduction in margin, and those supporting a new proposal from NEI. No commenters supported either a ''no reduction in results'' or a ''minimal'' standard, or any type of graduated approach such as that discussed earlier for consequences. As part of its comments on the proposed rule, the NEI proposed to replace the existing margin of safety criterion with one that states that a change requires prior NRC approval if it would result in a design basis limit directly related to integrity of the fuel cladding, the reactor coolant system boundary, or the containment boundary being exceeded or altered. Their proposal is similar in several respects to the guidance offered in NEI 96–07, with respect to using ''limits'' as the point at which a reduction in margin occurs, and in focusing on parameters for fission product barriers as being the instances where there is margin to protect. The difference is the concept of ''design basis limits'' as represented in the FSAR instead of acceptance limits that might be found in other documents. Further, NEI suggested that as part of the rule changes to adopt this criterion, the NRC should also delete the third criterion in § 50.92, which states that a determination of ''no significant hazards consideration'' cannot be made for amendments that would involve a significant reduction in a margin of safety.

Resolution

In SECY–99–054, dated February 22, 1999, the staff presented an alternate proposal for the margin of safety criterion. The staff proposal employed a concept that used the design basis capability for a SSC as the determinant for when prior staff review would be required. As presented in the final safety analysis report, there is a design basis (functions and controlling values of parameters) that determines the minimum performance requirements for SSCs. The controlling value for a parameter is the point at which confidence in the capability of the structure, system or component to perform its intended safety functions begins to decrease. For many parameters, requirements have been established in TS; for others, which are not directly controlled or measured, while certain TS requirements may have been imposed to keep values within required ranges, inclusion of a criterion

that verifies that facility changes have not adversely impacted design basis capability provides assurance of completeness beyond the requirements for approval of TS changes.

The staff was supportive of the NEI concept of using the design basis as the determinant of when prior NRC approval was needed. The staff proposal was a modification of the suggested NEI approach that would focus on the effectiveness of systems to protect barriers. The staff thought that the rule language as offered by NEI could be viewed too narrowly, and might not ensure that changes affecting performance of mitigation and support systems were appropriately evaluated with respect to their roles in protecting integrity of the barriers. Therefore, the staff's proposal was more explicit about the design basis capabilities of the SSC being used to determine whether approval of a change was needed. The principal difficulty with this proposal was uniquely identifying the design basis capabilities for all SSCs that would need to be satisfied in order to implement the concept.

Since the time that SECY–99–054 was submitted to the Commission, the NRC has gained a greater understanding of the NEI proposal and how it would be implemented, and, in particular, how it would be used to assess changes to mitigation systems and support systems. Although the NRC agreed that the process described in the NEI comment letter of December 21, 1998, would be sufficient to ensure that changes to other systems are appropriately examined with respect to impact upon the barriers, it was not apparent that the specific rule language suggested would require licensees to implement such a systematic approach to examination of design basis limits.

Therefore, the approach contained in the final rule is a combination of the NEI proposal contained in its comment letter and the staff proposal contained in SECY–99–054. In the final rule, the Commission is eliminating the existing criterion on reduction of margin of safety. In its place, the Commission is adding a new criterion (vii) that requires prior NRC review of changes that result in a design basis limit related to the integrity of the fission product barriers being exceeded or altered.

The final rule also contains a new criterion (viii) related to the use and control of evaluation methods (see below). These two criteria together in place of a criterion on margin of safety explicitly cover those margins that the Commission believes are important to address in this evaluation process—the first being the margin that exists in the limits that are to be met, and the second being the margin that exists from the conservatisms included in the methods used to demonstrate that requirements are met. Each of these criteria are discussed below.

The Commission concludes that the new criteria (vii) and (viii) together will maintain safety because they will preserve the design basis capabilities that protect the integrity of important fission product barriers, and thus those features that protect against release of radioactive material. The rule will also control the analyses and assessment process through control of the methods and will assure that the required response of the barriers as previously established by NRC review will be maintained.

The Commission does not plan to make any changes to the criterion in § 50.92(c)(3), which provides that license amendments involving a significant reduction in a margin of safety do not meet the criteria for a ''no significant hazards consideration'' determination as discussed in section M below.

Final Rule Language

New Criterion (vii)

New criterion (vii) would require a prior NRC review of any change that would ''result in a design basis limit for a fission product barrier as described in the FSAR (as updated) being exceeded or altered.'' For purposes of implementation of this criterion, the Commission defines *design basis limit for a fission product barrier* as the controlling numerical value for a parameter established during the licensing review as presented in the final safety analysis report for any parameter(s) used to determine the integrity of a barrier. Typically, the controlling value for the parameter is set at a point far enough away from failure that there is confidence in the integrity of the barrier. As a partial substitute for the previous ''reduction in margin'' criterion in the former § 50.59(a)(2)(iii), a change which does not exceed or alter a design basis limit for a fission product barrier does not involve any reduction in the margin of safety.

The Commission did not retain the suggested wording from commenters for criterion (vii) which might suggest that the evaluation can be limited to those changes that *are directly* related to fuel cladding, reactor coolant system boundary, and containment boundary. The Commission believes that a broader initial assessment of parameters is necessary than that which might be suggested by the term ''directly related.'' All changes that might affect the design basis limits, including changes to parameters within mitigation and support systems, must be evaluated for their effects upon the design basis limits for the barriers. Further, the Commission used the term ''fission product barrier,'' rather than listing the specific barriers for operating power reactors as used by NEI, so that the rule language would be appropriate for all Part 50 facilities (including non-power reactors, and reactors undergoing decommissioning). The more general terminology is also appropriate for the part 72 facilities.

New criterion (vii) narrows the focus for when prior NRC approval is required to those changes which result in the specific limits that relate directly to the performance of fission product barriers being exceeded or altered. For power reactors, these barriers are generally limited to the fuel cladding, the reactor coolant system pressure boundary and containment. For a reactor undergoing decommissioning, where the fuel is stored in the spent fuel pool, the barrier would be the fuel cladding. For non-power reactors, the fission product barriers would include, as applicable to the specific reactor, the fuel cladding, the reactor tank, and the reactor room, building, confinement, or containment.

The proposed criterion (vii) is equally applicable to independent spent fuel storage facilities or spent fuel storage cask designs in part 72. The particular parameters or barriers would be specified in terms of the barriers against release of radioactivity afforded by fuel storage facilities. For instance, these would include calculated fuel temperature or cladding oxidation, and stresses (or pressures) on the cask structure.

Although the list of fission product barriers includes containment and other features that prevent the release of radiation, the design basis limits for these barriers are for parameters such as pressure. The determination of resultant radiological consequences from leakage through or breech of these barriers is the subject of criteria (iii) and (iv), rather than criterion (vii).

Further, design basis limits for certain fission product barriers may not be applicable to particular facilities or conditions of the facility (such as permanently shutdown facilities). The determination as to the need for evaluation of particular barrier parameters or limits depends upon the safety analyses and information presented in the FSAR (as updated).

The Commission notes that the new criterion (vii) does not incorporate the use of a minimal change concept. The

modification of the criterion to reflect design basis limits as a point for evaluating when prior NRC review is necessary would not permit small changes beyond the limits without review.

With respect to changes relating to the design basis capability of SSCs to perform their functions in those circumstances in which the change does not cause any design basis limits to be exceeded or altered, the other evaluation criteria in § 50.59 (as well as other requirements such as TS or ASME code requirements) provide the standards for prior NRC approval of such changes.

The rule language that provides that a design basis limit may not be altered provides important and needed assurance. Changes that involve alteration of the design basis limit for a fission product barrier involve such a fundamental alteration of the facility design that a change, even in the conservative direction, should receive prior NRC review.

Guidance for Implementation

To satisfy new criterion (vii), licensees must determine the parameters that would be affected by the proposed change. The affected parameters are not limited to the specific parameters in the system in which the change is being made or to parameters that are only directly linked to the actual fission product barrier. Rather, the design parameters must include an assessment of all affected parameters, including design parameters of mitigation and support systems. Once the parameters are identified, the licensee must establish whether the parameters have values established in the FSAR, whether the parameters are controlling parameters that are reference bounds for the design, and whether the parameter has the potential to affect the performance of the fission product barrier. If the specific parameter values are already subject to controls established by the TS or other rules or regulation, those requirements shall be followed.

After a licensee assesses the information discussed above, it would need to identify the specific design basis limits that could be affected for each of the identified parameters. After the licensee completes its assessment of the change against each design basis limit, if no design basis limit is altered or exceeded, criterion (vii) is satisfied, and a licensee may make the change without prior NRC review.

Examples

The NRC has selected several examples to illustrate how the new criterion (vii) would be implemented. In these examples, it is assumed that NRC approval is not required because of other reasons, such as need for a TS change, section 50.55a requirements etc.

Example 1: A plant FSAR states that the function of the auxiliary feedwater system (AFW) is to provide feedwater flow to the steam generators following postulated accidents (*e.g.*, main steam line break, feed line break, small break loss-of-coolant accident), or when a reactor trip occurs coincident with a loss-of-offsite power. The FSAR states that 700 gallons per minute (gpm) will be delivered to the steam generators. The licensee's accident analyses used 700 gpm to assess the acceptability of the plant to respond to the accidents and concluded that no safety limits were challenged if 500 gpm were supplied. As a result of recent testing of the AFW system, the licensee determines that the pumps can no longer deliver 700 gpm. The licensee determines that the AFW pumps can deliver only 500 gpm at the required pressure and temperature. The licensee performs the necessary safety analyses and confirms that 500 gpm is sufficient to meet all necessary functions and that no safety limits would be challenged as a result of the flow reduction. The licensee decides to leave the pumps in the plant as is rather than replace the pumps to restore the originally stated capability. The licensee revises the FSAR to state that the AFW system will deliver 500 gpm during postulated accidents or for transients involving a loss-of-offsite power.

Under the new criterion (vii), the licensee would have to assess the impact of the reduced flow rate on the design limits of the fission product barriers. The licensee would have to identify the system parameters that would vary as a result of the changes in AFW system performance, identify the specific design limits that have the potential to affect the fission product barrier performance, and complete the analyses to determine whether the specific design limits for the fission product barriers would be challenged. In this example, it is assumed that the licensee did not change the method of evaluation for the safety analyses. If the licensee had used a different methodology from that used initially in establishing that the limits were met, then, the licensee may have to submit the revised analyses under criterion (viii) of the revised rule.

For this example, the licensee would have to complete the evaluations required by § 50.59 but would not have to submit a license amendment request to lower the expected flow rate of the AFW system, from that stated in the FSAR, to the lower as-found value, nor would a licensee have to request an amendment to remove the old pumps and replace the pumps with new pumps that provide the lower capacity assumed in this example. The basis for this conclusion is that the licensee analyses determined that the design limits of the fission product barriers would not be challenged and, therefore, that the fundamental basis for the staff's initial safety conclusion is maintained.

Example 2: A facility FSAR states that some of the functions of the component cooling water system are to provide cooling water flow to the reactor coolant pump seals and to the shell side of the residual heat removal system (RHR) heat exchangers. The FSAR states that the CCW system provides 400 gallons per minute, 100 gpm for the seals and 300 gpm for the RHR heat exchanger. The licensee has recently obtained a new reactor coolant pump seal which requires an additional 25 gpm of cooling flow. The licensee plans to revise the flow distribution such that 125 gpm is directed to the seals, and 275 gpm to the RHR heat exchangers. The licensee performs analyses to determine that with the reduced CCW flow to the RHR heat exchangers, the RHR system can still perform its required functions with required limits, as for example, removing sufficient decay heat to cool down within required time frames, keeping post-accident temperatures within required limits, etc. The licensee would satisfy criterion (vii) and be able to make this change under § 50.59.

Example 3: A licensee discovers an error in the primary system pressure boundary piping fatigue calculation performed to demonstrate compliance with the ASME Code requirements. A corrected calculation shows that the fatigue criterion would be exceeded (for the postulated FSAR events). A change to the licensing basis to accept revised fatigue criteria would require review under criterion (vii) because the design basis limit for one of the fission product barriers (reactor coolant system piping) would be exceeded or altered. (This change would also not satisfy criterion (i), ''minimal increase in frequency of occurrence of an accident'' because of potential failure of piping due to fatigue cracking, leading to loss of piping system integrity.)

New Criterion (viii)—Control of Evaluation Methods

In the proposed rule notice as part of the options presented on margin of safety, the Commission had discussed the issue of controlling methods (also, as noted, the proposed rule had explicitly stated that changes to methods were changes to the facility, and as such, required § 50.59 evaluations). Specifically, the Commission sought comment on whether the rule should include a statement that ''all analyses and evaluations for assessing the impact of plant changes must be performed using methodology and analytical techniques which are either reviewed and approved by the NRC or which are shown to meet applicable review guidance and standards for such analyses.''

Five commenters stated that methods should not be controlled by § 50.59 because the limits (e.g., acceptance limits) are conservative. These commenters thought that licensees should be allowed to use methods that are accepted by the NRC Standard Review Plan or other processes, without the need for prior NRC approval. A few commenters agreed that methods should either be reviewed and approved by NRC (or meet applicable standards); produce results that are consistent with the licensing basis methods; or that changes to methods should be reviewed as separate changes under § 50.59.

The Commission concludes that control of methods is essential in assuring a consistent application of the change review process, especially in light of the flexibility being provided by changes to the other evaluation criteria, such as having criterion (vii) that uses design basis limits being exceeded as the point at which NRC review is required instead of the ''margin of safety'' criterion. Although the Commission agreed that changes to methods should be reviewed as separate changes, the other evaluation criteria do not provide a standard that could be used to determine when changes to methods should be reviewed by NRC. While the NEI proposal would have controlled the methodologies through regulatory guidance, the Commission did not judge that process to provide sufficient rigor to assure uniform implementation of the requirement. A statement that the analysis should meet applicable standards was considered, but was ultimately rejected as being too vague. Therefore, the Commission has added criterion (viii) to be specifically used for changes to methods of evaluation.

Final Rule Language

New criterion (viii) will require prior NRC review of any change in a methodology or evaluation method that ''results in a departure from a method of evaluation described in the FSAR (as updated) used in establishing the design bases or in the safety analyses.''

Definitions and Guidance

For the purposes of this rule, a departure from a method of evaluation described in the FSAR (as updated) used in establishing the design bases or in the safety analyses means (1) changing any of the elements of the method described in the FSAR (as updated) unless the results of the analysis are conservative or essentially the same; or (2) changing from a method described in the FSAR to another method unless that method has been approved by NRC for the intended application. Results from a changed method are conservative relative to results from the previous method, if closer to the limits or values that must be satisfied to meet the design bases.

Results are ''essentially the same'' if they are within the margin of error needed for the type of analysis being performed, even if tending in the non-conservative direction. Results are essentially the same if the variation in results because of the change to the method is explainable as routine analysis sensitivities, and the differences in the results are not a factor in determining whether any limits or criteria are satisfied. The determination can be made through benchmarking (new vs. old method), or may be apparent from the nature of the changes between the methods. When benchmarking a method to determine how it compares to the previous one, the analyses that are done must be for the same set of plant conditions, otherwise, the results may not be comparable. Approval for intended application includes assuring that the approved method was approved for the type of analysis being conducted, generically approved for the type of facility using it, and that all terms and conditions for use of the method are satisfied.

The rule words were chosen to allow licensees only a small degree of flexibility in methods where the results are tending in the non-conservative direction, without burdening either the licensee or the NRC with the need to review very small changes that are not important with respect to the demonstrations of performance that the analyses are providing. The intent is to limit the need for review to those changes to methods that could impact upon the acceptability of performance were the results to be at the limiting values.

By limiting the methods to those described in the FSAR, and to those used for design bases and safety analyses, the Commission concludes that the burden of requiring review is justified in view of the relaxations in the other evaluation criteria. Unless the methods are used in FSAR safety analyses, as demonstrating that the facility performance continues to meet requirements, or to verify conformance with the design bases, they would not meet the rule requirements for approval. Thus, for example, if a licensee chose to perform sensitivity studies, or to examine alternative approaches for a change being contemplated, or included other analyses in the FSAR for reference purposes, these methods would not be subject to the rule. It is at the point in time that the revised method becomes the means used for purposes of satisfying FSAR safety analysis or design bases requirements that the approval (if the noted conditions are not met) would become necessary.

The Commission has included a definition of ''departure'' in the definitions section of the rule such that the intended meaning for purposes of § 50.59 is clearly understood.

Design bases as used in criterion (viii) is that information meeting the definition contained in 10 CFR 50.2, and in particular, those controlling values that are restraints derived from generally accepted practices for achieving functional goals, or requirements derived from analysis of the effects of a postulated accident for which a SSC must meet its functional goals. Safety analyses are those evaluations that demonstrate that acceptance criteria for the facility's capability to withstand or to respond to postulated events are met.

Thus, this criterion applies to those methods of evaluation used for demonstrating that design basis limits for fission product barriers are met, for other analyses such as radiological consequences that are part of the safety analyses, and for analyses that demonstrate that functional goals for SSC are met. These would include those analyses that show that SSC will function under limiting conditions such as natural phenomena, environmental conditions, dynamic effects, and so forth. However, as noted in the rule language, only those methods that are used in establishing the design bases or in the safety analyses fall within the criterion. In addition, the Commission notes that changes to time-limited aging

analyses and evaluations of aging management programs required by §§ 54.21(d) and 54.37(b), require evaluation with respect to criterion (viii) to the extent that evaluation methods for these analyses are described in the FSAR supplement.

To assure consistent implementation of criterion (viii), the Commission believes that it is important to clearly distinguish between methods of evaluation and input parameters to the methods. *Methods of evaluation* means the calculational framework for evaluating behavior or response of the reactor or any SSC. This includes the following (to the extent that they are described or applicable for a particular method):

—Data correlations
—Means of data reduction
—Physical constants or coefficients
—Mathematical models
—Specific assumptions in a computer program
—Specified factors to account for uncertainty in measurements or data
—Statistical treatment of results
—Dose conversion factors and assumed source term(s)

Input parameters are defined as those values derived directly from the physical characteristics of structures, systems or components, or processes in the plant. These would include such things as: Flow rates, temperatures, pressures, dimensions or measurements (*e.g.*, volume, weight, size), or system response times. Changes to input parameters (that are described in the FSAR) are to be evaluated as facility changes, and criterion (viii) would not be applicable. Additional guidance will be provided in the implementation guidance to describe the specific elements of the evaluation methods or methodology that would require review and to clearly define specific types of input parameters. The NRC intends to work closely with stakeholders to revise the existing guidance related to implementation of § 50.59 to reflect these definitions.

The rule requirements for evaluation methods would allow for use of generic topical reports as not being a ''departure,'' provided that the topical report is applicable to the facility, and is used within the terms and conditions specified in the approved topical report.

The Commission believes that with the guidance concerning ''evaluation methods'' and the definition of departure, licensees have the capability to perform analyses as needed without being unduly burdened by the need for NRC review, while still preserving those inherent conservatisms in the methods that provide the confidence that safety is maintained when the parameters are calculated to be at their design basis limits and that SSC capability continues to meet design basis requirements.

Examples

Example 1: The FSAR states that a damping value of 0.5 percent is used in the seismic analysis of safety-related piping. The licensee wishes to change this value to 2 percent to reanalyze the seismic loads for the piping. Using a higher damping value to represent the response of the piping to the acceleration from the postulated earthquake in the analysis would result in lower calculated stresses because the increased damping reduces the loads. Since this analysis was used in establishing the seismic design bases for the piping, and since this is a change to an element of the method that is not conservative and is not essentially the same, the NRC concludes that this change would require approval under criterion (viii). On the other hand, had NRC approved an alternate method of seismic analysis that allowed 2 percent damping provided certain other assumptions were made, and the licensee used the complete set of assumptions to perform its analysis, then the use of the 2 percent damping under these circumstances would not be a departure, under the second part of the definition.

Example 2: The licensee wishes to use an inelastic analysis procedure, not previously used in its seismic analyses as described in the FSAR, to demonstrate that the structural acceptance criteria are met for cable trays. NRC concludes that this would be a departure from the methods of evaluation and that it would not be essentially the same because the revised analysis would predict greater capacity than would the previous analysis. Therefore, this change would require NRC approval.

Example 3: The licensee wishes to change a non-LOCA FSAR Chapter 15 transient methodology. The methodology is being changed to a different vendor's NRC approved method. The new vendor's method has been approved generically for the particular reactor type (e.g., 2 loop PWR) and for the particular transient being analyzed. The analysis is being performed in accordance with all the applicable limitations and restrictions. The licensee can make this change without prior NRC approval because using a generically approved method for the purpose it was approved, while meeting all the limitations and restrictions, is not a ''departure.'' Subsequent plant changes can then be evaluated using this new method and the other seven criteria in § 50.59.

Example 4: The licensee wishes to change an analysis described in the FSAR which states that adequate net positive suction head (NPSH) is verified by analysis without crediting containment overpressure. The new analysis will assume that five pounds of overpressure is credited in calculation of available NPSH. The revised analysis predicts more (five additional pounds of) available NPSH for the pumps, a result further from the limit (the required NPSH) for an analysis that establishes part of the design bases for the pumps as being capable of performing their required function under the range of expected conditions. This change can not be made without prior NRC approval because a change in an element of a method described in the FSAR, used to establish the design basis, that is not conservative, or essentially the same, is a ''departure.''

Example 5: The licensee wishes to change an evaluation method described or incorporated by reference in the FSAR Chapter 15 transient analysis. In an attempt to remove some of the conservatism associated with the analysis, the change the licensee is contemplating is removal from the analysis of consideration of certain instrument uncertainties for a few parameters, by assuming nominal values instead. By not accounting for the greater range of the parameter (including the uncertainties), the analysis predicts response further from the limit to be satisfied. The treatment of uncertainties was an element of the method described in the FSAR, and, therefore, this change can not be made without prior NRC approval because a change in an element of a method described in the FSAR, used in the safety analysis, that is not essentially the same is a ''departure.''

On the other hand, if an instrument in the plant were replaced with a different one, the assumed uncertainty in the analysis for that instrument could be used in the analysis without prior NRC review, using the other seven § 50.59 criteria rather than criterion (viii), because this is an input change rather than a model change. How the uncertainties are treated in the analysis is part of the method. The range of values of the uncertainties associated with particular instruments is a characteristic of the facility and is thus an input parameter.

K. Safety Evaluation

The Commission proposed to delete the word ''safety'' in referring to the

required evaluation for determining whether the change, test, or experiment requires a license amendment. A similar change was proposed for § 50.71(e), which presently refers to safety evaluations either in support of license amendments or of conclusions that changes did not involve USQs.

The Commission also proposed to change ''safety evaluation in support of license amendments'' to ''safety analysis in support of license amendments.'' The second part of the existing phrase would be revised to refer to the ''evaluation that changes did not require a license amendment in accordance with § 50.59(c)(2) of this part.'' Conforming changes in Part 72 to revise the language to refer to ''evaluation'' were also proposed.

Commenters were generally supportive of these proposed changes. A few noted that as with the term ''USQ,'' a simple process should be adopted for revision of TS that use the term safety evaluation (this issue is discussed under Section A(4)). Other clarifying wording changes were included as a result of the comments, as for instance, referring to ''approved'' license amendments rather than to ''requested'' license amendments to make clear that the updates, as well as subsequent § 50.59 evaluations, should be based upon what has been approved (and implemented), not on what a licensee may have proposed for approval, but that has not been approved.

The final rule includes these changes offered in the proposed rule for § 50.71(e); in addition, the term ''approved'' was used in reference to license amendments. The final rule language for § 50.71(e) is presented in Section L, which also discusses other aspects of the requirements for FSAR updating.

L. Reporting and Recordkeeping Requirements

Records

Requirements for records for evaluations performed under § 50.59, and for submittal of a summary report are being moved to paragraph (d) as part of this rulemaking. In the final rule, the Commission has simplified the rule text concerning records. Although the text is simpler, there is no change in which records are being required. That is, the Commission views the phrase ''made pursuant to paragraph (c)'' as referring to those changes, tests, and experiments that require evaluation against the criteria (for example, because they involve the facility as described in the FSAR), but not to those other activities or changes that are determined to not fall within these required evaluations (as for instance, being screened out). As noted in Section K above, the rule now refers to ''evaluations'' not to ''safety evaluations.''

In addition, the Commission had proposed a change to the record retention requirements in existing paragraph § 50.59(b)(3) (renumbered by this rulemaking to (d)(3)). The change would add to the requirement that the records of changes to the facility be maintained until the termination of the license, the following statement ''or until the termination of a license issued pursuant to 10 CFR part 54, whichever is later.'' Commenters were supportive of this proposal, and the final rule section is unchanged from the proposed rule in this regard.

Summary Report

Simplified text was also included in § 50.59(d)(2), concerning submittal of the summary report. The existing text required submittal annually, or along with the FSAR update (which could be up to 24 months between submittals), or at such other frequencies as specified in the license. The Commission sees no need for such variability in submittal dates, and believes that a 24 month interval is acceptable for submittal of the summary report. Licensees may submit reports more often if they wish. If a licensee has a shorter time specified in its license, that licensee may request that the requirement be removed so that the rule frequency would be applicable. The 24 month frequency is also included in the part 72 sections, as requested by several commenters.

Updates to the Final Safety Analysis Report

In the proposed rule, the Commission proposed to supplement the reporting requirements in § 50.71(e) on ''effects'' of changes to require that in the FSAR update submittal (with the replacement pages), the licensee shall include a description of each change affecting that part of the SAR that provides sufficient information to document the effect of the change upon the probability or consequences of accidents or malfunctions, or reductions in margin associated with that part of the SAR.

The reason for this proposal was that the Commission was concerned about the potential cumulative effect of minimal increases. Since some increases are allowed in probability and consequences, the Commission thought that these rule changes would place greater importance on: (1) Complete and accurate SAR updating; (2) the licensee's evaluation process taking into account other changes made since last update; (3) the licensee's screening process examining plant changes to determine whether they are indeed changes requiring evaluation; and (4) reporting requirements so that staff can assess the ongoing nature of cumulative impact.

The issue discussed in the proposed rule was how the NRC could best oversee the process such that several ''minimal'' changes do not result in unacceptable results. In the proposed rule, the Commission proposed requiring licensees to report effects of changes in the FSAR update submittal in accordance with § 50.71(e) in a different manner to facilitate evaluation of cumulative effect.

A large number of commenters stated that this proposal was burdensome and unnecessary in view of the minimal standards. Further, commenters thought that this provision would require them to perform additional evaluations of the cumulative effects, or to numerically gauge the result of increases to probability that were judged on a qualitative basis. Others stated that when analyses were performed, such as for consequences or performance of SSC against limits, the existing update requirements would specify that the effects of these analyses be included in the update. The Commission agrees that the burden associated with the proposed rule change is not warranted in view of the specific criteria adopted and the existing update requirements. Therefore, the final rule does not contain such language.

Other wording changes for § 50.71(e) were discussed under section K. Therefore, the following language is in the final rule for this section:

(e) Each person licensed to operate a nuclear power reactor pursuant to the provisions of § 50.21 or § 50.22 of this part shall update periodically, as provided in paragraphs (e)(3) and (4) of this section, the final safety analysis report (FSAR) originally submitted as part of the application for the operating license, to assure that the information included in the FSAR (as updated) contains the latest information developed. This submittal shall contain all the changes necessary to reflect information and analyses submitted to the Commission by the licensee or prepared by the licensee pursuant to Commission requirement since the last submittal of the original FSAR, or as appropriate the last update to the FSAR under this section. The submittal shall include the effects [1] of: all changes made in the facility or procedures as described in the FSAR; all safety analyses and evaluations performed by the licensee either in support of approved license amendments, or in

[1] Effects of changes includes appropriate revisions of descriptions in the FSAR such that the FSAR (as updated) is complete and accurate.

support of conclusions that changes did not require a license amendment in accordance with § 50.59(c)(2) of this part; and all analyses of new safety issues performed by or on behalf of the licensee at Commission request. The updated information shall be appropriately located within the update to the FSAR.

M. No Significant Hazards Consideration Determinations

Under § 189.a(2)(A), the Commission may issue and make immediately effective an amendment to an operating license if the Commission has made a determination that the amendment involves a ''no significant hazards consideration'' (NSHC), despite the pendancy of a request for a hearing or the completion of such a hearing. The Commission's criteria for determining whether an amendment involves a NSHC, as set forth in § 50.92(c), are similar to the current USQ criteria in § 50.59:

(c) The Commission may make a final determination * * * that a proposed amendment to an operating license * * * involves no significant hazards consideration, if operation of the facility in accordance with the proposed amendment would not:

(1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or

(2) Create the possibility of a new or different kind of accident from any accident previously considered; or

(3) Involve a significant reduction in a margin of safety.

The Commission has evaluated whether the NSHC criteria in § 50.92(c) must be modified if the existing criteria in § 50.59 are altered, deleted or supplanted. The AEA does not define NSHC, nor does any provision of the AEA conceptually link the NSHC concept to any particular standard or concept. A review of the legislative history of the ''Sholly amendment'' which modified Section 189.a did not disclose any reference to § 50.59 or a discussion which links the NSHC concept and the § 50.59 criteria. H.R. Conf. Rep. No. 97–884, 97th Cong., 2d Sess. (1982), Sen. Rep. No. 97–113, 97th Cong., 2d Sess. (1981), H. Rep. No. 97–22, Part 2, 97th Cong., 2d. Sess. (1981).

The Commission has also evaluated whether changes to the NSHC criteria to conform more closely to the revised § 50.59 would facilitate implementation of the revisions to § 50.59, even if changes to the NSHC criteria are not required by the AEA. There are three areas where the current NSHC criteria diverge from the revised § 50.59 criteria: (i) The current NSHC criteria do not include the ''malfunction of components'' criterion in the revised § 50.59; (ii) the NSHC criteria retains a ''significant reduction in margin of safety'' criterion, which is no longer part of the revised § 50.59; and (iii) the NSHC criteria do not include the revised § 50.59 criteria (vii) and (viii) concerning changes to fission barrier design basis limits, and changes to and departures from evaluation methods. Although there may be some conceptual tidiness in utilizing the same evaluation factors for changes under § 50.59 and NSHC determinations under § 50.92, nothing in the AEA or the legislative history requires that the criteria be identical. Furthermore, the Commission notes that § 50.59 and NSHC address issues which are fundamentally different in purpose. Section 50.59 is focused upon the NRC's regulatory needs with respect to its review and approval of licensee-initiated changes, tests and experiments. By contrast, the NSHC determination is directed at determining what license amendments will require the Congressionally-mandated 30-day notice in the **Federal Register** and completion of any hearing granted pursuant to the Congressionally-mandated opportunity for hearing in Section 189.a. In the Commission's view, the existing NSHC criteria have been demonstrated through years of application to provide a workable standard for determining the potential safety significance of a proposed amendment for the purposes of determining whether issuance of a license amendment must await notice in the **Federal Register** and completion of any requested hearing. On balance, the Commission believes that no changes to the existing NSHC criteria are necessary in order to implement the revised change criteria in the revised § 50.59.

Recognizing the difference between the two sections, the Commission notes that if a change does not require a license amendment by virtue of the new § 50.59(c)(2)((vii) and (viii) criteria, then the change cannot be regarded as involving a ''significant reduction in a margin of safety'' under § 50.92(c)(3). If a change does require a license amendment by virtue of either § 50.59(c)(2)((vii) or (viii), the NRC would be required to determine whether the design basis limit for a fission product barrier being exceeded or altered, or the departure from the method of evaluation used in establishing the design bases or safety analyses, constitutes a significant reduction in a margin of safety. With respect to new § 50.59(c)(2)(ii) and (iv), the Commission regards these criteria as a substitute for and refinement of the ''malfunction of equipment'' aspect of the existing § 50.59(a)(2)(ii) criterion, for which there is no parallel provision in § 50.92(c)(2). Therefore, the NSHC evaluation for license amendments necessitated by the new § 50.59(c)(2)(ii) and (iv) criteria will be largely the same as the current process for evaluating license amendments necessitated by the ''malfunction of equipment'' provision in the existing § 50.59(a)(2)(ii).

N. Part 52 Changes

In the proposed rule, the Commission had proposed to revise appendices A and B to part 52 to conform with the proposed changes to § 50.59 concerning the evaluation criteria for when prior NRC approval is required for changes to certain Tier 2 information in plant-specific design control documents.

Two commenters believe that the changes to part 52 needed to be expanded to either include certain provisions or definitions, or to refer to § 50.59 to incorporate them. The Commission has decided to defer consideration of the changes in the proposed rule for part 52. The Commission anticipates other rule changes for Part 52 arising from an ongoing lessons-learned review. Further, the proposed design certification rule for the AP600 design being issued for public comment will emulate the two design certification rules in appendices A and B. Accordingly, the Commission will consider these proposed changes in an integrated manner later.

O.1. Part 72 Changes

This section first discusses the changes offered in the proposed rule on part 72, then discusses the comments received and the resolution and final rule language. The comments and rule language are discussed under subheadings relating to the specific requirements, such as for evaluation of changes, FSAR updating, and other conforming changes. A discussion of petition for rulemaking (PRM 72–3), submitted by Ms. Fawn Shillinglaw, and how it relates to the changes to part 72 is contained in section O.2.

Changes Presented in the Proposed Rule

For part 72, in the proposed rule, the Commission proposed changes to § 72.48 conforming with those made to § 50.59 and proposed to expand the scope of § 72.48 so that holders of a Certificate of Compliance (CoC) approving a spent fuel storage cask design also would be subject to the requirements of this section. The Commission envisioned that a general licensee who wants to adopt a change to the design of a spent fuel storage cask

it possesses—which change was previously made to the generic design by the certificate holder under the provisions of § 72.48—would be required to perform a separate evaluation under the provisions of § 72.48 to determine the suitability of the change for itself.

Certificate holders would be required to keep records of such changes as are allowed under § 72.48. New reporting requirements for certificate holders would be added in §§ 72.244 and 72.248, similar to existing requirements imposed on licensees in §§ 72.56 and 72.70, respectively.

In addition to these changes to § 72.48, the Commission proposed making changes in other sections of part 72 as follows:

In § 72.3 the definition for *independent spent fuel storage installation* (ISFSI) would be revised to remove the tests for evaluation of the acceptability of sharing common utilities and services between the ISFSI and other facilities; and the existing requirement in § 72.24(a) revised to reference shared common utilities and services in the applicant's assessment of potential interactions between the ISFSI and another facility. Proposed changes to § 72.56 would be conforming changes to those made to § 50.90. Changes to §§ 72.9 and 72.86 are conforming changes due to the proposed addition of new §§ 72.244, 72.246, and 72.248. The change to § 72.212(b)(4) would be a conforming change necessitated directly by the change to § 50.59, as this section in part 72 refers to § 50.59 with respect to evaluations for the reactor facility at which site the ISFSI is located.

In the proposed rule, § 72.70 was proposed for revision to conform to § 50.71(e). Requirements would be added on standards for submitting revised Final Safety Analysis Report (FSAR) pages. Requirements would also be established for reporting changes to procedures. New reporting requirements for certificate holders would be added in §§ 72.244 and 72.248, similar to existing requirements imposed on licensees in §§ 72.56 and 72.70, respectively.

New §§ 72.244 and 72.246 would be added to subpart L, to provide regulations on applying for, and approving, amendments to CoCs. A new § 72.248 would also be added to provide regulations for the certificate holder on submitting and updating the FSAR, which would document the changes it made to procedures or SSC under the provisions of § 72.48. The new § 72.248(c) would also require, in part, that updates to the FSAR use revision numbers, change bars, and a list of current pages.

Resolution of Comments Received: Of the 60 comment letters, 10 raised issues related to part 72. The following is a summary of those comments and the Commission's responses:

1. Overall Changes to Part 72

All ten of the commenters were generally supportive of the changes to part 72 and the expansion of scope of § 72.48 to include part 72 certificate holders. Nevertheless, the commenters indicated that the regulations in part 72 were more restrictive than similar regulations in part 50. The commenters pointed to certain part 72 requirements (i.e., release limits, § 72.48 evaluation criteria on occupational exposure and environmental impact, and update frequency and content for § 72.48 evaluations and FSAR changes) that do not exist in part 50 or that are more stringent than similar part 50 regulations. Overall, the commenters believe the risk from spent fuel storage casks and facilities is much less than from reactors. The commenters generally recommended that §§ 72.48 and 72.70 should be more consistent with §§ 50.59 and 50.71(e).

The Commission agrees that where possible the language used in the respective sections in parts 50 and 72 should be similar. Therefore, except where unique requirements exist (e.g., because § 72.48 involves both licensees and certificate holders, as well as facilities and spent fuel storage cask designs, and § 50.59 only involves licensees and facilities), the final rule has used consistent language in both parts 50 and 72. The NRC also notes that the comments on revising the release limits for part 72 are clearly beyond the scope of the proposed rule and no further response is made.

2. § 72.48 (Changes, Tests, and Experiments)

The ten commenters suggested that the tests in § 72.48 should be same as are used in § 50.59; in particular, five commenters said that the significant increase in occupational exposure and significant unreviewed environmental impact tests were unnecessary and therefore should be removed. One commenter indicated the unreviewed environmental impact test should be retained, but only for specific licensees.

The Commission agrees that the occupational exposure test is unnecessary because licensees are currently required by § 20.1101(b) to take actions to maintain occupational exposure as low as is reasonably achievable. The Commission also agrees that the significant unreviewed environmental impact test is unnecessary. As stated in the Finding of No Significant Environmental Impact for this rule, the changes being made in § 72.48 will allow only minimal increases in probability or consequences of accidents (still satisfying regulatory limits) without prior NRC review. Further, changes which result in more than minimal increases in radiological consequences will continue to require prior NRC approval, including NRC consideration of potential impact on the environment. Therefore, consistent with § 50.59, there is no need for this criterion to be included with respect to consideration of a change under § 72.48 and it has been deleted from the final rule.

One commenter suggested that the scope of § 72.48 should be limited to only ''important to safety'' structures, systems, and components (SSCs), not all SSCs described in the FSAR. One commenter suggested the § 50.59 term ''equipment important to safety'' should be used rather than ''SSC important to safety.'' One commenter suggested the term ''evaluations'' should be removed from the definition of the facility in proposed paragraph § 72.48(a)(3)(iii).

The Commission disagrees with these comments. The term SSCs provides a better description than equipment and is consistent with other regulations in both parts 50 and 72 (as noted earlier, the Commission is revising § 50.59 to refer to SSC instead of to equipment). The scope of these § 72.48 evaluations should include all SSCs described in the FSAR, not just those that are important to safety. The current regulations in § 72.48 require a scope that includes all structures, systems, and components described in the FSAR not just those ''important to safety.'' The Commission continues to believe that this approach is necessary to insure that changes to SSCs considered ''not important to safety'' do not have a negative impact on SSCs considered important to safety due to interactions and interfaces, and do not cause any adverse impact on public health and safety. The term ''evaluations and methods of evaluation'' is necessary for the reasons previously discussed for § 50.59 changes, and is retained in final § 72.48(a)(2)(iii).

One commenter stated that the term FSAR should not be used because Part 72 is a one step licensing process and using the term implies a second review step is required by staff. The same commenter added that the discussion of the FSAR (in the rule) could also imply that the § 72.48 process is not required to address changes until the licensee has an FSAR. (The commenter thought the

proposed rule language suggested that § 72.48 would not apply until after the FSAR was submitted). Two commenters identified concerns with the current requirement for a specific licensee to update its SAR every 6 months and its role as a hold point (requiring staff review) and the requirement to update the SAR 90 days prior to loading fuel. Two other commenters suggested that the order of §§ 72.48 (a)(2) and (a)(3) should be reversed and that the term ''required to be included'' should be deleted from proposed paragraph (a)(3)(iii).

The Commission has revised §§ 72.48, 72.70 and 72.248 in response to these comments. These changes have clarified the use of the term FSAR to avoid the interpretation that multiple staff reviews of this document will be required. The FSAR being submitted 90 days after license issuance precludes both a hold point and an additional staff review. Further the Commission agrees that providing a periodic FSAR update every 6 months and a final one 90 days prior to fuel load was an unnecessary burden, which does not exist in § 50.71(e), and these requirements have been eliminated. The Commission agrees that language was needed to indicate that the facility or design can be changed using the new process in § 72.48 after a license is issued and prior to issuing the FSAR and that has been reflected in the final rule. Sections 72.48 a(2) and a(3) have been reversed in order and the phrase ''required to be included'' has been deleted for clarity and for consistency with § 50.59.

Several commenters suggested that a different approach be taken on the margin of safety; that the terms ''minimal'', ''more than minimal'' or ''significant'' required further clarification and should be consistent with § 50.59; suggested reports of § 72.48 changes, tests, and experiments be submitted every 24 months: and that an implementation schedule be provided for the final rule.

The NRC agrees that §§ 50.59 and 72.48 should be as consistent as possible. Therefore § 72.48 has used the language adopted in response to comments on § 50.59 (see comments on § 50.59 on the use of minimal and margin of safety terminology). The NRC agrees that a 24 month reporting frequency is appropriate. The NRC has also provided direction in implementing the final rules.

One commenter suggested that licensees and certificate holders should inform each other of changes implemented under § 72.48 that affect a particular cask design, through the summary reports rather than through the FSAR update, as was stated in the proposed rule. One commenter also suggested that guidance on the timeliness of the review to be performed upon receipt of such changes be provided.

The NRC agrees with both comments and has added § 72.48 (d)(6)(i)—(iii) on providing copies of § 72.48 evaluations to other interested persons who use the particular cask design within 60-days of implementing the change (the proposed language in §§ 72.216 and 72.248 on this point has been deleted). Guidance on the timeliness of the reviews will be provided by the NRC along with other guidance information for §§ 50.59 and 72.48.

General licensees who have evaluated a proposed change under § 72.48 and concluded that a CoC amendment is required, must request that the certificate holder submit the application for amendment under § 72.244. Clarifying language was included in § 72.48 on this point.

As a result of other changes made earlier in § 72.48, the section on recordkeeping was reformatted to include subsection numbering. As part of this revision, the text in paragraphs (d)(3)(i) and (d)(3)(ii) was clarified to acknowledge those situations where the facility is no longer being used, but for which the license has not yet been terminated.

3. §§ 72.70, 72.216, and 72.248 (FSAR Updating)

Several commenters suggested that the language in §§ 72.70, 72.216, and 72.248 on updating the FSAR conform to the language in § 50.71(e). Specific changes requested included requiring a 24-month reporting period, adding a 6-month cutoff for reporting changes, clarifying requirements for the initial submittal of the FSAR, and how no changes to the FSAR are to be reported by stating that there are no changes. One commenter felt that requiring a general licensee to maintain its own FSAR (i.e., potentially separate and distinct from the certificate holder) was unnecessary and would cause confusion. One commenter felt that the process for revising the FSAR for a general licensee was confusing.

The NRC agrees that providing a 24-month FSAR update and adding the 6-month cutoff for bringing the FSAR up to date for changes made are consistent with § 50.71(e), are appropriate, and are a reduction in unnecessary regulatory burden. Lastly, the NRC believes that providing a written confirmation when no changes to the FSAR have been made provides a clear and timely record of the status of the FSAR to both the staff and the public and agrees with this comment. The NRC also agrees that having a general licensee keep a separate FSAR from that of a certificate holder is redundant and believes that requiring a separate FSAR is not necessary for the staff to maintain its regulatory oversight over general licensees. Accordingly, proposed paragraph (d) to § 72.216 has been withdrawn. In withdrawing this section, the NRC wishes to clarify that the certificate holder is not expected to incorporate § 72.48 changes made by general licensees into its FSAR; rather the certificate holder is responsible for updating the FSAR for any changes it has made under the provisions of § 72.48. Furthermore, the NRC expects certificate holders to maintain the FSAR current for any version of its cask design, which is being used to store spent fuel.

Two commenters suggested that the proposed rule language in §§ 72.70, and 72.248 that the FSAR update include a ''description and analysis of changes in procedures or in [SSC]'', was more burdensome than the existing language in § 50.71(e) that the update is to ''contain all the changes necessary to reflect information and analyses submitted. * * *''

The NRC agrees that this language could be read as requiring a separate discussion of the effects of changes beyond the SAR updates themselves, which was not the intent of the proposed rule. The language in §§ 72.70 and 72.248 has been revised to be as consistent with § 50.71(e) as possible and, in particular, refers to ''include the effects of'' changes, analyses and evaluations, but not stating that the update needs to describe each change.

In the current rule, a licensee must submit to the NRC its FSAR 90 days prior to the receipt of fuel or high level waste and this action serves as a formal notification to the regulator that fuel (or high level waste) is planned to be loaded. A number of comments viewed this requirement as overly restrictive because many changes related to cask loading included in a FSAR will not be identified or analyzed until preoperational testing is performed and, thus, the 90 day FSAR update requirement could be interpreted as another holdpoint before loading. The NRC agrees that the requirement that a FSAR be submitted at least 90 days prior to fuel load was not intended to serve as a holdpoint and in the final rule, this has been changed to require a specific licensee to submit a FSAR 90 days after receiving a license. To maintain the notification aspect of the current regulation, a new requirement

was added to § 72.80(g) to notify the NRC of the licensee's readiness to begin operation at least 90 days prior to the first loading of spent fuel or high-level radioactive waste. Specific licensees will update their FSAR every two years. Because the FSAR will be submitted before construction and preoperational testing of the ISFSI would be completed, a requirement was retained in § 72.70 to provide a final analysis and evaluation of the design and performance of SSCs taking into account information since the submittal of the application (i.e., information developed during final design, construction, and preoperational testing), in the next periodic update to the FSAR. This information is not required by the final § 50.71(e); however, it is necessary to require these actions to complete the description of the ISFSI, because of the single-step licensing process in part 72.

New reporting requirements for certificate holders will be added in §§ 72.244 and 72.248, similar to existing requirements imposed on licensees in §§ 72.56 and 72.70, respectively.

4. §§ 72.3, 72.9, 72.24, 72.56, 72.86, and 72.212 (Miscellaneous Sections of Part 72)

No specific comments were received on §§ 72.3, 72.9, 72.24 and 72.86, and the final rule language is unchanged from the proposed rule language for these sections.

Two commenters believed that § 72.56 was not clear on whether this regulation applied to specific licensees, general licensees, or both.

The NRC agrees and has revised this section to indicate it applies to specific licensees only.

One commenter suggested that § 72.56 be revised to allow licensees to apply for emergency or exigency processing of license amendment requests, similar to that allowed under certain conditions for Part 50 licensees under § 50.91(a)(5) and (6).

The NRC disagrees. The NRC currently has the authority under § 72.46(b)(2) to immediately issue an amendment to a part 72 license upon a finding that no genuine issue exists that could adversely affect public health and safety. Consequently, the NRC's authority to immediately issue an amendment to a part 72 license obviates the need for a separate emergency or exigency amendment process.

One commenter recommended that any changes to the written evaluations performed by a general licensee in accordance with § 72.212(b), in determining whether a spent fuel storage cask design can be used at a particular part 50 reactor site, should be accomplished using the requirements of § 72.48.

The NRC agrees and has revised § 72.212(b)(2)(ii) to require the general licensee evaluate any changes to the written evaluations required by § 72.212 using the requirements of § 72.48(c).

O.2 Petition for Rulemaking (PRM–72–3)

The NRC received a petition for rulemaking submitted by Ms. Fawn Shillinglaw in the form of two letters addressed to Chairman Jackson dated December 9 and December 29, 1995. The Office of General Counsel determined on March 5, 1996, that the issues presented in these letters would be treated as a petition for rulemaking. The petition requested that the NRC amend its regulations in 10 CFR part 72, ''Licensing Requirements for the Independent Storage of Spent Fuel and High-Level Radioactive Waste.'' The petition was docketed as PRM–72–3 on March 14, 1996. Ms. Shillinglaw supplemented her petition with additional information in a letter dated April 15, 1996. The NRC published in the **Federal Register** on May 14, 1996, a notice of receipt of this petition and stated the issues contained in the petition (61 FR 24249).

Specifically, the petitioner requested that the NRC amend those regulations which govern independent storage of spent nuclear fuel in dry storage casks to require that: (1) The safety analysis report (SAR) for a dry storage cask design fully conforms with the associated NRC safety evaluation report (SER) and Certificate of Compliance (CoC) before NRC certification (i.e., approval) of the dry storage cask design; (2) the revision date and number of an SAR be specified whenever that report is referenced in documents; (3) the NRC clarify the process for modification of an SAR after a cask has been certified; and (4) the NRC make available to the public, the licensees' unloading procedures. In her supplemental letter, the petitioner recommended that to eliminate confusion, the term ''CSAR'' (i.e., cask safety analysis report) be used when referring to the SAR for any dry storage cask design which has been approved by the NRC and issued a CoC.

The Commission received ten comment letters on PRM–72–3. The commenters included five members of the public, three public interest groups, and the Nuclear Energy Institute (NEI). Copies of the public comments on PRM–72–3 are available for review in the NRC Public Document Room, 2120 L Street, NW (Lower Level), Washington, DC 20003–1527. No comments were received objecting to the petition. Eight of the commenters were supportive of all, or some, of the four issues raised in PRM–72–3. One commenter (NEI), neither supported nor opposed the petition and recommended that any rulemaking action based on the petition be delayed until the NRC addressed issues in 10 CFR part 50 relating to the use of the ''FSAR'' as a licensing basis document and the application of § 50.59 in 10 CFR part 50. One commenter objected to NEI's recommendation to delay rulemaking on PRM–72–3.

The Commission has determined that PRM–72–3 issues (1), (2), and (3) should be granted, in part; and issue (4) should be denied. This notice constitutes the Commission's final action on this petition. The basis for the Commission's actions on each issue and responses to public comments received on the petition are described below.

Issue (1): Part 72 should be amended to require that the safety analysis report (SAR) for a spent fuel dry storage cask design fully conforms with the associated NRC safety evaluation report (SER) and certificate of compliance (CoC) before NRC certification (*i.e.*, approval) of the cask design.

Five comment letters were received supporting Issue (1) of PRM–72–3.

Resolution of Issue (1): In this final rule the Commission has granted, in part, the petitioner's request on this issue. This rule adds new § 72.248 to part 72 and this section addresses this issue by requiring a certificate holder to submit a final safety analysis report (FSAR) after issuance of the CoC. This rule also describes the process for periodic updates of the FSAR. Section 72.248, paragraphs (a)(1) and (a)(2) state, in part:

> Each certificate holder shall submit an original FSAR to the Commission * * * within 90 days after the spent fuel storage cask design has been approved pursuant to § 72.238. This original FSAR shall be based on the safety analysis report submitted with the application and reflect any changes and applicant commitments developed during the cask design review process. The original FSAR shall be updated to reflect any changes to requirements contained in the issued Certificate of Compliance (CoC). * * *

The Commission agrees with the petitioner that the FSAR should be fully conformed (*i.e.*, consistent) with the operating limits contained in the CoC, because the FSAR contains the design information the staff used to make its safety finding and to approve the dry storage cask design for use. The Commission disagrees with the petitioner's request that the FSAR be conformed to the NRC SER for the dry storage cask design, and that the FSAR be submitted to the NRC before approval

of the cask design (*i.e.*, issuance of the CoC). The NRC SER contains staff conclusions on the adequacy of the cask design, not applicant commitments to the NRC on the cask design. Therefore, the Commission believes it is not necessary to conform the FSAR to the issued NRC SER before the CoC can be issued. The NRC SER is available in the NRC Public Document Room for public review.

The Commission disagrees with the petitioner's request that issuance of the CoC (*i.e.*, placement of the CoC in the list at § 72.214 which enables a general licensee to use the cask design) be delayed until after the certificate holder has submitted an FSAR to the NRC (*i.e.*, updated the topical safety analysis report, submitted with its application for approval of a dry storage cask design, to ensure that the SAR is consistent (fully conforms) with the approved CoC). This final rule codifies as a regulation the NRC's current approach which, administratively, requires a certificate holder to update its SAR after issuance of the CoC to ensure it is consistent with the issued CoC. For administrative purposes, the Commission prefers that the original FSAR be submitted to the NRC, within 90 days after the CoC is issued, so that the certificate holder can include [conform] in the FSAR any conditions from the issued CoC. The FSAR does not need to be conformed to the CoC, before the CoC is issued, because this action does not provide any new information the NRC would need to make a determination that the cask design meets the requirements of part 72, subpart L, and is acceptable for use.

The Commission also disagrees with the petitioner's supplemental information to use the term ''cask safety analysis report (CSAR)'' when referring to the SAR submitted after the NRC approves a cask design. Instead, the Commission is using the term ''final safety analysis report (FSAR)'' to identify the SAR submitted after the NRC approves a cask design. The use of the term ''FSAR'' is the accepted practice by industry and will not cause confusion. Further, this approach will ensure consistency between parts 50 and 72, because the term ''FSAR'' is used by §§ 50.59, 50.71(e), 72.48, and 72.70 in this final rule.

Issue (2): Part 72 should be amended to require that the revision date and number of an SAR be specified whenever that report is referenced in documents.

Five comment letters were received supporting Issue (2) of PRM–72–3.

Resolution of Issue (2): In this final rule the Commission has granted, in part, the petitioner's request on this issue. This rule adds new § 72.248 to part 72 which requires that revision numbers, change bars, and a list of current pages be included in any revisions to the FSAR. Section 72.248, subparagraphs (c)(2) and (c)(3) state:

> The update [of the FSAR] shall include a list that identifies the current pages of the FSAR following page replacement. Each replacement page shall include both a change indicator for the area changed, *e.g.*, a bold line vertically drawn in the margin adjacent to the portion actually changed, and a page change identification (date of change or change number or both).

These features will clearly identify what has been changed, as well as the date of the change, in any revision to a FSAR. While § 72.248 will provide a process for requiring revisions to the FSAR be clearly indicated, the Commission has denied the portion of the petitioner's request to amend part 72 to require a FSAR revision number and date be specified when the FSAR is referenced in other documents (*e.g.*, an application for a part 72 license or CoC). Instead, the NRC will revise guidance documents for part 72 activities (*e.g.*, regulatory guides and standard review plans) to require specification of the FSAR revision date and number whenever a FSAR is referenced in another document. The Commission believes addressing this portion of the petitioner's request in guidance documents rather than in a regulation is more appropriate and meets the intent of the request.

Issue (3): The NRC must clarify the process for modification of a safety analysis report after a cask [design] has been certified (*i.e.*, approved by the NRC).

Five comment letters were received supporting Issue (3) of PRM–72–3 including a comment from the petitioner clarifying that she believed that ''any changes to the SAR (FSAR) should be done by the amendment process of rulemaking.'' Four commenters also recommended that any changes made to the SAR (including a generic SAR), the cask design, or the CoC should require rulemaking and public comment or a public hearing. One commenter also suggested that the regulations be amended to include more detail on who can make changes to dry storage cask designs and whether vendors (*i.e.*, certificate holders) can make these changes.

Resolution of Issue (3): The Commission is revising § 72.48 to allow a certificate holder to make certain types of changes to a cask design, or procedures, or to conduct tests and experiments, not described in the FSAR (as updated) without requiring prior NRC approval if the criteria in § 72.48(c) are met. If these criteria are not met, a certificate holder must obtain a CoC amendment pursuant to § 72.244. Following such changes (either resulting from the § 72.48 process or the CoC amendment process), the certificate holder must update the FSAR as required by § 72.248. Section 72.248, paragraphs (b), (b)(2), and (b)(3) state, in part:

> The (FSAR) update shall include the effects of: All safety analyses and evaluations performed by the certificate holder either in support of approved CoC amendments, or in support of conclusions that the changes did not require a CoC amendment in accordance with § 72.48. All analysis of new safety issues performed by or on behalf of the certificate holder at Commission request. The information shall be appropriately located with the updated FSAR.

The Commission is seeking to reduce any unnecessary regulatory burden placed on its licensees and certificate holders without compromising safety. The dry storage cask design review process and the analysis acceptance criteria are defined in the NRC's standard review plans. This final rule allows licensees and certificate holders to make changes to the cask design, without obtaining prior NRC approval, for changes which do not significantly impact the ability of the cask to perform its intended functions. The impact of these changes are then incorporated into an updated FSAR, which is submitted to the NRC. Requiring that all changes to a cask design or changes to a FSAR be reviewed and approved by the NRC through the rulemaking amendment process, including either a public comment period or a public hearing, defeats these efforts with no discernable increase in safety. Further, while rulemaking is currently utilized to amend a CoC, the Commission is presently re-examining the appropriateness of this procedure. Therefore, the Commission has granted petitioner's request to clarify the process for modification of an FSAR after the NRC has approved the cask design and issued the CoC, but has rejected the request to require all changes to a cask design, or the FSAR, be made via a rulemaking amendment process.

Issue (4): The NRC should make cask unloading procedures publicly available.

Five comment letters were received supporting Issue (4) of PRM–72–3. One commenter also requested that the NRC review, approve, and have tested unloading procedures prior to their being implemented. One commenter suggested suspending all cask loading

activities until the NRC reviews procedures [for loading and unloading] and appropriate tests are completed.

Resolution of Issue (4): The NRC does not approve or test a licensee's loading or unloading procedures, rather the licensee is responsible for development, verification, and validation of the loading and unloading procedures. The NRC inspects the licensee's procedures (*i.e.*, reviews the procedures and observes the licensee implementing them) to determine whether the procedures will provide reasonable assurance that public health and safety will be adequately protected.

The Commission does not agree that cask unloading procedures should be required to be public documents. First, in order to make these procedures publicly available, either the NRC must possess the procedures, or the licensee must place the procedures in the public domain. The Commission's position is that only those documents necessary to demonstrate that a dry storage cask is designed to meet the requirements of part 72, subpart L, need to be submitted to the NRC on the docket (*i.e.*, to allow the NRC to determine that the cask design is acceptable for use). Cask loading and unloading procedures are implementing documents required by the CoC which are developed and implemented by the licensee.

Although the NRC does not possess the procedures, they are subject to inspection by NRC staff. However, even during inspection activities, NRC generally does not take possession of the procedures. Therefore, the unloading procedures remain the property of the licensees and are not available to the public. The NRC's inspection program for part 72 licensees requires the inspection of loading and unloading activities, including a review of applicable procedures, before a licensee begins cask loading. NRC inspection personnel perform these activities at the licensee's site and observe the licensee's preoperational testing and dry run activities to assess the adequacy of these procedures and the readiness of the licensee to begin loading spent fuel. The results of these inspections are documented in reports which are placed in the NRC Public Document Room and are available for public review.

Furthermore, requiring part 72 licensees to submit their implementing procedures to the NRC (*i.e.*, operating procedures such as loading and unloading procedures, maintenance procedures, surveillance procedures, radiation protection procedures, security procedures, emergency procedures, and administrative procedures), as well as any revisions to these procedures, would impose a huge paperwork burden on both the licensee and on NRC staff without a corresponding safety benefit. Therefore, Issue (4) is denied.

Additional Public Comments on the Petition

In addition to the specific comments that were received on the petition that are discussed above, a number of comments were received on related and unrelated subjects.

Comment: Five comments were received on the VSC–24 cask design being used at the Palisades and Point Beach plants and incidents related to the VSC–24 cask design.

Response: The Commission considers these comments beyond the scope of this petition and this rulemaking.

Comment: Two comments were received suggesting that when a change to an approved dry storage cask design is requested, that the existing CoC be suspended until the changes are approved by the NRC.

Response: The Commission considers these comments would impose an unreasonable burden on part 72 licensees. Suspending a CoC solely on the basis of receiving a change and not on the basis of a compelling safety need, would imply that any casks manufactured under the CoC, which are in use by part 72 licensees, should be taken out of service (i.e., unloaded) upon receipt of any request to revise the cask design. Requiring that a cask be unloaded in these circumstances would impose an unreviewed backfit on the part 72 licensees using that cask design and would also result in unnecessary occupational exposure to licensee workers.

Comment: One comment was received recommending that any rulemaking action based on PRM–72–3 be delayed until the NRC addressed issues in 10 CFR part 50 relating to the use of the ''FSAR'' as a licensing basis document and the application of § 50.59 in 10 CFR part 50. Another commenter disagreed with this recommendation to delay rulemaking on PRM–72–3.

Response: The Commission believes that issuance of this final rule resolves this comment.

Comment: One commenter requested that the NRC prohibit general licensees from using § 72.48 and only permit cask design changes via rulemaking. One commenter recommended that any identification of an unreviewed safety question submitted to the NRC should require that NRC conduct a hearing on the issue. One commenter suggested that the NRC approve each § 72.48 safety evaluation and place each evaluation in the public document room. One commenter suggested that the NRC ''vacate the generic ruling procedure'' subpart L and require that public hearings be held prior to NRC cask certification. One commenter suggested a moratorium on additional dry cask storage cask designs.

Response: Petitioner's concerns related to cask certification issues; in particular, the process for modifying a SAR for a dry cask storage design before and after issuance of the CoC. These comments raise broad policy issues that go well beyond the scope of this petition and rulemaking.

O.3 Part 71 (Transportation) Comments

Several commenters stated that a change control process similar to § 72.48 should be established in part 71 for transportation. These commenters noted that for dual-purpose casks, used for both transportation and storage, the lack of a process in part 71 would limit the usefulness of the authority provided under § 72.48. Although the Commission agrees that this comment has merit, adding this authority to part 71 is beyond the scope of the proposed rule. In response to these comments, the Commission will consider adding ''§ 71.48-type'' change authority as part of a currently planned rulemaking for part 71 intended to update requirements for compatibility with the most recent International Atomic Energy Agency transportation standards.

P. Other Topics Discussed in the Notice and Comments Not Related to Preceding Topic Areas

The **Federal Register** notice containing the proposed rule also solicited comments on particular topics that were discussed in the preceding sections. In addition, comments were received on a number of aspects not directly related to the rule language itself, such as guidance, enforcement policy, the regulatory (and backfit) analysis, or on other issues.

Guidance

Many comments were received on the subject of guidance. Many suggested that NEI and NRC work together to develop guidance, and that the guidance be endorsed before the revised rule becomes effective. Commenters also requested examples of such matters as interdependent changes, minimal increases, and screening of changes (as discussed in Sections B and G).

The NRC agrees that guidance is important, and notes that NEI has stated its willingness to revise existing guidance to conform with the final rule such that NRC could endorse it. The

NRC will work with interested stakeholders to agree upon guidance that includes consideration of these issues. Further, NRC is delaying the required implementation of the rule for several months to allow time for guidance to be revised.

Fuel Burnup Limits

One commenter stated that NRC should clarify the acceptance limits of § 51.55 concerning burnup assumptions for the transportation of spent fuel for BWRs, as well as clarifying if this is subject to § 50.59 evaluations.

The Commission notes that a proposed rule (§ 51.52, not § 51.55 as cited by the commenter) was recently published on February 26, 1999 (64 FR 9884), concerning environmental implications of higher burnup fuel for transportation of spent fuel. Transportation of fuel is not covered by § 50.59 (as noted elsewhere in this notice, the Commission is considering revisions to part 71 that would add a change control process similar to § 50.59 that could be used for changes to transportation requirements under part 71). If the commenter was asking whether higher burnup fuel can be used without NRC approval, it is unlikely that such a change would satisfy the criteria of § 50.59, either because TS changes would be involved, other requirements (*e.g.*, § 50.46) would not be met, or the burnup being considered would be outside the range of what was approved in the topical reports for the fuel.

Alternative Criteria

Two commenters proposed the use of alternate criteria for reactors that are being decommissioned. One commenter suggested that a ''margin'' criterion is not necessary, but that a criterion on environmental impact might be appropriate.

The Commission notes that the new criteria in the final rule that replace the ''margin'' criterion are appropriate for a reactor being decommissioned. Further, § 50.82(a)(6) specifies that licensees shall not perform any decommissioning activities that result in significant environmental impact not previously reviewed. Section 50.82(a)(4) requires that the post-shutdown decommissioning activities report include a discussion that provides the reasons for concluding that the environmental impacts associated with site-specific decommissioning activities will be bounded by appropriate, previously issued environmental impact statements. For these reasons, the Commission concludes that a criterion on environmental impact is not needed.

The second commenter stated that the scope of § 50.59 should be limited to systems related to spent fuel pool cooling or radiological waste.

The Commission notes that the staff involved in requirements for decommissioning are developing guidance on the scope of information required to be in an updated FSAR for a reactor undergoing decommissioning. This effort is examining what information should be retained in an FSAR for these facilities. The Commission believes that defining the scope of information required to be in the FSAR for a reactor undergoing decommissioning would be the best way to address the apparent concern raised in this comment, rather than by modifying § 50.59 as recommended by the commenter.

Regulatory Analysis

Some comments were received on the regulatory analysis, primarily that NRC underestimated the impacts on NRC and licensees of the number of license amendments that would result, or the burden on part 72 licensees. These comments would appear to reflect a view that the proposed rule would require more amendments than are currently required, perhaps because of differences between the proposed rule language and existing practice of some licensees using NEI 96–07, or depending upon which formulation of ''margin of safety'' was ultimately adopted. The Commission has prepared a final regulatory analysis that reflects the final rule language and consideration of the public comments. The Commission does not agree that the final rule language will result in more amendments than presently arise under the existing rule.

Need for Further Notice and Comment

Two commenters stated that the Commission should ensure that the final rule is within the bounds of the proposed rule notice, or should provide opportunity for public comment on substantive changes. The Commission has examined the final rule for consistency with the proposed rule and concludes that the final rule is within the bounds of the proposed rule, taking due consideration of the public comments that sought clarification and revisions in some respects, as well as greater consistency between the Part 50 and Part 72 requirements.

Different Process for non-TS Issues

Several commenters believe that the license amendment process is not well suited to the type of changes that require review under § 50.59(c)(2), but that do not involve changes to the TS or the license directly. They believe that the Commission should establish a different review process for such changes, such as letter approval.

The Commission notes that at one time (until 1974), § 50.59 did contain two approval processes, one for license amendments, and the other for ''authorizations.'' The rule was revised in 1974 to delete the ''authorization'' process and to handle all the required approvals as license amendments. The Commission notes that the present rulemaking provides some relaxation in the evaluation criteria. Therefore, the NRC has responded to concerns about having to process a license amendment for ''minimal'' changes. The current process provides opportunity for public participation in the process under the provisions of § 50.90 for changes that exceed the criteria, and for public knowledge, through the summary reports, of those matters that did not require prior approval. Therefore, the Commission does not plan to establish a different process.

Other Definitions

Some commenters felt that NRC should provide better definitions of certain terms that appear in § 50.59 (and elsewhere), specifically, for ''design bases'' and for ''important to safety.''

The Commission notes that § 50.2 does define design bases, but also notes that efforts are underway within the agency to enhance understanding of what constitutes design basis information, through possible development of criteria and examples. Concerning ''important to safety,'' the Commission does not believe that a definition is critical to implementation of the rule, since the set of SSCs viewed as important to safety was arrived at during the license review and are described in the FSAR. Thus, lack of an established definition is not an impediment to implementation of the rule (the Commission notes that for part 72, a definition is provided for SSC important to safety).

Applicability to Part 76

In its development of the proposed rule, as discussed in SECY–98–171, the staff recommended exclusion of part 76 (''Certification of Gaseous Diffusion Plants'') from those regulations for which rule changes were being proposed. The basis for this recommendation was a lack of design detail currently available in the safety analysis reports for these plants. One commenter argued that the flexibility provided by the revised evaluation criteria should also be included in § 76.68 (this section contains

requirements very similar to existing §§ 50.59 and 72.48). This commenter stated that the process by which changes are evaluated should not vary based on the detail of the description being changed.

The Commission notes that the gaseous diffusion plants (GDP) have significantly less design basis information than is currently available for reactor facilities. The lack of design detail and lack of understanding of the design basis has been documented in the Compliance Plans for the GDPs, in NRC inspection reports, and is evident in the GDP SARs. The Commission concludes that successful implementation of a change control process is dependent upon the level of knowledge about the design basis of the plant equipment or operation being changed. At the present time, the Commission does not believe that additional flexibility is appropriate for part 76 facilities.

Q. Enforcement Policy

Some commenters raised issues about how enforcement decisions would be made during the transition period, and following implementation, particularly with respect to evaluations performed in the past.

The Commission recognizes that it will take time to revise existing industry guidance and to revise procedures, and conduct training on the new rule provisions before the rule can be fully implemented. There will still be the possibility of finding previous plant changes performed prior to the implementation of the new rule that would be potential violations of the previous rule. The Commission has concluded that enforcement of potential violations of §§ 50.59 and 72.48 for past evaluations will be handled as described below, and also in accordance with the NRC Enforcement Policy, NUREG–1600, Revision 1.

Following publication of the revised rule, for situations that violate the ''old'' requirements, but that would not be violations had the evaluation been performed under the revised rule, the NRC will exercise enforcement discretion pursuant to VII.B.6 of the Enforcement Policy and not issue citations against the ''old'' rule. The staff will document in inspection reports that the issue was identified, but that no enforcement action is being taken because the revised rule requirements are met. However, for those situations identified prior to the effective date of the revised rule that involve a violation of the existing rule requirements but that would not be violations under the revised rule, licensees still need to take the required corrective action within a reasonable time frame commensurate with safety significance to avoid the potential for a willful violation of NRC requirements.

The NRC plans to maintain an enforcement panel made up of NRR (and NMSS as applicable), OE, and OGC representatives for some months after publication to maintain consistency. Additional enforcement policy changes that may be applicable to violations of §§ 50.59 or 72.48 are under consideration. The Commission intends to revise NUREG–1600, Rev. 1, ''General Statement of Policy and Procedures for NRC Enforcement Actions,'' consistent with this enforcement approach prior to the effective date of the rule.

R. Implementation

The Commission recognizes the role that regulatory guidance will play in effective implementation of the revisions to the rule. Existing guidance (*e.g.*, NEI 96–07 and NRC inspection guidance) needs to be revised to conform with the rule changes. To allow time for the guidance to be revised, and for licensees to implement the revised rule provisions using the revised guidance, the Commission has established that the rule changes to part 50 will become effective 90 days after promulgation of the final regulatory guidance.

For part 72 facilities, current schedules for guidance would result in availability at a time later than that anticipated for the guidance for part 50. Accordingly, the effective date for these sections is longer, set at 18 months from publication of the rule in the **Federal Register**. For those sections in part 72 for which no guidance is needed, as for instance, §§ 72.244 and 72.246, the effective date is 120 days from publication.

III. Section by Section Analysis

10 CFR Part 50

10 CFR 50.59

As discussed in more detail above, § 50.59 is being restructured and revised to have the following components:

Paragraph (a): This is a new paragraph that contains definitions of terms used in the rule. The terms establish requirements for when evaluations are to be conducted to determine if the proposed changes, tests, or experiments meet the criteria to require prior NRC approval. Accordingly, definitions are given for ''change,'' ''facility as described in the final safety analysis report (as updated) * * *,'' ''procedures as described * * *,'' ''tests and experiments not described * * *'' etc. The specific definitions were discussed in the preceding sections.

Paragraph (b): Relocation into one paragraph of existing applicability provisions. Section 50.59 applies to facilities licensed under part 50, including power reactors and non-power reactors, whether operating or being decommissioned.

Paragraph (c)(1): Relocation and clarification of existing provisions establishing which changes, tests, or experiments require evaluation and process for receiving approval when necessary. The provisions now use the terms defined in paragraph (a), and refer to the ''final safety analysis report (as updated),'' rather than to ''safety analysis report.'' The terminology of ''unreviewed safety question'' has been replaced by referring to the need to obtain a license amendment.

Paragraph (c)(2): Reformatting of the (existing) evaluation requirements into seven distinct statements of the criteria, addition of an eighth criterion, and revision of the existing criteria for when prior NRC approval of a change, test, or experiment is required. Specifically, language of ''more than a minimal increase in frequency (or likelihood),'' and of ''more than a minimal increase in consequences'' was inserted in the criteria concerning accidents and malfunctions, and rule requirements were revised from ''may be created'' to ''would create'' concerning creation of accidents of a different type and malfunctions of structures, systems, and components important to safety with a different result (instead of existing language of malfunction of equipment of a different type). In addition, the existing criterion on ''margin of safety'' was replaced by a criterion focusing upon design basis limits for fission product barriers being exceeded or altered, and a new criterion was added to control evaluation methods. These revisions clarify the criteria for when prior approval is needed and allow some flexibility for licensees to make changes that would not affect the NRC basis for licensing of the facility.

Paragraph (c)(3): This is a new paragraph containing the requirement that evaluations and analyses performed since the last FSAR update was submitted need to be considered in performing evaluations of changes to the facility or procedures, or for conduct of tests and experiments. This paragraph is consistent with the terminology of ''final safety analysis report (as updated).''

Paragraph (c)(4): This is a new paragraph that states that § 50.59 requirements do not apply to changes to

the facility or procedures when other regulations establish more specific criteria for such changes. Thus, this paragraph clarifies that duplicative reviews in accordance with § 50.59 are not necessary for information that is described in the FSAR, but for which other regulations provide standards for change control.

Paragraph (d)(1): Renumbered paragraph with (existing) recordkeeping requirements. The text was simplified concerning which records are needed, and conforming changes were made for the change in terminology from ''safety evaluation'' to ''evaluation.''

Paragraph (d)(2): Renumbered paragraph with (existing) reporting requirements. The text was simplified to state that summary reports must be submitted at least once every 24 months, instead of the existing statement that refers to submitting the summary report along with the FSAR update submittal or annually. This revision will allow all facilities to submit the report on a 24 month frequency.

Paragraph (d)(3): Renumbered paragraph on retention of records. The text was revised to cover retention of records required by § 50.59 until the term of any renewed license has expired.

10 CFR 50.66

This section specifies requirements for thermal annealing of a reactor pressure vessel. The changes to § 50.66 are to conform existing language referring to unreviewed safety questions, and to updated final safety analysis report, to the language in revised § 50.59.

10 CFR 50.71(e)

This section discusses requirements for periodic updating of the final safety analysis report, to reflect the effects of changes made either under § 50.59, or through license amendments, or effects of new analyses. The changes to this section are to conform language with respect to unreviewed safety question, safety evaluation, and reference to the final safety analysis report (as updated), with the language in revised § 50.59, as well as other minor wording changes as noted above (e.g., ''approved'' license amendments).

10 CFR 50.90

A portion of existing § 50.59(c) is being relocated into this section. This change places the requirements for changes to technical specifications themselves (not a result of a change, test or experiment as defined in § 50.59), into the rule section on amendments to licenses rather than retaining the requirement in the section on changes to the facility.

10 CFR Part 72

Most of the revisions in part 72 mirror those made to § 50.59. As for part 50, other changes are needed with respect to updating of safety analysis reports, and in other sections for consistent terminology.

10 CFR 72.3

The definition of ''independent spent fuel storage installation'' is being revised to remove the tests for evaluation of the acceptability of sharing common utilities and services between the ISFSI and other facilities. (Section 72.24 is being revised to include this evaluation.)

10 CFR 72.9

Paragraph (b) is being revised as a conforming change to include in the list of information collection requirements the new requirements in §§ 72.244 and 72.248 for amendments and for updates to the safety analysis reports by CoC holders.

10 CFR 72.24

This section is being revised to reference shared common utilities and services in the applicant's assessment of potential interactions between the ISFSI and another facility (previously covered by § 72.3).

10 CFR 72.48

This section is being totally reformatted and revised, as discussed above for § 50.59. Specifically, it contains the following:

Paragraph (a): This paragraph now specifies definitions for terms such as ''change'' and ''facility as described in the Final Safety Analysis Report (as updated).'' Additionally, the term ''Final Safety Analysis Report (FSAR) (as updated)'' has been defined to provide greater clarity and consistency with § 50.59 and other sections of part 72.

Paragraph (b): This paragraph specifies that this section is applicable to general and specific licensees for an ISFSI or MRS, and to spent fuel storage cask certificate holders.

Paragraph (c): Paragraph (c)(1) establishes the conditions a licensee or certificate holder must meet in order to (1) make changes to the facility or spent fuel storage cask design as described in the FSAR, or (2) make changes to the procedures as described in the FSAR, or (3) conduct tests or experiments not described in the FSAR, without prior NRC approval. Those conditions are that: (1) A change to the technical specifications is not required; (2) a change in the terms, conditions or specifications incorporated in the CoC is not required; and (3) the change, test, or experiment does not meet any of the criteria in paragraph (c)(2).

Paragraph (c)(2) lists the specific criteria which, if met, permit a licensee or certificate holder to make the changes, or conduct the tests or experiments, described in paragraph (c)(1) without NRC approval. These new criteria revise existing criteria and conform with the criteria adopted in § 50.59(c)(2). Two existing criteria involving a significant increase in occupational exposure or a significant environmental impact have been deleted. Paragraph (c)(3) states that changes made but not yet reflected in the FSAR update also need to be considered in making the determination under paragraph (c)(2). Paragraph (c)(4) states that § 72.48 does not apply to changes to the facility or procedures when the regulations establish other change control processes for such changes.

Paragraph (d): This paragraph contains the recordkeeping requirements and reporting requirements. In the final rule, subsection numbers were included for clarity. For records, the rule is revised to refer to the records of determinations of the need for license or certificate of compliance (CoC) amendments, rather than to records involving unreviewed safety question determinations. The time frame for submitting summary reports in (renumbered) paragraph (d)(2) was revised from 12 months to 24 months. The filing requirements for the summary reports are modified to be consistent with § 72.4 (Communications).

Paragraphs (d)(3), (d)(4) and (d)(5) contain record retention requirements. The retention requirements for changes to procedures and conduct of tests and experiments were revised to be 5 years (instead of until termination). These time frames are more consistent with those in § 50.59, and also reflect that while facility changes need to be maintained until termination, other records are of less importance after a period of time such as 5 years. Paragraph (d)(3)(i) and (d)(3)(ii) are renumbered and clarified with respect to when records no longer need to be maintained.

New paragraph (d)(6) requires licensees who make changes under § 72.48 to provide copies of the records of such changes to the certificate holder for the cask, and for the certificate holders who make changes to provide

records to the general and specific licensees using that cask, within 60 days of implementing the changes.

10 CFR 72.56

Existing § 72.48(c)(2) is being relocated into this section. This is a parallel change to that for §§ 50.59 and 50.90. The Commission is placing the requirements for changes to license conditions in the rule section on amendments to licenses instead of in the section on changes to the facility.

10 CFR 72.70

This section contains requirements for updating of safety analysis reports by licensees. Section 72.70 was reformatted and revised to conform more closely with the update requirements in § 50.71(e), as well as those in (new) § 72.248. The update frequency is being revised from 12 months to 24 months. Paragraphs (a) and (b) are being revised to use the terms ''Final Safety Analysis Report,'' ''FSAR,'' and ''as updated.'' Paragraph (a) is also being revised to indicate the original FSAR for a specific licensee will be submitted within 90 days of issuance of the license. Final analyses associated with completion of construction or preoperational testing will be provided in the next periodic update of the FSAR. The requirement for a licensee to submit a FSAR 90 days before planned receipt of spent fuel has been removed, in lieu of a notification under § 72.80(g) by the licensee 90 days before ISFSI operation commences. The section is also being revised to add the requirement that changes to procedures be reflected in the periodic updates of the FSAR. New paragraph (c) is being added to provide requirements on submitting revisions to the FSAR for specific licensees, including provisions for replacement pages, a cut off date for changes, time frame to file, and provisions for updating if no changes were made.

10 CFR 72.80

New paragraph (g) is being added to this section to require a specific licensee to notify the NRC at least 90 days in advance of its readiness to commence ISFSI (or MRS) operations This requirement replaces a requirement in present § 72.70(a) that an FSAR be submitted to the Commission at least 90 days prior to the planned receipt of spent fuel or high-level waste. This requirement thus ensures that the NRC is informed in advance of licensee plans to use the facility so that appropriate oversight activities can be conducted.

10 CFR 72.86

Paragraph (b) currently includes those sections under which criminal sanctions are not issued. This paragraph is being revised to add §§ 72.244 and 72.246 as a conforming change to reflect that certificate holders who fail to comply with these new sections would not be subject to the criminal penalty provisions of section 223 of the Atomic Energy Act (AEA). New § 72.248 has not been included in paragraph (b) to reflect that certificate holders who fail to comply with this new section would be subject to the criminal penalty provisions of section 223 of the AEA.

10 CFR 72.212(b)(2)

Paragraph (b)(2)(i) retains the current rule language but has been renumbered and reordered for clarity as a result of the addition of paragraph (b)(2)(ii). Paragraph (b)(2)(ii) was added to require that the general licensee evaluate any changes to the written evaluations required by § 72.212 using the requirements of § 72.48(c).

10 CFR 72.212(b)(4)

The change to this section is to conform the reference to § 50.59 provisions, specifically to change from the terminology of unreviewed safety question to referring to the need for a license amendment for the facility (that is, the reactor facility at whose site the independent spent fuel storage installation is located).

10 CFR 72.216

In the proposed rule, a new paragraph (d) would have been added to present requirements for a general licensee to submit annual updates to a final safety analysis report (FSAR) for the cask or casks approved for spent fuel storage that are used by the general licensee. In the final rule, this section was withdrawn because the Commission concluded that it was not necessary for general licensees to submit updates to the safety analysis report for the approved cask design that they are using for storage.

10 CFR 72.244

This new section presents requirements for how a certificate holder is to submit an application to amend the certificate of compliance (CoC). This section is similar to the requirements in § 72.56 for licensees to apply for an amendment to their license.

10 CFR 72.246

This new section presents requirements for approval of an amendment to a CoC. This section is similar to the requirements in § 72.58 for approval of an amendment to a license.

10 CFR 72.248

This new section presents requirements for submittal of periodic updates to an FSAR associated with the design of a spent fuel storage cask which has been issued a CoC. This new section also states that the changes to procedures and SSC associated with the spent fuel storage cask and which are made pursuant to § 72.48 would be included in the update. This section is similar to the requirements in § 72.70 for submission of updates to the FSAR associated with a part 72 license and to the requirements in § 50.71(e) for power reactor FSAR updates.

IV. Finding of No Significant Environmental Impact

The Commission has determined under the National Environmental Policy Act of 1969, as amended, and the Commission's regulations in subpart A of 10 CFR part 51, that this rule, as adopted, will not have a significant impact on the environment. The rule changes are of two types: those that relate to the processes for evaluating and approving changes to licensed facilities and those that involve the degree of potential change in safety for which changes can proceed without NRC review. The process changes will make it more likely that planned changes are properly reviewed and approved by NRC when necessary. With respect to the criteria changes, only minimal increases in frequencies of postulated design basis accidents will be allowed without prior NRC review. All changes to the Technical Specifications, which are the operating limits and other parameters of most immediate concern for public health and safety, will continue to require prior NRC review and approval. Changes to the facility that would involve an accident of a different type from any already analyzed require prior approval. Further, changes that result in more than minimal increases in radiological consequences will continue to require prior NRC approval, including NRC consideration as to whether there is a potential impact on the environment. Therefore, the Commission concludes that there will be no significant impact on the environment from this rule. This discussion constitutes the environmental assessment and finding of no significant impact for this rulemaking.

V. Paperwork Reduction Act Statement

This rule amends information collection requirements that are subject

to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). The proposed rule was submitted to the Office of Management and Budget for review and approval of the information collection requirements. Existing requirements were approved by the Office of Management and Budget approval numbers 3150–0011 and 3150–0132.

The rule changes affect information collection requirements through the existing reporting requirements in § 50.59 for a summary report of changes, tests and experiments, performed under the authority of § 50.59 as well as recordkeeping requirements. Similar requirements exist in § 72.48 for licensees under part 72. In addition, revisions are being made to the requirements in § 72.70 and (new) 72.248 for submittal of updates to the safety analysis reports. Further, the final rule establishes recordkeeping and reporting requirements for CoC holders who make changes to an approved storage cask design in accordance with § 72.48.

The public reporting burden for this information collection request was estimated in the proposed rule to average 3100 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the information collection. The Commission had estimated that there would be only a slight increase in burden associated with these proposed changes over the existing burden. For the final rule, certain of the provisions that might have resulted in an increase in burden have been removed; therefore, the Commission now concludes that the final rule would result in an overall reduction in reporting and recordkeeping burden, other than for the estimated effort required for a one-time revision to procedures and training. Therefore, the present estimate of the public reporting burden for this information collection request under the final rule is 2900 hours per response.

Public Protection Notification

If a means used to impose an information collection does not display a currently valid OMB control number, the NRC may not conduct or sponsor, and a person is not required to respond to the information collection.

VI. Regulatory Analysis

The Commission has prepared a regulatory analysis for this rulemaking. The analysis sets forth the objectives of the rulemaking, the alternatives considered, and examines the values and impacts of the alternatives considered by the Commission. The alternatives considered in this analysis include no action, issuance of guidance only, or rulemaking. The analysis is available for inspection in the NRC Public Document Room, 2120 L Street NW., (Lower Level), Washington, D.C.

VII. Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980, (5 U.S.C. 605(b)), the Commission certifies that this rule will not, have a significant economic impact on a substantial number of small entities. This rule affects only the licensing, operation and decommissioning of nuclear power plants, nonpower reactors, and independent spent fuel storage facilities (including cask certificate holders). The companies that own these facilities do not fall within the scope of the definition of ''small entities'' set forth in the Regulatory Flexibility Act or the Small Business Size Standards set out in regulations issued by the Small Business Administration at 13 CFR part 121.

VIII. Backfit Analysis

The Commission has evaluated these rule changes under the backfitting requirements in §§ 50.109 and 72.62. The Commission does not regard the changes to be backfits as defined in §§ 50.109(a)(1) and 72.62(a), as applicable. Accordingly, a backfit analysis applicable to these changes has not been prepared. However, the Commission has prepared a regulatory analysis which sets forth the objectives of the rulemaking changes, the alternatives that were considered, and the expected benefits and costs associated with the rulemaking changes. The Commission regards this analysis as providing for a disciplined approach for evaluating the impacts of the proposed changes, which satisfies the underlying purposes of the backfitting requirements in §§ 50.109 and 72.62.

Changes to Section 50.59

Section 50.59 defines the circumstances under which holders of nuclear power plant operating licenses may make changes to and conduct tests or experiments at their facilities without prior NRC review and approval. In this rulemaking, new definitions are added to § 50.59 (*e.g.*, the definitions for ''change,'' and ''facility as described in the final safety analysis report (as updated)''), and the structure and language of the rule were modified (*e.g.*, the addition of a new applicability section, and the removal of the term, ''unreviewed safety question''). These changes constitute clarifications of the existing rule, and codification of existing NRC practice and interpretations of terminology which are undefined by the current rule. Clarifications and codification of existing NRC interpretation and practice do not constitute a generic backfit (although the application of the revised rule may constitute a plant-specific backfit). The new criteria in § 50.59(c)(2)(i), (ii), (iii), (iv), (v) and (vi) are being added primarily [4] for the purpose of providing additional flexibility to licensees to make changes and conduct tests without having to obtain prior NRC review and approval. Each of these changes constitute permissive relaxations [5] from the superseded § 50.59(a)(2)(i) and (ii) criteria. Permissive relaxations are not considered to be backfits, inasmuch as a licensee will continue to be in compliance with the final rule even if it uses its existing procedures and the superseded criteria for implementing § 50.59. The new criteria in § 50.59(c)(2)(vii) and (viii) together constitute replacements for the superseded § 50.59(a)(2)(iii) criterion on ''margin of safety.'' As noted in Section J, these two criteria together, in place of a criterion on margin of safety, explicitly cover those margins that the Commission believes are important to address in this evaluation process—the first being the margin that exists in the limits that are to be met, and the second being the margin that exists from the conservatisms included in the methods used to demonstrate that requirements are met. The replacement criteria were thus developed to accomplish two complementary goals: (1) Defining with more precision the important safety margins which should be the focus of a § 50.59 determination, rather than the problematic term, ''margin of safety as defined in the basis for any technical specification;'' and (2) assuring that the relaxations embodied in the § 50.59(c)(2)(i), (ii), (iii), (iv), (v) and (vi) criteria will not result in changes approaching the adequate protection threshold without prior NRC review and approval. As such, the new criteria (vii) and (viii) are fundamentally part of the overall regulatory scheme in the revisions to § 50.59 which relax and clarify the thresholds for licensee-initiated changes and tests requiring

[4] In some cases, these changes coincide with other changes intended to clarify and codify existing practice, and to make the rule easier to understand (*e.g.*, separating the ''frequency of occurrence'' of an accident from the ''consequences'' of an accident as a criterion for NRC review and approval.

[5] ''Permissive'' relaxations are relaxations which licensees may voluntarily choose (but are not compelled) to comply.

prior NRC review and approval before their implementation. In sum, the Commission has determined that the changes to § 50.59 constitute clarifications and codifications of existing practices, or constitute permissive relaxations from the existing § 50.59 criteria, and therefore do not constitute backfits as defined in § 50.109(a)(1).

Changes to Part 72

Section 72.48 defines the circumstances under which a holder of a ISFSI license may make changes and conduct tests and experiments, analogous to the criteria in § 50.59. The change to § 72.48 will conform the criteria for ISFSI and storage cask changes to that in § 50.59. Therefore, as with the changes to § 50.59, the changes to § 72.48 constitute a permissive relaxation as compared with the existing criteria in § 72.48. Furthermore, there will be consistency in regulatory approach in changes to nuclear power plants and ISFSIs. Such consistency is appropriate since most ISFSIs are licensed to nuclear power plant licensees; there are resource efficiencies for such licensees using the same criteria for evaluating changes, tests and experiments. The change criteria in § 72.48 are also extended by the final rule to holders of CoCs., which contributes to regulatory stability and predictability since known standards will be utilized in determining whether a change to a CoC may be made without prior NRC review and approval. The existing backfitting provision in § 72.62 only apply to licensees and not to CoC holders. However, even if the backfitting provisions in § 72.62 applied to CoC holders, the changes in § 72.48 would not be regarded as backfits since the extension of § 72.48 to CoC holders represents a permissive relaxation. For similar reasons, the changes in part 72 applicable to CoC holders, which are necessary to support the extension of the change criteria in § 72.48 to CoC holders, are not considered to be backfits under § 72.62.

The Commission is deferring consideration of conforming changes to the design certifications in part 52, appendices A and B, which are the design certifications for the ABWR and System 80+ designs. The Commission will conduct a broader rulemaking to amend part 52, whose purpose will be to correct typographic errors, clarify language, and reflect lessons learned as a result of the ABWR, System 80+, and AP600 design certification rulemakings. If conforming changes to appendices A and B are made, in a future rulemaking, the Commission regards this rulemaking amending § 50.59 as satisfying the Commission's obligations under the backfit rule for any conforming changes made to part 52, inasmuch as the backfitting issues associated with the adoption of the new criteria are being addressed in this rulemaking.

IX. Small Business Regulatory Enforcement Fairness Act

In accordance with the Small Business Regulatory Enforcement Fairness Act of 1996, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs of OMB.

X. National Technology Transfer and Advancement Act

The National Technology Transfer and Advancement Act of 1995, Pub. L. 104–113, requires that Federal agencies use technical standards developed by or adopted by voluntary consensus standards bodies unless the use of such a standard is inconsistent with applicable law or otherwise impractical. There are no consensus standards that apply to the change control process requirements established in this rulemaking. Thus the provisions of the Act do not apply to this rulemaking.

XI. Criminal Penalties

For the purposes of section 223 of the Atomic Energy Act (AEA), the Commission is issuing this rule to amend 10 CFR part 50:50.59, : 50.66, and :50.71; and 10 CFR part 72:72.48, : 72.70, :72.212, and :72.248, under one or more of sections 161b, 161i, or 161o of the AEA. Willful violations of the rule would be subject to criminal enforcement.

XII. Compatibility of Agreement State Regulations

Under the ''Policy Statement on Adequacy and Compatibility of Agreement State Programs'' approved by the Commission on June 30, 1997, and published in the **Federal Register** (62 FR 46517, September 3, 1997), this rule is classified as compatibility Category ''NRC.'' Compatibility is not required for Category ''NRC'' regulations. The NRC program elements in this category are those that relate directly to areas of regulation reserved to the NRC by the AEA or the provisions of Title 10 of the Code of Federal Regulations, and although an Agreement State may not adopt program elements reserved to NRC, it may wish to inform its licensees of certain requirements via a mechanism that is consistent with the particular State's administrative procedure laws, but that does not confer regulatory authority on the State.

List of Subjects

10 CFR Part 50

Antitrust, Classified information, Criminal penalties, Fire protection, Intergovernmental relations, Nuclear power plants and reactors, Radiation protection, Reactor siting criteria, Reporting and record keeping requirements.

10 CFR Part 72

Criminal penalties, Manpower training programs, Nuclear materials, Occupational safety and health, Reporting and recordkeeping requirements, Security measures, Spent fuel.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR parts 50 and 72.

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

1. The authority citation for part 50 continues to read as follows:

Authority: Secs. 102, 103, 104, 105, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246, (42 U.S.C. 5841, 5842, 5846).

Section 50.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951, as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123, (42 U.S.C. 5851). Sections 50.10 also issued under secs. 101, 185, 68 Stat. 936, 955, as amended (42 U.S.C. 2131, 2235); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.13, 50.54(dd), and 50.103 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138). Sections 50.23, 50.35, 50.55, and 50.56 also issued under sec. 185, 68 Stat. 955 (42 U.S.C. 2235). Sections 50.33a, 50.55a, and Appendix Q also issued under sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under sec. 204, 88 Stat. 1245 (42 U.S.C. 5844). Sections 50.58, 50.91, and 50.92 also issued under Pub. L. 97–415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80, 50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Appendix F also issued under sec. 187, 66 Stat. 955 (42 U.S.C. 2237).

2. Section 50.59 is revised to read as follows:

§ 50.59 Changes, tests, and experiments.

(a) Definitions for the purposes of this section:

(1) *Change* means a modification or addition to, or removal from, the facility or procedures that affects a design function, method of performing or controlling the function, or an evaluation that demonstrates that intended functions will be accomplished.

(2) *Departure from a method of evaluation described in the FSAR (as updated) used in establishing the design bases or in the safety analyses* means:

(i) Changing any of the elements of the method described in the FSAR (as updated) unless the results of the analysis are conservative or essentially the same; or

(ii) Changing from a method described in the FSAR to another method unless that method has been approved by NRC for the intended application.

(3) *Facility as described in the final safety analysis report (as updated)* means:

(i) The structures, systems, and components (SSC) that are described in the final safety analysis report (FSAR) (as updated),

(ii) The design and performance requirements for such SSCs described in the FSAR (as updated), and

(iii) The evaluations or methods of evaluation included in the FSAR (as updated) for such SSCs which demonstrate that their intended function(s) will be accomplished.

(4) *Final Safety Analysis Report (as updated)* means the Final Safety Analysis Report (or Final Hazards Summary Report) submitted in accordance with § 50.34, as amended and supplemented, and as updated per the requirements of § 50.71(e) or § 50.71(f), as applicable.

(5) *Procedures as described in the final safety analysis report (as updated)* means those procedures that contain information described in the FSAR (as updated) such as how structures, systems, and components are operated and controlled (including assumed operator actions and response times).

(6) *Tests or experiments not described in the final safety analysis report (as updated)* means any activity where any structure, system, or component is utilized or controlled in a manner which is either:

(i) Outside the reference bounds of the design bases as described in the final safety analysis report (as updated) or

(ii) Inconsistent with the analyses or descriptions in the final safety analysis report (as updated).

(b) Applicability. This section applies to each holder of a license authorizing operation of a production or utilization facility, including the holder of a license authorizing operation of a nuclear power reactor that has submitted the certification of permanent cessation of operations required under § 50.82(a)(1) or a reactor licensee whose license has been amended to allow possession but not operation of the facility.

(c)(1) A licensee may make changes in the facility as described in the final safety analysis report (as updated), make changes in the procedures as described in the final safety analysis report (as updated), and conduct tests or experiments not described in the final safety analysis report (as updated) without obtaining a license amendment pursuant to § 50.90 only if:

(i) A change to the technical specifications incorporated in the license is not required, and

(ii) The change, test, or experiment does not meet any of the criteria in paragraph (c)(2) of this section.

(2) A licensee shall obtain a license amendment pursuant to § 50.90 prior to implementing a proposed change, test, or experiment if the change, test, or experiment would:

(i) Result in more than a minimal increase in the frequency of occurrence of an accident previously evaluated in the final safety analysis report (as updated);

(ii) Result in more than a minimal increase in the likelihood of occurrence of a malfunction of a structure, system, or component (SSC) important to safety previously evaluated in the final safety analysis report (as updated);

(iii) Result in more than a minimal increase in the consequences of an accident previously evaluated in the final safety analysis report (as updated);

(iv) Result in more than a minimal increase in the consequences of a malfunction of an SSC important to safety previously evaluated in the final safety analysis report (as updated);

(v) Create a possibility for an accident of a different type than any previously evaluated in the final safety analysis report (as updated);

(vi) Create a possibility for a malfunction of an SSC important to safety with a different result than any previously evaluated in the final safety analysis report (as updated);

(vii) Result in a design basis limit for a fission product barrier as described in the FSAR (as updated) being exceeded or altered; or

(viii) Result in a departure from a method of evaluation described in the FSAR (as updated) used in establishing the design bases or in the safety analyses.

(3) In implementing this paragraph, the FSAR (as updated) is considered to include FSAR changes resulting from evaluations performed pursuant to this section and analyses performed pursuant to § 50.90 since submittal of the last update of the final safety analysis report pursuant to § 50.71 of this part.

(4) The provisions in this section do not apply to changes to the facility or procedures when the applicable regulations establish more specific criteria for accomplishing such changes.

(d)(1) The licensee shall maintain records of changes in the facility, of changes in procedures, and of tests and experiments made pursuant to paragraph (c) of this section. These records must include a written evaluation which provides the bases for the determination that the change, test, or experiment does not require a license amendment pursuant to paragraph (c)(2) of this section.

(2) The licensee shall submit, as specified in § 50.4, a report containing a brief description of any changes, tests, and experiments, including a summary of the evaluation of each. A report must be submitted at intervals not to exceed 24 months.

(3) The records of changes in the facility must be maintained until the termination of a license issued pursuant to this part or the termination of a license issued pursuant to 10 CFR part 54, whichever is later. Records of changes in procedures and records of tests and experiments must be maintained for a period of 5 years.

3. In § 50.66, paragraph (b), introductory text, paragraphs (b)(4), (c)(2), and (c)(3)(iii) are revised to read as follows:

§ 50.66 Requirements for thermal annealing of the reactor pressure vessel.

* * * * *

(b) Thermal Annealing Report. The Thermal Annealing Report must include: a Thermal Annealing Operating Plan; a Requalification Inspection and Test Program; a Fracture Toughness Recovery and Reembrittlement Trend Assurance Program; and an Identification of Changes Requiring a License Amendment.

(1) * * *

(4) Identification of Changes Requiring a License Amendment. Any changes to the facility as described in the final safety analysis report (as updated) which requires a license amendment pursuant to § 50.59(c)(2) of this part, and any changes to the Technical Specifications, which are necessary to either conduct the thermal annealing or to operate the nuclear

power reactor following the annealing must be identified. The section shall demonstrate that the Commission's requirements continue to be complied with, and that there is reasonable assurance of adequate protection to the public health and safety following the changes.

(c) * * *

(2) If the thermal annealing was completed but the annealing was not performed in accordance with the Thermal Annealing Operating Plan and the Requalification Inspection and Test Program, the licensee shall submit a summary of lack of compliance with the Thermal Annealing Operating Plan and the Requalification Inspection and Test Program and a justification for subsequent operation to the Director, Office of Nuclear Reactor Regulation. Any changes to the facility as described in the final safety analysis report (as updated) which are attributable to the noncompliances and which require a license amendment pursuant to § 50.59(c)(2) and any changes to the Technical Specifications shall also be identified.

(i) If no changes requiring a license amendment pursuant to § 50.59(c)(2) or changes to Technical Specifications are identified, the licensee may restart its reactor after the requirements of paragraph (f)(2) of this section have been met.

(ii) If any changes requiring a license amendment pursuant to § 50.59(c)(2) or changes to the Technical Specifications are identified, the licensee may not restart its reactor until approval is obtained from the Director, Office of Nuclear Reactor Regulation and the requirements of paragraph (f)(2) of this section have been met.

(3) * * *

(iii) If the partial annealing was not performed in accordance with the Thermal Annealing Operating Plan and the Requalification Inspection and Test Program, the licensee shall submit a summary of lack of compliance with the Thermal Annealing Operating Plan and the Requalification Inspection and Test Program and a justification for subsequent operation to the Director, Office of Nuclear Reactor Regulation. Any changes to the facility as described in the final safety analysis report (as updated) which are attributable to the noncompliances and which require a license amendment pursuant to § 50.59(c)(2) and any changes to the technical specifications which are required as a result of the noncompliances, shall also be identified.

(A) If no changes requiring a license amendment pursuant to § 50.59(c)(2) or changes to Technical Specifications are identified, the licensee may restart its reactor after the requirements of paragraph (f)(2) of this section have been met.

(B) If any changes requiring a license amendment pursuant to § 50.59(c)(2) or changes to Technical Specifications are identified, the licensee may not restart its reactor until approval is obtained from the Director, Office of Nuclear Reactor Regulation and the requirements of paragraph (f)(2) of this section have been met.

* * * * *

4. In § 50.71, paragraph (e), introductory text is revised to read as follows:

§ 50.71 Maintenance of records, making of reports.

* * * * *

(e) Each person licensed to operate a nuclear power reactor pursuant to the provisions of § 50.21 or § 50.22 of this part shall update periodically, as provided in paragraphs (e) (3) and (4) of this section, the final safety analysis report (FSAR) originally submitted as part of the application for the operating license, to assure that the information included in the report contains the latest information developed. This submittal shall contain all the changes necessary to reflect information and analyses submitted to the Commission by the licensee or prepared by the licensee pursuant to Commission requirement since the submittal of the original FSAR, or as appropriate the last update to the FSAR under this section. The submittal shall include the effects [1] of: All changes made in the facility or procedures as described in the FSAR; all safety analyses and evaluations performed by the licensee either in support of approved license amendments, or in support of conclusions that changes did not require a license amendment in accordance with § 50.59(c)(2) of this part; and all analyses of new safety issues performed by or on behalf of the licensee at Commission request. The updated information shall be appropriately located within the update to the FSAR.

(1) * * *

* * * * *

5. Section 50.90 is revised to read as follows:

§ 50.90 Application for amendment of license or construction permit.

Whenever a holder of a license or construction permit desires to amend the license (including the Technical Specifications incorporated into the license) or permit, application for an amendment must be filed with the Commission, as specified in § 50.4, fully describing the changes desired, and following as far as applicable, the form prescribed for original applications.

[1] Effects of changes includes appropriate revisions of descriptions in the FSAR such that the FSAR (as updated) is complete and accurate.

PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL AND HIGH-LEVEL RADIOACTIVE WASTE

6. The authority citation for part 72 continues to read as follows:

Authority: Secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 68 Stat. 929, 930, 932, 933, 934, 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2238, 2282); sec. 274, Pub. L. 86–373, 73 Stat. 688, as amended (42 U.S.C. 2021); sec. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); Pub. L. 95–601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332); secs. 131, 132, 133, 135, 137, 141, Pub. L. 97–425, 96 Stat. 2229, 2230, 2232, 2241, sec. 148, Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10151, 10152, 10153, 10155, 10157, 10161, 10168).

Section 72.44(g) also issued under secs. 142(b) and 148 (c), (d), Pub. L. 100–203, 101 Stat. 1330–232, 1330–236 (42 U.S.C. 10162(b), 10168(c), (d)). Section 72.46 also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97–425, 96 Stat. 2230 (42 U.S.C. 10154). Section 72.96(d) also issued under sec. 145(g), Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10165(g)). Subpart J also issued under secs. 2(2), 2(15), 2(19), 117(a), 141(h), Pub. L. 97–425, 96 Stat. 2202, 2203, 2204, 2222, 2224 (42 U.S.C. 10101, 10137(a), 10161(h)). Subparts K and L are also issued under sec. 133, 98 Stat. 2230 (42 U.S.C. 10153) and sec. 218(a), 96 Stat. 2252 (42 U.S.C. 10198).

7. Section 72.3 is amended by revising the definition for *independent spent fuel storage installation or ISFSI* to read as follows:

§ 72.3 Definitions.

* * * * *

Independent spent fuel storage installation or ISFSI means a complex designed and constructed for the interim storage of spent nuclear fuel and other radioactive materials associated with spent fuel storage. An ISFSI which is located on the site of another facility licensed under this part or a facility licensed under part 50 of this chapter and which shares common utilities and services with such a facility or is physically connected with such other

facility may still be considered independent.

* * * * *

8. In § 72.9, paragraph (b) is revised to read as follows:

§ 72.9 Information collection requirements: OMB approval.

* * * * *

(b) The approved information collection requirements contained in this part appear in §§ 72.7, 72.11, 72.16, 72.19, 72.22 through 72.34, 72.42, 72.44, 72.48 through 72.56, 72.62, 72.70 through 72.82, 72.90, 72.92, 72.94, 72.98, 72.100, 72.102, 72.104, 72.108, 72.120, 72.126, 72.140 through 72.176, 72.180 through 72.186, 72.192, 72.206, 72.212, 72.216, 72.218, 72.230, 72.232, 72.234, 72.236, 72.240, 72.244, and 72.248.

9. In § 72.24, paragraph (a) is revised as follows:

§ 72.24 Contents of application: Technical information.

* * * * *

(a) A description and safety assessment of the site on which the ISFSI or MRS is to be located, with appropriate attention to the design bases for external events. Such assessment must contain an analysis and evaluation of the major structures, systems, and components of the ISFSI or MRS that bear on the suitability of the site when the ISFSI or MRS is operated at its design capacity. If the proposed ISFSI or MRS is to be located on the site of a nuclear power plant or other licensed facility, the potential interactions between the ISFSI or MRS and such other facility—including shared common utilities and services—must be evaluated.

* * * * *

10. Section 72.48 is revised to read as follows:

§ 72.48 Changes, tests, and experiments.

(a) Definitions for the purposes of this section:

(1) *Change* means a modification or addition to, or removal from, the facility or spent fuel storage cask design or procedures that affects a design function, method of performing or controlling the function, or an evaluation that demonstrates that intended functions will be accomplished.

(2) *Departure from a method of evaluation described in the FSAR (as updated) used in establishing the design bases or in the safety analyses* means:

(i) Changing any of the elements of the method described in the FSAR (as updated) unless the results of the analysis are conservative or essentially the same; or

(ii) Changing from a method described in the FSAR to another method unless that method has been approved by NRC for the intended application.

(3) *Facility* means either an independent spent fuel storage installation (ISFSI) or a Monitored Retrievable Storage facility(MRS).

(4) The *facility or spent fuel storage cask design as described in the Final Safety Analysis Report (FSAR) (as updated)* means:

(i) The structures, systems, and components (SSC) that are described in the FSAR (as updated),

(ii) The design and performance requirements for such SSCs described in the FSAR (as updated), and

(iii) The evaluations or methods of evaluation included in the FSAR (as updated) for such SSCs which demonstrate that their intended function(s) will be accomplished.

(5) *Final Safety Analysis Report (as updated)* means:

(i) For specific licensees, the Safety Analysis Report for a facility submitted and updated in accordance with § 72.70;

(ii) For general licensees, the Safety Analysis Report for a spent fuel storage cask design, as amended and supplemented; and

(iii) For certificate holders, the Safety Analysis Report for a spent fuel storage cask design submitted and updated in accordance with § 72.248.

(6) *Procedures as described in the Final Safety Analysis Report (as updated)* means those procedures that contain information described in the FSAR (as updated) such as how SSCs are operated and controlled (including assumed operator actions and response times).

(7) *Tests or experiments not described in the Final Safety Analysis Report (as updated)* means any activity where any SSC is utilized or controlled in a manner which is either:

(i) Outside the reference bounds of the design bases as described in the FSAR (as updated) or

(ii) Inconsistent with the analyses or descriptions in the FSAR (as updated).

(b) This section applies to:

(1) Each holder of a general or specific license issued under this part, and

(2) Each holder of a Certificate of Compliance (CoC) issued under this part.

(c)(1) A licensee or certificate holder may make changes in the facility or spent fuel storage cask design as described in the FSAR (as updated), make changes in the procedures as described in the FSAR (as updated), and conduct tests or experiments not described in the FSAR (as updated), without obtaining either:

(i) A license amendment pursuant to § 72.56 (for specific licensees) or

(ii) A CoC amendment submitted by the certificate holder pursuant to § 72.244 (for general licensees and certificate holders) if:

(A) A change to the technical specifications incorporated in the specific license is not required; or

(B) A change in the terms, conditions, or specifications incorporated in the CoC is not required; and

(C) The change, test, or experiment does not meet any of the criteria in paragraph (c)(2) of this section.

(2) A specific licensee shall obtain a license amendment pursuant to § 72.56, a certificate holder shall obtain a CoC amendment pursuant to § 72.244, and a general licensee shall request that the certificate holder obtain a CoC amendment pursuant to § 72.244, prior to implementing a proposed change, test, or experiment if the change, test, or experiment would:

(i) Result in more than a minimal increase in the frequency of occurrence of an accident previously evaluated in the FSAR (as updated);

(ii) Result in more than a minimal increase in the likelihood of occurrence of a malfunction of a system, structure, or component (SSC) important to safety previously evaluated in the FSAR (as updated);

(iii) Result in more than a minimal increase in the consequences of an accident previously evaluated in the FSAR;

(iv) Result in more than a minimal increase in the consequences of a malfunction of an SSC important to safety previously evaluated in the FSAR (as updated);

(v) Create a possibility for an accident of a different type than any previously evaluated in the FSAR (as updated);

(vi) Create a possibility for a malfunction of an SSC important to safety with a different result than any previously evaluated in the FSAR (as updated);

(vii) Result in a design basis limit for a fission product barrier being exceeded or altered as described in the FSAR (as updated); or

(viii) Result in a departure from a method of evaluation described in the FSAR (as updated) used in establishing the design bases or in the safety analyses.

(3) In implementing this paragraph, the FSAR (as updated) is considered to include FSAR changes resulting from evaluations performed pursuant to this section and analyses performed pursuant to § 72.56 or § 72.244 since the

last update of the FSAR pursuant to § 72.70, or § 72.248 of this part.

(4) The provisions in this section do not apply to changes to the facility or procedures when the applicable regulations establish more specific criteria for accomplishing such changes.

(d)(1) The licensee and certificate holder shall maintain records of changes in the facility or spent fuel storage cask design, of changes in procedures, and of tests and experiments made pursuant to paragraph (c) of this section. These records must include a written evaluation which provides the bases for the determination that the change, test, or experiment does not require a license or CoC amendment pursuant to paragraph (c)(2) of this section.

(2) The licensee and certificate holder shall submit, as specified in § 72.4, a report containing a brief description of any changes, tests, and experiments, including a summary of the evaluation of each. A report shall be submitted at intervals not to exceed 24 months.

(3) The records of changes in the facility or spent fuel storage cask design shall be maintained until:

(i) Spent fuel is no longer stored in the facility or the spent fuel storage cask design is no longer being used, or

(ii) The Commission terminates the license or CoC issued pursuant to this part.

(4) The records of changes in procedures and of tests and experiments shall be maintained for a period of 5 years.

(5) The holder of a spent fuel storage cask design CoC, who permanently ceases operation, shall provide the records of changes to the new certificate holder or to the Commission, as appropriate, in accordance with § 72.234(d)(3).

(6)(i) A general licensee shall provide a copy of the record for any changes to a spent fuel storage cask design to the applicable certificate holder within 60 days of implementing the change.

(ii) A specific licensee using a spent fuel storage cask design, approved pursuant to subpart L of this part, shall provide a copy of the record for any changes to a spent fuel storage cask design to the applicable certificate holder within 60 days of implementing the change.

(iii) A certificate holder shall provide a copy of the record for any changes to a spent fuel storage cask design to any general or specific licensee using the cask design within 60 days of implementing the change.

11. Section 72.56 is revised to read as follows:

§ 72.56 Application for amendment of license.

Whenever a holder of a specific license desires to amend the license (including a change to the license conditions), an application for an amendment shall be filed with the Commission fully describing the changes desired and the reasons for such changes, and following as far as applicable the form prescribed for original applications.

12. Section 72.70 is revised to read as follows:

§ 72.70 Safety analysis report updating.

(a) Each specific licensee for an ISFSI or MRS shall update periodically, as provided in paragraphs (b) and (c) of this section, the final safety analysis report (FSAR) to assure that the information included in the report contains the latest information developed.

(1) Each licensee shall submit an original FSAR to the Commission, in accordance with § 72.4, within 90 days after issuance of the license.

(2) The original FSAR shall be based on the safety analysis report submitted with the application and reflect any changes and applicant commitments developed during the license approval and/or hearing process.

(b) Each update shall contain all the changes necessary to reflect information and analyses submitted to the Commission by the licensee or prepared by the licensee pursuant to Commission requirement since the submission of the original FSAR or, as appropriate, the last update to the FSAR under this section. The update shall include the effects [1] of:

(1) All changes made in the ISFSI or MRS or procedures as described in the FSAR;

(2) All safety analyses and evaluations performed by the licensee either in support of approved license amendments, or in support of conclusions that changes did not require a license amendment in accordance with § 72.48;

(3) All final analyses and evaluations of the design and performance of structures, systems, and components that are important to safety taking into account any pertinent information developed during final design, construction, and preoperational testing; and

(4) All analyses of new safety issues performed by or on behalf of the licensee at Commission request. The information shall be appropriately located within the updated FSAR.

(c)(1) The update of the FSAR shall be filed in accordance with § 72.4, on a replacement-page basis;

(2) The update shall include a list that identifies the current pages of the FSAR following page replacement;

(3) Each replacement page shall include both a change indicator for the area changed, e.g., a bold line vertically drawn in the margin adjacent to the portion actually changed, and a page change identification (date of change or change number or both);

(4) The update shall include:

(i) A certification by a duly authorized officer of the licensee that either the information accurately presents changes made since the previous submittal, or that no such changes were made; and

(ii) An identification of changes made under the provisions of § 72.48, but not previously submitted to the Commission;

(5) The update shall reflect all changes implemented up to a maximum of 6 months prior to the date of filing; and

(6) Updates shall be filed every 24 months from the date of issuance of the license.

(d) The updated FSAR shall be retained by the licensee until the Commission terminates the license.

13. In § 72.80, paragraph (g) is added to read as follows:

§ 72.80 Other records and reports.

* * * * *

(g) Each specific licensee shall notify the Commission, in accordance with § 72.4, of its readiness to begin operation at least 90 days prior to the first storage of spent fuel or high-level waste in an ISFSI or MRS.

14. In § 72.86, paragraph (b) is revised to read as follows:

§ 72.86 Criminal penalties.

* * * * *

(b) The regulations in this part 72 that are not issued under sections 161b, 161i, or 161o for the purposes of section 223 are as follows: §§ 72.1, 72.2, 72.3, 72.4, 72.5, 72.7, 72.8, 72.9, 72.16, 72.18, 72.20, 72.22, 72.24, 72.26, 72.28, 72.32, 72.34, 72.40, 72.46, 72.56, 72.58, 72.60, 72.62, 72.84, 72.86, 72.90, 72.96, 72.108, 72.120, 72.122, 72.124, 72.126, 72.128, 72.130, 72.182, 72.194, 72.200, 72.202, 72.204, 72.206, 72.210, 72.214, 72.220, 72.230, 72.238, 72.240, 72.244, and 72.246.

15. In § 72.212, paragraphs (b)(2) and (b)(4) are revised to read as follows:

§ 72.212 Conditions of general license issued under § 72.210.

* * * * *

[1] Effects of changes includes appropriate revisions of descriptions in the FSAR such that the FSAR (as updated) is complete and accurate.

(b) * * *

(2)(i) Perform written evaluations, prior to use, that establish that:

(A) conditions set forth in the Certificate of Compliance have been met;

(B) cask storage pads and areas have been designed to adequately support the static load of the stored casks; and

(C) the requirements of § 72.104 have been met. A copy of this record shall be retained until spent fuel is no longer stored under the general license issued under § 72.210.

(ii) The licensee shall evaluate any changes to the written evaluations required by this paragraph using the requirements of § 72.48(c). A copy of this record shall be retained until spent fuel is no longer stored under the general license issued under § 72.210.

* * * * *

(4) Prior to use of this general license, determine whether activities related to storage of spent fuel under this general license involve a change in the facility Technical Specifications or require a license amendment for the facility pursuant to § 50.59(c)(2) of this chapter. Results of this determination must be documented in the evaluation made in paragraph (b)(2) of this section.

16. Section 72.244 is added to read as follows:

§ 72.244 Application for amendment of a certificate of compliance.

Whenever a certificate holder desires to amend the CoC (including a change to the terms, conditions or specifications of the CoC), an application for an amendment shall be filed with the Commission fully describing the changes desired and the reasons for such changes, and following as far as applicable the form prescribed for original applications.

17. Section 72.246 is added to read as follows:

§ 72.246 Issuance of amendment to a certificate of compliance.

In determining whether an amendment to a CoC will be issued to the applicant, the Commission will be guided by the considerations that govern the issuance of an initial CoC.

18. Section 72.248 is added to read as follows:

§ 72.248 Safety analysis report updating.

(a) Each certificate holder for a spent fuel storage cask design shall update periodically, as provided in paragraph (b) of this section, the final safety analysis report (FSAR) to assure that the information included in the report contains the latest information developed.

(1) Each certificate holder shall submit an original FSAR to the Commission, in accordance with § 72.4, within 90 days after the spent fuel storage cask design has been approved pursuant to § 72.238.

(2) The original FSAR shall be based on the safety analysis report submitted with the application and reflect any changes and applicant commitments developed during the cask design review process. The original FSAR shall be updated to reflect any changes to requirements contained in the issued Certificate of Compliance (CoC).

(b) Each update shall contain all the changes necessary to reflect information and analyses submitted to the Commission by the certificate holder or prepared by the certificate holder pursuant to Commission requirement since the submission of the original FSAR or, as appropriate, the last update to the FSAR under this section. The update shall include the effects [1] of:

(1) All changes made in the spent fuel storage cask design or procedures as described in the FSAR;

(2) All safety analyses and evaluations performed by the certificate holder either in support of approved CoC amendments, or in support of conclusions that changes did not require a CoC amendment in accordance with § 72.48; and

(3) All analyses of new safety issues performed by or on behalf of the certificate holder at Commission request. The information shall be appropriately located within the updated FSAR.

(c)(1) The update of the FSAR shall be filed in accordance with § 72.4, on a replacement-page basis;

(2) The update shall include a list that identifies the current pages of the FSAR following page replacement;

(3) Each replacement page shall include both a change indicator for the area changed, *e.g.*, a bold line vertically drawn in the margin adjacent to the portion actually changed, and a page change identification (date of change or change number or both);

(4) The update shall include:

(i) A certification by a duly authorized officer of the certificate holder that either the information accurately presents changes made since the previous submittal, or that no such changes were made; and

(ii) An identification of changes made by the certificate holder under the provisions of § 72.48, but not previously submitted to the Commission;

(5) The update shall reflect all changes implemented up to a maximum of 6 months prior to the date of filing;

(6) Updates shall be filed every 24 months from the date of issuance of the CoC; and

(7) The certificate holder shall provide a copy of the updated FSAR to each general and specific licensee using its cask design.

(d) The updated FSAR shall be retained by the certificate holder until the Commission terminates the certificate.

(e) A certificate holder who permanently ceases operation, shall provide the updated FSAR to the new certificate holder or to the Commission, as appropriate, in accordance with § 72.234(d)(3).

Dated at Rockville, Maryland, this 20th day of September, 1999.

For the Nuclear Regulatory Commission.

Annette Vietti-Cook,

Secretary of the Commission.

[FR Doc. 99–25054 Filed 10–1–99; 8:45 am]

BILLING CODE 7590–01–P

[1] Effects of changes includes appropriate revisions of descriptions in the FSAR such that the FSAR (as updated) is complete and accurate.

FEDERAL RESERVE SYSTEM

12 CFR Part 204

[Regulation D; Docket No. R–1046]

Reserve Requirements of Depository Institutions

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board is amending Regulation D, Reserve Requirements of Depository Institutions, to reflect the annual indexing of the low reserve tranche and the reserve requirement exemption for 2000, and announces the annual indexing of the deposit reporting cutoff levels that will be effective beginning in September 2000. The amendments decrease the amount of transaction accounts subject to a reserve requirement ratio of three percent in 2000, as required by section 19(b)(2)(C) of the Federal Reserve Act, from $46.5 million to $44.3 million of net transaction accounts. This adjustment is known as the low reserve tranche adjustment. The Board is increasing from $4.9 million to $5.0 million the amount of reservable liabilities of each depository institution that is subject to a reserve requirement of zero percent in 2000. This action is required by section 19(b)(11)(B) of the Federal Reserve Act, and the adjustment is known as the reservable liabilities exemption adjustment. The Board is also increasing

the deposit cutoff levels that are used in conjunction with the reservable liabilities exemption to determine the frequency of deposit reporting from $81.9 million to $84.5 million for nonexempt depository institutions and from $52.6 million to $54.3 million for exempt institutions. (Nonexempt institutions are those with total reservable liabilities exceeding the amount exempted from reserve requirements ($5.0 million) while exempt institutions are those with total reservable liabilities not exceeding the amount exempted from reserve requirements.) Thus, beginning in September 2000, nonexempt institutions with total deposits of $84.5 million or more will be required to report weekly while nonexempt institutions with total deposits less than $84.5 million may report quarterly, in both cases on form FR 2900. Similarly, exempt institutions with total deposits of $54.3 million or more will be required to report quarterly on form FR 2910q while exempt institutions with total deposits less than $54.3 million may report annually on form FR 2910a.

DATES: *Effective date:* November 3, 1999.

Compliance dates: For depository institutions that report weekly, the low reserve tranche adjustment and the reservable liabilities exemption adjustment will apply to the reserve computation period that begins Tuesday, November 30, 1999, and the corresponding reserve maintenance period that begins Thursday, December 30, 1999. For institutions that report quarterly, the low reserve tranche adjustment and the reservable liabilities exemption adjustment will apply to the reserve computation period that begins Tuesday, December 21, 1999, and the corresponding reserve maintenance period that begins Thursday, January 20, 2000. For all depository institutions, the deposit cutoff levels will be used to screen institutions in the second quarter of 2000 to determine the reporting frequency for the twelve month period that begins in September 2000.

FOR FURTHER INFORMATION CONTACT: Rick Heyke, Counsel (202/452–3688), Legal Division, or June O'Brien, Economist (202/452–3790), Division of Monetary Affairs; for the hearing impaired only, contact Diane Jenkins, Telecommunications Device for the Deaf (TDD)(202/452–3544); Board of Governors of the Federal Reserve System, 20th and C Streets, NW, Washington, DC 20551.

SUPPLEMENTARY INFORMATION: Section 19(b)(2) of the Federal Reserve Act (12 U.S.C. 461(b)(2)) requires each depository institution to maintain reserves against its transaction accounts and nonpersonal time deposits, as prescribed by Board regulations. The required reserve ratio applicable to transaction account balances exceeding the low reserve tranche is 10 percent. Section 19(b)(2) also provides that, before December 31 of each year, the Board shall issue a regulation adjusting the low reserve tranche for the next calendar year. The adjustment in the tranche is to be 80 percent of the percentage increase or decrease in net transaction accounts at all depository institutions over the one-year period that ends on the June 30 prior to the adjustment.

Currently, the low reserve tranche on net transaction accounts is $46.5 million. Net transaction accounts of all depository institutions decreased by 6.0 percent (from $689.0 billion to $647.7 billion) from June 30, 1998, to June 30, 1999. In accordance with section 19(b)(2), the Board is amending Regulation D (12 CFR part 204) to decrease the low reserve tranche for transaction accounts for 2000 by $2.2 million to $44.3 million.

Section 19(b)(11)(A) of the Federal Reserve Act (12 U.S.C. 461 (b)(11)(B)) provides that $2 million of reservable liabilities [1] of each depository institution shall be subject to a zero percent reserve requirement. Each depository institution may, in accordance with the rules and regulations of the Board, designate the reservable liabilities to which this reserve requirement exemption is to apply. However, if net transaction accounts are designated, only those that would otherwise be subject to a three percent reserve requirement (*i.e.*, net transaction accounts within the low reserve requirement tranche) may be so designated.

Section 19(b)(11)(B) of the Federal Reserve Act provides that, before December 31 of each year, the Board shall issue a regulation adjusting for the next calendar year the dollar amount of reservable liabilities exempt from reserve requirements. Unlike the adjustment for the low reserve tranche on net transaction accounts, which adjustment can result in a decrease as well as an increase, the change in the exemption amount is to be made only if the total reservable liabilities held at all depository institutions increase from one year to the next. The percentage increase in the exemption is to be 80 percent of the increase in total reservable liabilities of all depository institutions as of the year ending June 30. Total reservable liabilities of all depository institutions increased by 3.0 percent (from $1,905.9 billion to $1,962.3 billion) from June 30, 1998, to June 30, 1999. Consequently, the reservable liabilities exemption amount for 2000 under section 19(b)(11)(B) will be increased by $0.1 million from $4.9 million to $5.0 million.[2]

The effect of the application of section 19(b) of the Federal Reserve Act to the change in the total net transaction accounts and the change in the total reservable liabilities from June 30, 1998, to June 30, 1999, is to decrease the low reserve tranche to $44.3 million, to apply a zero percent reserve requirement on the first $5.0 million of transaction accounts, and to apply a three percent reserve requirement on the remainder of the low reserve tranche.

For institutions that report weekly, the tranche adjustment and the reservable liabilities exemption adjustment will be effective for the reserve computation period beginning Tuesday, November 30, 1999, and for the corresponding reserve maintenance period beginning Thursday, December 30, 1999. For institutions that report quarterly, the tranche adjustment and the reservable liabilities exemption adjustment will be effective for the computation period beginning Tuesday, December 21, 1999, and for the corresponding reserve maintenance period beginning Thursday, January 20, 2000. In addition, all institutions currently submitting form FR 2900 must continue to submit reports to the Federal Reserve under current reporting procedures.

In order to reduce the reporting burden for small institutions, the Board has established deposit reporting cutoff levels to determine deposit reporting frequency. Institutions are screened during the second quarter of each year to determine reporting frequency beginning the following September. The cutoff level for nonexempt institutions determines whether they report (on form FR 2900) quarterly or weekly, and the deposit cutoff level for exempt institutions determines whether they report annually (on form FR 2910a) or quarterly (on form FR 2910q).

In September 1999, the cutoff level for nonexempt institutions was raised to $81.9 million, and the cutoff level for exempt institutions was raised to $52.6

[1] Reservable liabilities include transaction accounts, nonpersonal time deposits, and Eurocurrency liabilities as defined in section 19(b)(5) of the Federal Reserve Act. The reserve ratio on nonpersonal time deposits and Eurocurrency liabilities is zero percent.

[2] Consistent with Board practice, the tranche and exemption amounts have been rounded to the nearest $0.1 million.

million. However, in order to help reduce the number and extent of modifications needed in the data processing systems of depository institutions close to the time of the century date change, the Board adjusted its usual category shift procedures for September 1999 (64 FR 39142, July 21, 1999.) The Board determined that any nonexempt institution that would otherwise be required to begin filing on a weekly basis (including an institution that became nonexempt with the September 1999 panel shifts) would instead be allowed to file on a quarterly basis, and any exempt institution that would otherwise be required to begin filing quarterly would instead be allowed to file annually, with normal category shift procedures resuming in September 2000.

From June 30, 1998, to June 30, 1999, total deposits increased 3.9 percent, from $4,654.3 billion to $4,837.9 billion. Accordingly, the nonexempt deposit cutoff level will increase by $2.6 million from $81.9 million to $84.5 million and the exempt deposit cutoff level will increase by $1.7 million from 52.6 million to $54.3 million. Based on the indexation of the reservable liabilities exemption, the cutoff level for total deposits above which reports of deposits must be filed will rise from $4.9 million to $5.0 million. Institutions with total deposits below $5.0 million will be excused from reporting if their deposits can be estimated from other data sources. The $84.5 million cutoff level for weekly versus quarterly form FR 2900 reporting for nonexempt institutions, the $54.3 million cutoff level for quarterly form FR 2910q versus annual form FR 2910a reporting for exempt institutions, and the $5.0 million level threshold for reporting will be used in the second quarter 2000 deposits report screening process, and the adjustments will be made when the new deposit reporting panels are implemented in September 2000.

All U.S. branches and agencies of foreign banks and all Edge and agreement corporations, regardless of size, are required to file weekly the Report of Transaction Accounts, Other Deposits and Vault Cash (form FR 2900). After the indexations become effective in 2000, all other institutions that have reservable liabilities in excess of the exemption level of $5.0 million prescribed by section 19(b)(11) of the Federal Reserve Act (known as ''nonexempt institutions'') and total deposits at least equal to the nonexempt deposit cutoff level ($84.5 million) will be required to file weekly the Report of Transaction Accounts, Other Deposits and Vault Cash (form FR 2900) for the twelve month period starting September 2000. However, nonexempt institutions with total deposits less than the nonexempt deposit cutoff level ($84.5 million), will be able to file the form FR 2900 quarterly. Institutions that obtain funds from non-U.S. sources or that have foreign branches or international banking facilities are required to file the Report of Certain Eurocurrency Transactions (form FR 2950/2951) at the same frequency as they file the form FR 2900.

Institutions with reservable liabilities at or below the exemption level ($5.0 million) (known as exempt institutions) will be required to file the Quarterly Report of Selected Deposits, Vault Cash, and Reservable Liabilities (form FR 2910q) if their total deposits equal or exceed the exempt deposit cutoff level ($54.3 million). Exempt institutions with total deposits less than the exempt deposit cutoff level ($54.3 million) but at least equal to the exemption amount ($5.0 million) will be able to file the Annual Report of Total Deposits and Reservable Liabilities (form FR 2910a). Institutions that have total deposits less than the exemption amount ($5.0 million) are not required to file deposit reports if their deposits can be estimated from other data sources.

Finally, the Board may require a depository institution to report on a weekly basis, regardless of the cutoff level, if the institution manipulates its total deposits and other reservable liabilities in order to qualify for quarterly reporting. Similarly, any depository institution that reports quarterly may be required to report weekly and to maintain appropriate reserve balances with its Reserve Bank if, during its computation period, it understates its usual reservable liabilities or overstates the deductions allowed in computing required reserve balances.

Notice and public participation. The provisions of 5 U.S.C. 553(b) relating to notice and public participation have not been followed in connection with the adoption of these amendments because the amendments involve expected, ministerial adjustments prescribed by statute and by an interpretative statement reaffirming the Board's policy concerning reporting practices. In addition, the reservable liabilities exemption adjustment and the increases for reporting purposes in the deposit cutoff levels reduce regulatory burdens on depository institutions, and the low reserve tranche adjustment will have a *de minimis* effect on depository institutions with net transaction accounts exceeding $44.3 million. Accordingly, the Board finds good cause for determining, and so determines, that notice and public participation is unnecessary, impracticable, or contrary to the public interest.

Regulatory Flexibility Analysis

The Board certifies that these amendments will not have a substantial economic impact on small depository institutions. *See* ''Notice and Public Participation'' above.

List of Subjects in 12 CFR Part 204

Banks, banking, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Board is amending 12 CFR part 204 as follows:

PART 204—RESERVE REQUIREMENTS OF DEPOSITORY INSTITUTIONS (REGULATION D)

1. The authority citation for part 204 continues to read as follows:

Authority: 12 U.S.C. 248(a), 248(c), 371a, 461, 601, 611, and 3105.

2. Section 204.9 is revised to read as follows:

§ 204.9 Reserve requirement ratios.

(a) *Reserve percentages.* The following reserve ratios are prescribed for all depository institutions, Edge and Agreement corporations, and United States branches and agencies of foreign banks:

Category	Reserve requirement [1]
Net transaction accounts:	
$0 to $44.3 million	3 percent of amount.
Over $44.3 million	$1,329,000 plus 10 percent of amount over $44.3 million.
Nonpersonal time deposits.	0 percent.
Eurocurrency liabilities.	0 percent.

[1] Before deducting the adjustment to be made by the paragraph (b) of this section.

(b) *Exemption from reserve requirements.* Each depository institution, Edge or agreement corporation, and U.S. branch or agency of a foreign bank is subject to a zero percent reserve requirement on an amount of its transaction accounts subject to the low reserve tranche in paragraph (a) of this section not in excess of $5.0 million determined in accordance with § 204.3(a)(3).

By order of the Board of Governors of the Federal Reserve System, September 28, 1999.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 99–25650 Filed 10–1–99; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98–NM–378–AD; Amendment 39–11340; AD 99–20–10]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 727 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Boeing Model 727 series airplanes, that requires modification of the pressure web of the nose landing gear wheel well. This amendment is prompted by reports of fatigue cracks in the pressure web of the nose landing gear wheel well. The actions specified by this AD are intended to prevent cracking of the pressure web of the nose landing gear wheel well, which could result in loss of airplane pressurization.

DATES: Effective November 8, 1999.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of November 8, 1999.

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Walt Sippel, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Transport Airplane Directorate, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2774; fax (425) 227–1181.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain Boeing Model 727 series airplanes was published in the **Federal Register** on July 19, 1999 (64 FR 38603). That action proposed to require modification of the pressure web of the nose landing gear wheel well.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

The commenters support the proposed rule.

Conclusion

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

Cost Impact

There are approximately 24 airplanes of the affected design in the worldwide fleet. The FAA estimates that 13 airplanes of U.S. registry will be affected by this AD, that it will take approximately 82 work hours per airplane to accomplish the required modification, and that the average labor rate is $60 per work hour. Required parts will cost approximately $701 per airplane. Based on these figures, the cost impact of the required AD on U.S. operators is estimated to be $73,073, or $5,621 per airplane.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted.

Regulatory Impact

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

99–20–10 Boeing: Amendment 39–11340. Docket 98–NM–378–AD.

Applicability: Model 727 series airplanes; line numbers 124, 126, 130, 146, 221, 287, 331, 339, 345, 355, 416, 439, 516, 532, 540, 608, 631, 650, 717, 777, 788, 791, 837, and 1087; certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (b) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent cracking of the pressure web of the nose landing gear wheel well, which could result in loss of airplane pressurization, accomplish the following:

Modification

(a) Prior to the accumulation of 60,000 total flight cycles, or within 4 years after the effective date of this AD, whichever occurs later, install reinforcement straps and stiffeners on the sidewall, top, and forward bulkhead panels of the pressure web of the

nose landing gear wheel well, in accordance with Part II of the Accomplishment Instructions of Boeing Service Bulletin 727–53–0145, Revision 1, dated December 7, 1989.

Alternative Methods of Compliance

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate; or in accordance with data meeting the type certification basis of the airplane approved by a Boeing Company Designated Engineering Representative who has been authorized by the Manager, Seattle ACO, to make such findings. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Seattle ACO.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

Special Flight Permits

(c) Special flight permits may be issued in accordance with §§ 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

Incorporation by Reference

(d) The modification shall be done in accordance with Boeing Service Bulletin 727–53–0145, Revision 1, dated December 7, 1989. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(e) This amendment becomes effective on November 8, 1999.

Issued in Renton, Washington, on September 22, 1999.

D.L. Riggin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 99–25219 Filed 10–1–99; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98–NM–277–AD; Amendment 39–11339; AD 99–20–09]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to certain Boeing Model 747 series airplanes, that currently requires inspections of the lower engine mount to determine if the tangential link upper bolt and nut are oriented properly, and if the tangential link upper bolt nut is torqued within certain limits. Additionally, that amendment requires replacement of the bolt and nut with serviceable parts, if necessary, and requires certain follow-on actions for airplanes on which the upper bolt is missing. This amendment requires accomplishment of a previously optional terminating action or a new alternative terminating action for the repetitive inspections. This amendment is prompted by development of a new terminating action by the manufacturer. The actions specified by this AD are intended to prevent separation of the engine from the airplane due to migration of the tangential link upper bolt.

DATES: Effective November 8, 1999.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the **Federal Register** as of November 8, 1999.

The incorporation by reference of Boeing Alert Service Bulletin 747–71A2277, dated November 29, 1995, listed in the regulations, was approved previously by the Director of the **Federal Register** as of February 16, 1996 (61 FR 10270, March 13, 1996).

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the **Federal Register**, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Tamara L. Anderson, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Transport Airplane Directorate, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2771; fax (425) 227–1181.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) by superseding AD 96–03–01 R1, amendment 39–9538 (61 FR 10270, March 13, 1996), which is applicable to certain Boeing Model 747 series airplanes, was published in the **Federal Register** on July 16, 1999 (64 FR 38379). The action proposed to continue to require inspections of the lower engine mount to determine if the tangential link upper bolt and nut are oriented properly, and if the tangential link upper bolt nut is torqued within certain limits. Additionally, that action also proposed to continue to require replacement of the bolt and nut with serviceable parts, if necessary, and requires certain follow-on actions for airplanes on which the upper bolt is missing. That action also proposed to require accomplishment of either a previously optional terminating action or a new, alternative terminating action for the repetitive inspections.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the single comment received.

The commenter supports the proposed rule.

Conclusion

After careful review of the available data, including the comment noted above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

Cost Impact

There are approximately 421 airplanes of the affected design in the worldwide fleet. The FAA estimates that 185 airplanes of U.S. registry will be affected by this AD.

The inspections that are currently required by AD 96–03–01 R1 take approximately 16 work hours per airplane to accomplish, at an average labor rate of $60 per work hour. Based on these figures, the cost impact of the currently required actions on U.S. operators is estimated to be $177,600, or $960 per airplane, per inspection cycle.

The replacement of the safety link that is required as one option for compliance with this AD action will take approximately 18 work hours per airplane to accomplish, at an average

labor rate of $60 per work hour. Required parts will cost approximately $30,228 per airplane. Based on these figures, the cost impact of this replacement required by this AD on U.S. operators is estimated to be $31,308 per airplane.

In lieu of replacement of the safety link, this AD provides for replacement of the tangential link upper bolt on the aft engine mount with a reworked bolt and a new nut retainer. Such replacement, which is provided as an additional option for compliance with this AD action, will take approximately 20 work hours per airplane to accomplish, at an average labor rate of $60 per work hour. Required parts will cost approximately $1,888 per airplane. Based on these figures, the cost impact of this replacement required by this AD on U.S. operators is estimated to be $3,088 per airplane.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted.

Regulatory Impact

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by removing amendment 39–9538 (61 FR 10270, March 13, 1996), and by adding a new airworthiness directive (AD), amendment 39–11339, to read as follows:

99–20–09 Boeing: Amendment 39–11339. Docket 98–NM–277–AD. Supersedes AD 96–03–01 R1, amendment 39–9538.

Applicability: Model 747 series airplanes, as listed in Boeing Alert Service Bulletin 747–71A2277, dated November 29, 1995; or Boeing Service Bulletin 747–71A2277, Revision 1, dated May 21, 1998, or Revision 2, dated January 14, 1999; certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (c)(1) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent separation of the engine from the airplane, accomplish the following:

Restatement of Requirements of AD 96–03–01 R1, Amendment 39–9538

Inspections and Corrective Actions

(a) Within 90 days after February 16, 1996 (the effective date of AD 96–03–01 R1, amendment 39–9538), accomplish the requirements of paragraphs (a)(1) and (a)(2) of this AD in accordance with Boeing Alert Service Bulletin 747–71A2277, dated November 29, 1995, or Boeing Service Bulletin 747–71A2277, Revision 1, dated May 21, 1998, or Revision 2, dated January 14, 1999.

(1) Perform a visual inspection to ensure that installation of the tangential link upper bolt nut is on the forward side of the engine mount fitting.

(i) If the tangential link upper bolt nut is installed on the forward side of the engine mount fitting, repeat the visual inspection at intervals not to exceed 18 months.

(ii) If the tangential link upper bolt nut is not installed on the forward side of the engine mount fitting, prior to further flight, remove the nut, bolt, and washers, and reinstall the nut, bolt, and washers in accordance with the service bulletin. Thereafter, repeat the visual inspection at intervals not to exceed 18 months.

(iii) If the tangential link upper bolt is missing from the engine mount fitting, prior to further flight, perform the various follow-on actions in accordance with the service bulletin. (The follow-on actions include visual inspections, magnetic particle inspections, replacement of the lower engine mount fitting with a serviceable part, if necessary; installation of new safety links, bolts, and nuts; and installation of a new tangential link upper bolt.) Thereafter, repeat the visual inspection at intervals not to exceed 18 months.

(2) Perform an inspection to verify that the torque value of the tangential link upper bolt (on both sides of the mount) is within the limits specified in the service bulletin.

(i) If the torque value of the tangential link upper bolt nut is within the limits specified in the service bulletin, repeat the inspection (verification) at intervals not to exceed 18 months.

(ii) If the torque value of the tangential link upper bolt nut is outside the limits specified in the service bulletin, prior to further flight, perform a visual inspection of the tangential link upper bolt and washer for any damage or discrepancy, in accordance with the service bulletin.

(A) If no damage or discrepancy of the tangential link upper bolt and washers is found, prior to further flight, replace the bolt nut with a new or serviceable part in accordance with the service bulletin. Thereafter, repeat the inspection (verification) specified in paragraph (a)(2) of this AD at intervals not to exceed 18 months.

(B) If any damage or discrepancy of the tangential link upper bolt and washers is found, prior to further flight, replace the damaged or discrepant part with a new or serviceable part, and replace the bolt nut with a new or serviceable part, in accordance with the service bulletin. Thereafter, repeat the inspection (verification) specified in paragraph (a)(2) of this AD at intervals not to exceed 18 months.

New Requirements of This AD

Replacement

(b) Within 18 months after the effective date of this AD, accomplish the requirements of either paragraph (b)(1) or (b)(2) of this AD. Accomplishment of either paragraph (b)(1) or (b)(2) of this AD constitutes terminating action for the repetitive inspection requirements of this AD.

(1) Replace the safety links on the aft engine mount with modified safety links in accordance with Boeing Service Bulletin 747–71–2206, dated April 16, 1987; or Boeing Service Bulletin 747–71–2206, Revision 1, dated November 12, 1987, as revised by Boeing Notice of Status Change No. 747–71–2206 NSC 1, dated December 4, 1987, and Boeing Notice of Status Change

No. 747–71–2206 NSC 2, dated March 17, 1988.

(2) Replace the tangential link upper bolt on the aft engine mount with a reworked bolt and a new nut retainer, in accordance with Parts 2 and 3 of Boeing Service Bulletin 747–71A2277, Revision 1, dated May 21, 1998, or Revision 2, dated January 14, 1999.

Alternative Methods of Compliance

(c)(1) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate.

Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Seattle ACO.

(c)(2) Alternative methods of compliance, approved previously in accordance with AD 96–03–01 R1, amendment 39–9538, are approved as alternative methods of compliance with this AD.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

Special Flight Permits

(d) Special flight permits may be issued in accordance with §§ 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

Incorporation by Reference

(e) The actions shall be done in accordance with Boeing Alert Service Bulletin 747–71A2277, dated November 29, 1995; Boeing Service Bulletin 747–71A2277, Revision 1, dated May 21, 1998; Boeing Service Bulletin 747–71A2277, Revision 2, dated January 14, 1999; Boeing Service Bulletin 747–71–2206, dated April 16, 1987; or Boeing Service Bulletin 747–71–2206, Revision 1, dated November 12, 1987, as revised by Boeing Notice of Status Change No. 747–71–2206 NSC 1, dated December 4, 1987, and Boeing Notice of Status Change No. 747–71–2206 NSC 2, dated March 17, 1988; as applicable.

(1) The incorporation by reference of Boeing Service Bulletin 747–71A2277, Revision 2, dated January 14, 1999; Boeing Service Bulletin 747–71–2206, dated April 16, 1987; or Boeing Service Bulletin 747–71–2206, Revision 1, dated November 12, 1987, as revised by Boeing Notice of Status Change No. 747–71–2206 NSC 1, dated December 4, 1987, and Boeing Notice of Status Change No. 747–71–2206 NSC 2, dated March 17, 1988; as applicable is approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Boeing Service Bulletin 747–71–2206, Revision 1, dated November 12, 1987, contains the following list of effective pages:

Page No.	Revision level shown on page	Date shown on page
1–5, 9, 10, 12	1	November 12, 1987.
6–8, 11, 13–18	Original	April 16, 1987.

(2) The incorporation by reference of Boeing Alert Service Bulletin 747–71A2277, dated November 29, 1995, was approved previously by the Director of the Federal Register as of February 16, 1996 (61 FR 10270, March 13, 1996).

(3) Copies may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(f) This amendment becomes effective on November 8, 1999.

Issued in Renton, Washington, on September 22, 1999.

D.L. Riggin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 99–25218 Filed 10–1–99; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 99–SW–53–AD; Amendment 39–11343; AD 99–19–23]

RIN 2120–AA64

Airworthiness Directives; Eurocopter France Model EC 120B Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This document publishes in the **Federal Register** an amendment adopting Airworthiness Directive (AD) 99–19–23 which was sent previously to all known U.S. owners and operators of Eurocopter France Model EC 120B helicopters by individual letters. This AD requires, at specified time intervals, inspecting the engine coupling tube for cracks and replacing any cracked engine coupling tube with an airworthy engine coupling tube. This amendment is prompted by the discovery, during routine maintenance inspections, of three cracked engine coupling tubes caused by structural resonance. The actions specified by this AD are intended to detect a crack in the engine coupling tube which could result in coupling failure, loss of engine drive, and a subsequent forced landing.

DATES: Effective October 19, 1999, to all persons except those persons to whom it was made immediately effective by Emergency Priority Letter AD 99–19–23, issued on September 2, 1999, which contained the requirements of this amendment.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of October 19, 1999.

Comments for inclusion in the Rules Docket must be received on or before December 3, 1999.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 99–SW–53–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

The applicable service information may be obtained from American Eurocopter Corporation, 2701 Forum Drive, Grand Prairie, Texas 75053–4005, telephone (972) 641–3460, fax (972) 641–3527. This information may be examined at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas; or at the Office of the Federal Register , 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Shep Blackman, Aerospace Engineer, FAA, Rotorcraft Directorate, Rotorcraft Regulations Group, 2601 Meacham Blvd., Fort Worth, Texas 76137, telephone (817) 222–5296, fax (817) 222–5961.

SUPPLEMENTARY INFORMATION: On September 2, 1999, the FAA issued Emergency Priority Letter AD 99–19–23, applicable to Eurocopter France Model EC 120B helicopters, which requires, within 10 hours time-in-service (TIS), and thereafter, at intervals not to exceed 10 hours TIS, inspecting the engine coupling tube for cracks and replacing any cracked engine coupling tube with an airworthy engine coupling tube. That action was prompted by the discovery, during routine maintenance inspections, of three cracked engine coupling tubes caused by structural resonance. This condition, if not corrected, could result in coupling failure, loss of engine drive, and a subsequent forced landing.

Eurocopter France has issued Eurocopter Service Telex No. 05–001 EC 120, Version B, dated August 26, 1999, which describes procedures for checking the coupling tube assembly, part number (P/N) C631A1002101, on the engine-to-main gearbox coupling. The Direction Generale De L'Aviation Civile (DGAC), which is the airworthiness authority for France, classified this service telex as mandatory and issued telegraphic AD No. T1999–349–002(A) R1, dated August 27, 1999, to ensure the continued airworthiness of these helicopters in France.

This helicopter model is manufactured in France and is type certificated for operation in the United States under the provision of § 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DGAC has kept the FAA informed of the situation described above. The FAA has examined the findings of the DGAC, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operations in the United States.

Since the unsafe condition described is likely to exist or develop on other Eurocopter France Model EC 120 helicopters of the same type design, the FAA issued Emergency Priority Letter AD 99–19–23 to detect a crack in the engine coupling tube which could result in coupling failure, loss of engine drive, and a subsequent forced landing. The AD requires, within 10 hours TIS, and thereafter, at intervals not to exceed 10 hours TIS, inspecting the engine coupling tube, P/N C631A1002101, for cracks and replacing any cracked engine coupling tube with an airworthy engine coupling tube. The actions must be accomplished in accordance with the service telex described previously. The short compliance time involved is required because the previously described critical unsafe condition can adversely affect the structural integrity of the helicopter. Therefore, inspecting the engine coupling tube for any crack and replacing any cracked engine coupling tube is required within 10 hours TIS, and this AD must be issued immediately.

Since it was found that immediate corrective action was required, notice and opportunity for prior public comment thereon were impracticable and contrary to the public interest, and good cause existed to make the AD effective immediately by individual letters issued on September 2, 1999, to all known U.S. owners and operators of Eurocopter France Model EC 120B helicopters. These conditions still exist, and the AD is hereby published in the **Federal Register** as an amendment to section 39.13 of the Federal Aviation Regulations (14 CFR 39.13) to make it effective to all persons.

The FAA estimates that 12 helicopters of U.S. registry will be affected by this AD; it will take approximately 2 work hours per helicopter to inspect the engine coupling tube; 4 work hours to replace the engine coupling tube, if necessary; and the average labor rate is $60 per work hour. Required parts, if the engine coupling tube is replaced, will cost approximately $4,020 per helicopter. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $39,960 per year, assuming 10 inspections per helicopter and replacement of the engine coupling tube on 6 helicopters.

Comments Invited

Although this action is in the form of a final rule that involves requirements affecting flight safety and, thus, was not preceded by notice and an opportunity for public comment, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified under the caption ''**ADDRESSES.**'' All communications received on or before the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this AD will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 99–SW–53–AD.'' The postcard will be date stamped and returned to the commenter.

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that this regulation is an emergency regulation that must be issued immediately to correct an unsafe condition in aircraft, and that it is not a ''significant regulatory action'' under Executive Order 12866. It has been determined further that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the Rules Docket. A copy of it, if filed, may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding a new airworthiness directive to read as follows:

AD 99–19–23 Eurocopter France: Amendment 39–11343. Docket No. 99–SW–53–AD.

Applicability: Model EC 120B helicopters with engine coupling tube, P/N C631A1002101, installed, certificated in any category.

Note 1: This AD applies to each helicopter identified in the preceding applicability provision, regardless of whether it has been otherwise modified, altered, or repaired in

the area subject to the requirements of this AD. For helicopters that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (b) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To detect a crack in the engine coupling tube which could result in coupling failure, loss of engine drive, and a subsequent forced landing, accomplish the following:

(a) Within 10 hours time-in-service (TIS) and thereafter at intervals not to exceed 10 hours TIS, inspect engine coupling tube, P/N C631A1002101, for any crack and replace any cracked engine coupling tube before further flight. Inspect and replace, if necessary, in accordance with paragraph CC of Eurocopter Service Telex No. 05–001 EC 120, Version B, dated August 26, 1999, except that reporting to Eurocopter Technical Support is not required.

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Rotorcraft Regulations Group, FAA. Operators shall submit their requests through an FAA Principal Maintenance Inspector, who may concur or comment and then send it to the Manager, Rotorcraft Regulations Group.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Rotorcraft Regulations Group.

(c) Special flight permits will not be issued.

(d) The inspection and repair, if necessary, shall be done in accordance with paragraph CC of Eurocopter Service Telex No. 05–001 EC 120, Version B, dated August 26, 1999. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from American Eurocopter Corporation, 2701 Forum Drive, Grand Prairie, Texas 75053–4005, telephone (972) 641–3460, fax (972) 641–3527. Copies may be inspected at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(e) This amendment becomes effective on October 19, 1999 to all persons except those persons to whom it was made immediately effective by Emergency Priority Letter AD 99–19–23, issued September 2, 1999, which contained the requirements of this amendment.

Issued in Fort Worth, Texas, on September 22, 1999.

Henry A. Armstrong,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 99–25374 Filed 10–1–99; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No.99–SW–15–AD; Amendment 39–11344; AD 99–21–01]

RIN 2120–AA64

Airworthiness Directives; Eurocopter France Model SA–360C, SA–365C, C1, and C2 Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) applicable to Eurocopter France Model SA–360C, SA–365C, C1, and C2 helicopters. This action requires replacing certain electrical modules with airworthy electrical modules. This amendment is prompted by the discovery of several defective electrical modules. This condition if not corrected could result in loss of electrical continuity, which could cause loss of critical rotorcraft electrical systems and subsequent loss of control of the helicopter.

DATES: Effective October 19, 1999.

Comments for inclusion in the Rules Docket must be received on or before December 3, 1999.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 99–SW–15–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Robert McCallister, Aerospace Engineer, FAA, Rotorcraft Directorate, Rotorcraft Standards Staff, Fort Worth, Texas 76193–0110, telephone (817) 222–5121, fax (817) 222–5961.

SUPPLEMENTARY INFORMATION: The Direction Generale De L'Aviation Civile (DGAC), the airworthiness authority for France, recently notified the FAA that an unsafe condition may exist on Eurocopter France Model SA–360C, SA–365C, C1, and C2 helicopters. The DGAC advises of the malfunctions due to faulty ''CONNECTRAL'' modules on electrical circuits of a Super Puma AS332 helicopter.

Eurocopter France has issued Eurocopter Service Bulletin No. 01.37, dated May 28, 1998 (SB), for Model SA–360C, SA–365C, C1, and C2 helicopters. The SB specifies inspecting and replacing ''CONNECTRAL'' green electrical modules having a manufacturing code of 95/16 through 96/21. The manufacturing code identifies the year and week of module production. The electrical modules identified by a white dot on the face are airworthy and do not need to be replaced. The DGAC classified this SB as mandatory and issued AD 98–252–043(A), dated July 1, 1998, to ensure the continued airworthiness of these helicopters in France.

These helicopter models are manufactured in France and are type certificated for operation in the United States under the provisions of § 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DGAC has kept the FAA informed of the situation described above. The FAA has examined the findings of the DGAC, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Since an unsafe condition has been identified that is likely to exist or develop on other Eurocopter France Model SA–360C, SA–365C, C1, and C2 helicopters of the same type design registered in the United States, this AD is being issued to prevent loss of electrical continuity, which could cause loss of critical systems and subsequent loss of control of the helicopter. This AD requires replacing each ''CONNECTRAL'' green electrical module having a manufacturing code of 95/16 through 96/21 with an airworthy electrical module. Replacing the electrical modules identified with a white dot on the face is not required because the manufacturer has verified the proper functioning of these units.

None of the Model SA–360C, SA–365C, C1, and C2 helicopters affected by this action are on the U.S. Register. All helicopters included in the applicability of this rule are operated by non-U.S. operators under foreign registry; therefore, they are not directly affected by this AD action. However, the FAA considers that this rule is necessary to ensure that the unsafe condition is addressed in the event that any of these

subject helicopters are imported and placed on the U.S. Register in the future.

Should an affected helicopter be imported and placed on the U.S. Register in the future, it would require approximately 120 work hours per helicopter to accomplish the proposed actions at an average labor rate of $60 per work hour. Required parts would cost approximately $7,282 for the maximum number of modules replaced per helicopter, but the helicopter manufacturer has stated that the parts will be provided at no cost. Based on these figures, the total cost impact of this AD would be $7,200 per helicopter.

Since this AD action does not affect any helicopter that is currently on U.S. Register, it has no adverse economic impact and imposes no additional burden on any person. Therefore, notice and public procedures hereon are unnecessary and the amendment may be made effective in less than 30 days after publication in the **Federal Register**.

Comments Invited

Although this action is in the form of a final rule that involves requirements affecting flight safety and, thus, was not preceded by notice and an opportunity for public comment, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified under the caption **ADDRESSES.** All communications received on or before the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this AD will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 99–SW–15–AD.'' The postcard will be date stamped and returned to the commenter.

The regulations adopted herein would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that notice and public comment are unnecessary in promulgating this regulation; therefore, it can be issued immediately to correct an unsafe condition in aircraft since none of these model helicopters are registered in the United States. The FAA has also determined that this regulation is not a ''significant regulatory action'' under Executive Order 12866. It has been determined further that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the Rules Docket. A copy of it, if filed, may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding a new airworthiness directive to read as follows:

AD 99–21–01 Eurocopter France: Amendment 39–11344, Docket No. 99–SW–15–AD.

Applicability: Model SA–360C, SA–365 C, C1, and C2 helicopters, certificated in any category.

Note 1: This AD applies to each helicopter identified in the preceding applicability provision, regardless of whether it has been otherwise modified, altered, or repaired in the area subject to the requirements of this AD. For helicopters that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (b) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required within 400 hours time-in-service or within 6 calendar months, whichever occurs first, unless accomplished previously.

To prevent loss of electrical continuity, which could cause loss of critical rotorcraft electrical systems and subsequent loss of control of the helicopter, accomplish the following:

(a) Remove and replace each ''CONNECTRAL'' green electrical module that does not have a white dot on the face and that has a manufacturing code of 95/16 through 96/21 with an airworthy electrical module.

Note 2: Eurocopter France Service Bulletin No. 01.37, dated May 28, 1998, pertains to the subject of this AD.

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Rotorcraft Standards Staff, Rotorcraft Directorate, FAA. Operators shall submit their requests through an FAA Principal Maintenance Inspector, who may concur or comment and then send it to the Manager, Standards Staff.

Note 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Rotorcraft Standards Staff.

(c) Special flight permits may be issued in accordance with §§ 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the helicopter to a location where the requirements of this AD can be accomplished.

Note 4: The subject of this AD is addressed in Direction Generale De L'Aviation Civile AD 98–252–043(A), dated July 1, 1998.

Issued in Fort Worth, Texas, on September 24, 1999.

Henry A. Armstrong,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 99–25598 Filed 10–1–99; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 99–ACE–34]

Amendment to Class E Airspace; Kansas City, MO

AGENCY: Federal Aviation Administration [FAA], DOT.

ACTION: Final rule; correction.

SUMMARY: This action corrects an error in the study number of a final rule that was published in the **Federal Register** on September 13, 1999 (64 FR 49376), Airspace Docket No. 98–ACE–34.

EFFECTIVE DATE: October 4, 1999.

FOR FURTHER INFORMATION CONTACT: Kathyy Randolph, Air Traffic Division, Airspace Branch, ACE–520C, Federal Aviation Administration, 601 E. 12th Street, Kansas City, MO 64106; telephone: (816) 426–3408.

SUPPLEMENTARY INFORMATION:

History

Federal Register Document 99–23725, Airspace Docket No. 98–ACE–34, published in September 13, 1999 (64 FR 49376), revised the description of the Class E airspace area at Kansas City, MO. An error was noted in the study number of Kansas City, MO. This action corrects that error.

Corrections to Final Rule

Accordingly, pursuant to the authority delegated to me, the study number, Airspace Docket No. 98–ACE–34 for Kansas City, MO, as published in the **Federal Register** on September 13, 1999 (64 FR 49376), (**Federal Register** Document 99–23725, page 49376, Column 1), is corrected as follows:

By removing study number [Airspace Docket No. 98–ACE–34] and substituting [Airspace Docket No. 99–ACE–34].

Issued in Kansas City, MO, on September 22, 1999.

Herman L. Lyons, Jr.,

Manager, Air Traffic Division Central Region.

[FR Doc. 99–25730 Filed 10–1–99; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Part 122

[T.D. 99–71]

RIN 1515–AC51

Flights To and From Cuba

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to provide that aircraft and passengers departing the U.S. for, or entering the U.S. from, Cuba must depart or enter through either the John F. Kennedy International Airport, Jamaica, New York; the Los Angeles International Airport, Los Angeles, California; or the Miami International Airport, Miami, Florida. At present, such aircraft and passengers may depart or enter only through the Miami International Airport. The change is in accordance with a statement by the President that direct passenger flights would be authorized between Cuba and some cities in the U.S. besides Miami, in order to facilitate licensed travel to and from Cuba, including family reunification for Cuban resident aliens and U.S. citizens of Cuban heritage living in U.S. cities other than Miami. To this end, the Department of State and the National Security Council have specifically directed that direct charter passenger flights by persons that possess a valid Office of Foreign Assets Control Carrier Service Provider authorization may operate between Cuba and the two additional U.S. airports.

EFFECTIVE DATE: October 4, 1999.

FOR FURTHER INFORMATION CONTACT: Margaret R. Fearon, Office of Field Operations, 202–927–0494.

SUPPLEMENTARY INFORMATION:

Background

In part 122, Customs Regulations, subpart O, consisting of §§ 122.151–122.158 (19 CFR 122.151–122.158), sets forth special Customs procedures that apply to all aircraft except public aircraft that depart or enter the U.S. to or from Cuba.

In particular, § 122.153, Customs Regulations (19 CFR 122.153), provides that unless otherwise authorized by the Assistant Commissioner, Field Operations, Customs Headquarters, the owner or person in command of an aircraft clearing the U.S. for, or entering from, Cuba, must clear or obtain permission to depart from, or enter at, the Miami International Airport, Miami, Florida.

In addition, § 122.154, Customs Regulations (19 CFR 122.154), requires that the person in command of the aircraft furnish advance notice of arrival at least one hour before crossing the U.S. coast or border. The notice must be given either through the Federal Aviation Administration flight notification procedure or directly to the Customs officer in charge at the Miami International Airport.

Flights Between Cuba and Additional Cities in the U.S.

In a statement issued on January 5, 1999, the President announced a series of humanitarian measures designed to reach out to and ease the plight of the Cuban people, and to help them prepare for a democratic future. As one of these measures, the President authorized the restoration of flights between Cuba and some cities in the U.S. in addition to Miami. The purpose of this measure is to facilitate licensed travel to and from Cuba, including family reunification for Cuban resident aliens and U.S. citizens of Cuban heritage living in U.S. cities other than Miami.

To this end, the Department of State and the National Security Council have specifically directed that direct charter passenger flights by persons that possess a valid Office of Foreign Assets Control Carrier Service Provider authorization may operate between Cuba and two additional U.S. airports—the John F. Kennedy International Airport in Jamaica, New York, and the Los Angeles International Airport in Los Angeles, California.

Accordingly, §§ 122.153 and 122.154 are amended to reflect that flights between Cuba and the U.S. will be permitted at these two additional U.S. airports.

Inapplicability of Notice and Delayed Effective Date Requirements, the Regulatory Flexibility Act and Executive Order 12866

Pursuant to the provisions of 5 U.S.C. 553(a)(1), public notice and comment procedure is not applicable to this rule because the rule falls within the foreign affairs function of the United States. In this regard, as noted, the rule implements a January 5, 1999, announcement by the President that direct passenger flights would be authorized to and from Cuba and other U.S. cities in addition to Miami, as part of a humanitarian effort designed to reach out to and ease the plight of the Cuban people, and to help them prepare for a democratic future. The Department of State and the National Security Council have specifically directed that passenger flights be permitted between

Cuba and the U.S. through the John F. Kennedy International Airport in Jamaica, New York, and the Los Angeles International Airport in Los Angeles, California.

Because this document is not subject to the requirements of 5 U.S.C. 553, delayed effective date requirements are not applicable, and the document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because the document involves a foreign affairs function of the United States, it is not subject to the provisions of E.O. 12866.

List of Subjects in 19 CFR Part 122

Administrative practice and procedure, Air carriers, Aircraft, Airports, Air transportation, Cuba, Customs duties and inspection, Entry procedure, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Security measures.

Amendments to the Regulations

Accordingly, part 122, Customs Regulations (19 CFR part 122), is amended as set forth below.

PART 122—AIR COMMERCE REGULATIONS

1. The authority citation for part 122 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1433, 1436, 1448, 1459, 1590, 1594, 1623, 1624, 1644, 1644a.

2. Section 122.153 is revised to read as follows:

§ 122.153 Limitations on airport of entry or departure.

The owner or person in command of any aircraft clearing the U.S. for, or entering the U.S. from, Cuba, whether the aircraft is departing on a temporary sojourn, or for export, must clear or obtain permission to depart from, or enter at, the Miami International Airport, Miami, Florida; the John F. Kennedy International Airport, Jamaica, New York; or the Los Angeles International Airport, Los Angeles, California, and comply with the requirements in this part unless otherwise authorized by the Assistant Commissioner, Office of Field Operations, Customs Headquarters.

3. Section 122.154 is amended by revising paragraph (b)(2) to read as follows:

§ 122.154 Notice of arrival.

* * * * *

(b) *Procedure for giving advance notice of arrival.* * * *

* * * * *

(2) Directly to the Customs officer in charge at the Miami International Airport, Miami, Florida; the John F. Kennedy International Airport, Jamaica, New York; or the Los Angeles International Airport, Los Angeles, California, whichever is applicable.

* * * * *

Raymond W. Kelly,

Commissioner of Customs.

Dated: September 15, 1999.

John P. Simpson,

Deputy Assistant Secretary of the Treasury.

[FR Doc. 99–25689 Filed 10–1–99; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 100

[CGD08–99–052]

RIN 2115–AE46

Special Local Regulations; Tall Stacks 1999; Ohio River Mile 467.0–475.0, Cincinnati, OH

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: Special local regulations are being adopted for Tall Stacks 1999. This event will be held from 6 a.m. on October 13, 1999 through 12:01 a.m. on October 18, 1999 on the Ohio River near Cincinnati, Ohio. These regulations are needed to provide for the safety of life on navigable waters during the event.

DATES: These regulations are effective from 6 a.m. on October 13, 1999, until 12:01 a.m. on October 18, 1999.

ADDRESSES: Unless otherwise indicated, all documents referred to in this document are available for review at Marine Safety Office, Louisville, 600 Martin Luther King Jr. Place, Room 360, Louisville, KY 40202–2230.

FOR FURTHER INFORMATION CONTACT: Lieutenant Jeff Johnson, Chief, Port Management Department, USCG Marine Safety Office, Louisville, KY at (502) 582–5194, ext. 39.

SUPPLEMENTARY INFORMATION:

Regulatory History

In accordance with 5 U.S.C. 553, a notice of proposed rule making for these regulations has not been published, and good cause exists for making them effective in less than 30 days from the date of publication. Following normal rule making procedures would be impracticable. The details of the event were not finalized in sufficient time to publish proposed rules in advance of the event or to provide for a delayed effective date.

Background and Purpose

The marine event requiring this regulation is Tall Stacks 1999, which is a national celebration of the steamboating era in America. The event is sponsored by the Greater Cincinnati Tall Stacks Commission. There will be boat races and parade cruises on the Ohio River between miles 467.0 to 475.0, mid-channel. Non-participating vessels will be able to transit the area when the river is reopened after each race and parade cruise.

Regulatory Evaluation

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that order. The Office of Management and Budget has not reviewed it under that order. It is not significant under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040; February 26, 1979). The Coast Guard expects the economic impact of this rule to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies and procedures of DOT is unnecessary because of the event's short duration.

Small Entities

The Coast Guard finds that the impact on small entities, if any, is not substantial. Therefore, the Coast Guard certifies under section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 601 *et. seq.*, that this temporary rule will not have a significant economic impact on a substantial number of small entities because of the event's short duration and the regularly scheduled river openings during the event.

Collection of Information

This rule contains no information collection requirements under the Paperwork Reduction Act (44 U.S.C. 3501 *et. seq.*).

Federalism Assessment

The Coast Guard has analyzed this action in accordance with the principles and criteria of Executive Order 12612 and has determined that this rule does not raise sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environmental Assessment

The Coast Guard considered the environmental impact of this rule and concluded that under section 2–1, paragraph (34)(h) of Commandant

Instruction M16475.1C, this rule is excluded from further environmental documentation.

List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

Temporary Regulations

In consideration of the foregoing, Part 100 of Title 33, Code of Federal Regulations, is amended as follows:

PART 100—[AMENDED]

1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233; 49 CFR 1.46 and 33 CFR 100.35

2. A temporary § 100.35–T08–052 is added to read as follows:

§ 100.35–T08–052 Ohio River at Cincinnati, Ohio.

(a) *Regulated area.* All the waters of the Ohio River Mile 467.0–475.0.

(b) *Special local regulations.* (1) All persons and vessels not registered with the sponsors as participants or official patrol vessels are considered spectators. ''Participants'' are those persons and vessels identified by the sponsor as taking part in the event. The ''official patrol'' consists of any Coast Guard, public, state or local law enforcement or sponsor-provided vessel assigned to patrol the event. The Coast Guard ''Patrol Commander'' is a Coast Guard commissioned, warrant, or petty officer who has been designated by Commanding Officer, Coast Guard Marine Safety Office Louisville.

(2) No vessel shall anchor, block, loiter in, or impede the through transit of participants or official patrol vessels in the regulated area during effective dates and times, unless cleared for such entry by or through an official patrol vessel.

(3) When hailed and/or signaled by an official patrol vessel, a spectator shall come to an immediate stop. Vessels shall comply with all directions given; failure to do so may result in a citation.

(4) The Patrol Commander is empowered to forbid and control the movement of all vessels in the regulated area. The Patrol Commander may terminate the event at any time it is deemed necessary for the protection of life and/or property and can be reached on VHF–FM Channel 16 by using the call sign ''PATCOM''.

(c) *Effective dates.* This section will be effective from 6 a.m. on October 13, 1999, until 12:01 a.m. on October 18, 1999.

Dated: September 17, 1999.

Paul J. Pluta,

Rear Admiral, U.S. Coast Guard Commander, Eighth Coast Guard District.

[FR Doc. 99–25728 Filed 10–1–99; 8:45 am]

BILLING CODE 4910–15–U

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[FRL–6450–7]

National Oil and Hazardous Substances Contingency Plan; National Priorities List Update

AGENCY: Environmental Protection Agency.

ACTION: Notice of deletion of the Neal's Dump Superfund site From the National Priorities List (NPL).

SUMMARY: The Environmental Protection Agency (EPA) announces the deletion of the Neal's Dump Superfund Site in Indiana from the National Priorities List (NPL). The NPL is appendix B of 40 CFR part 300, which is the National Oil and Hazardous Substances Contingency Plan (NCP), which EPA promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended. This action is being taken by EPA and the State of Indiana, because it has been determined that Responsible Parties have implemented all appropriate response actions required. Moreover, EPA and the State of Indiana have determined that remedial actions conducted at the site to date remain protective of public health, welfare, and the environment.

EFFECTIVE DATE: October 4, 1999.

FOR FURTHER INFORMATION CONTACT: Thomas Alcamo at (312) 886–7278 (SR–6J), Remedial Project Manager or Gladys Beard at (312) 886–7253, Associate Remedial Project Manager, Superfund Division, U.S. EPA—Region V, 77 West Jackson Blvd., Chicago, IL 60604. Information on the site is available at the local information repository located at: The Monroe County Public Library, 303 E. Kirkwood, Bloomington, IN 47408 or The Monroe County Public Library-Elletsville Branch, 600 West Temperance, Ellettsville, IN. Requests for comprehensive copies of documents should be directed formally to the Regional Docket Office. The contact for the Regional Docket Office is Jan Pfundheller (H–7J), U.S. EPA, Region V, 77 W. Jackson Blvd., Chicago, IL 60604, (312) 353–5821.

SUPPLEMENTARY INFORMATION: The site to be deleted from the NPL is: Neal's Dump Superfund Site located in southeast Owen County, Indiana. A Notice of Intent to Delete for this site was published August 26, 1999 (64 FR 46632). The closing date for comments on the Notice of Intent to Delete was September 24, 1999. EPA received no comments and therefore no Responsiveness Summary was prepared.

The EPA identifies sites which appear to present a significant risk to public health, welfare, or the environment and it maintains the NPL as the list of those sites. Sites on the NPL may be the subject of Hazardous Substance Response Trust Fund (Fund-) financed remedial actions. Any site deleted from the NPL remains eligible for Fund-financed remedial actions in the unlikely event that conditions at the site warrant such action. Section 300.425(e)(3) of the NCP states that Fund-financed actions may be taken at sites deleted from the NPL in the unlikely event that conditions at the site warrant such action. Deletion of a site from the NPL does not affect responsible party liability or impede agency efforts to recover costs associated with response efforts.

List of Subjects in 40 CFR Part 300

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

Dated: September 17, 1999.

Francis X. Lyons,

Regional Administrator, Region V.

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 by removing the Site ''Neal's Dump (Spencer), Spencer, Indiana.''

[FR Doc. 99–25711 Filed 10–1–99; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 990304063–9063–01; I.D. 092899B]

Fisheries of the Exclusive Economic Zone Off Alaska; Vessels Catching Pollock for Processing by the Inshore Component In the Bering Sea Subarea

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

ACTION: Closure.

SUMMARY: NMFS is prohibiting directed fishing for pollock by vessels catching pollock for processing by the inshore component in the critical habitat/catcher vessel operational area (CH/CVOA) of the Bering Sea subarea of the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary because the C season limit of pollock total allowable catch (TAC) specified for the inshore component within the CH/CVOA will be reached.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), September 29, 1999, until 2400 hrs, A.l.t., December 31, 1999.

FOR FURTHER INFORMATION CONTACT: Mary Furuness, 907–586-7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI according to the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

In accordance with § 679.20(a)(5)(i)(C)(1) and the revised emergency interim rule (64 FR 39087, July 21, 1999), the C season limit of pollock TAC specified for harvest by the inshore component within the CH/CVOA is 79,307 metric tons (mt).

In accordance with § 679.22(a)(11)(iv)(A) the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the C season limit of pollock total allowable catch specified for harvest by the inshore component within the CH/CVOA will be reached.

Consequently, NMFS is prohibiting directed fishing for pollock by vessels catching pollock for processing by the inshore component within the CH/CVOA conservation zone, as defined at § 679.22(a)(11)(iv)(B).

Maximum retainable bycatch amounts may be found in the regulations at § 679.20(e) and (f).

Classification

This action responds to the best available information recently obtained from the fishery. It must be implemented immediately in order to prevent exceeding the C season limit of pollock TAC specified to the inshore component for harvest within the CH/CVOA. A delay in the effective date is impracticable and contrary to the public interest. Further delay would result in noncompliance with reasonable and prudent management measures implemented to promote the recovery of the endangered Steller sea lion. NMFS finds for good cause that the implementation of this action can not be delayed for 30 days. Accordingly, under 5 U.S.C. 553(d), a delay in the effective date is hereby waived.

This action is required by § 679.22 and is exempt from review under E.O. 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: September 28, 1999.

Bruce C. Morehead,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 99–25680 Filed 9–29–99; 3:59 pm]

BILLING CODE 3510–22–F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 990304063–9063–01; I.D. 092499K]

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Catcher Vessels Using Trawl Gear in the Bering Sea and Aleutian Islands

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

ACTION: Modification of a closure.

SUMMARY: NMFS is opening directed fishing for Pacific cod by catcher vessels using trawl gear in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to fully utilize the portion of the 1999 total allowable catch (TAC) of Pacific cod allocated to these vessels using trawl gear in this area.

DATES: Effective 1200 hours, Alaska local time (A.l.t.), October 1, 1999, until 2400 hours, A.l.t., December 31, 1999, or until NMFS publishes further notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Andrew Smoker, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI according to the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The Final 1999 Harvest Specifications of Groundfish for the BSAI (64 FR 12103, March 11, 1999) established the portion of the TAC of Pacific cod allocated to catcher vessels using trawl gear in the BSAI as 38,475 metric tons (mt). See § 679.20(c)(3)(iii) and § 679.20(a)(7)(i)(B).

The fishery for Pacific cod by catcher vessels using trawl gear in the BSAI was closed to directed fishing under § 679.20(d)(1)(iii) on April 11, 1999, (64 FR 18373, April 14, 1999), in order to reserve amounts anticipated to be needed for incidental catch in other fisheries. In that notice, the Regional Administrator, Alaska Region, NMFS (Regional Administrator) also established a directed fishing allowance of 34,475 mt, and set aside the remaining 4,000 mt as bycatch to support other anticipated groundfish fisheries.

NMFS has determined that as of September 11, 1999, 2,870 mt remain in the portion of the TAC of Pacific cod allocated to catcher vessels using trawl gear in the BSAI and of that amount, 500 mt will be necessary as bycatch to support other anticipated groundfish fisheries through the end of 1999. Therefore, the Regional Administrator is establishing a revised directed fishing allowance of 37,975mt, and is setting aside the remaining 500 mt as bycatch to support other anticipated groundfish fisheries. NMFS has determined that 2,370 mt remain in the directed fishing allowance. Therefore, NMFS is terminating the previous closure and is opening directed fishing for Pacific cod by catcher vessels using trawl gear in the BSAI.

Classification

All other closures remain in full force and effect. This action responds to the

best available information recently obtained from the fishery. It must be implemented immediately in order to allow full utilization of the Pacific cod TAC. Providing prior notice and opportunity for public comment for this action is impracticable and contrary to the public interest. Further delay would only disrupt the FMP objective of providing the Pacific cod TAC for harvest. NMFS finds for good cause that the implementation of this action cannot be delayed for 30 days. Accordingly, under 5 U.S.C. 553(d), a delay in the effective date is hereby waived.

This action is required by § 679.20 and is exempt from review under E.O. 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: September 28, 1999.

Bruce C. Morehead,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 99–25679 Filed 9–30–99; 10:28 am]

BILLING CODE 3510–22–F

Proposed Rules

Federal Register
Vol. 64, No. 191
Monday, October 4, 1999

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF STATE

22 CFR Part 194

[Public Notice 3118]

Office of the Assistant Legal Adviser for Private International Law; Inter-American Convention on International Commercial Arbitration Rules of Procedure

AGENCY: Office of the Assistant Legal Adviser for Private International Law.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of State proposes to make effective under United States law the revised rules of procedure of the Inter-American Commercial Arbitration Commission (''IACAC''). The amended rules of procedure enhance the role of IACAC in the initiation and conduct of arbitration of international contractual disputes to which the International Convention on Commercial Arbitration (''Convention'') applies. The amended rules address such issues as notice procedures, the appointment of arbitrators, the role of each National Section of IACAC, and an increased fee schedule. Adoption of these rules will ensure their uniformity of application among states party to the Convention.

DATES: Comments must be received by November 18, 1999.

ADDRESSES: Comments should be addressed to Jeffrey D. Kovar, Assistant Legal Adviser for Private International Law, South Building, Suite 203, 2430 E St., NW, Washington, DC 20037–2860. They may also be sent via telefax to (202) 776–8482 or e-mail to <pildb@his.com>.

FOR FURTHER INFORMATION CONTACT: Ms. Rosie Gonzales (202–776–8423), at the above office address for copies of the proposed revisions to the IACAC rules of procedure. Copies are available in English and Spanish.

SUPPLEMENTARY INFORMATION: IACAC has amended its rules of procedure applicable to arbitration conducted under the Convention. The Convention entered into force for the United States in 1990 with the reservation that the United States would only be bound by the rules of procedure in effect on July 1, 1988, unless the Secretary of State determines by regulation that any subsequent modification or amendment will apply in the United States. Pursuant to Title 9 section 306 of the United States Code, the rulemaking procedures of Title 5 section 553 of the United States Code apply to any determination to effectuate such a modification or amendment within the United States. In accordance with those procedures, notice must be published in the **Federal Register**, time for comment provided, and the final rule published for 30 days before the rule may become effective.

The proposed changes in the Convention's rules of procedure include, *inter alia*:

—Requiring IACAC approval before the arbitrating parties may use modified rules of procedure;
—Requiring notice from one party to the other also to be delivered to the Director General of IACAC or the IACAC National Section;
—In cases involving a three-person Tribunal, requiring the claimant to designate one arbitrator in the notice of demand for arbitration;
—In the event that one member of a three-person Tribunal is unable to continue, authorizing the remaining two arbitrators to continue at their discretion;
—In the absence of a majority for a decision, giving the Tribunal President the sole and unreviewable authority to decide;
—In cases where the respondent fails to submit its defense, providing the Tribunal discretion whether to continue the arbitration or not;
—Specifying that an award is not subject to appeal;
—Requiring notice of post-award requests for interpretation, correction, or an additional award to be made to the Tribunal, and for the Tribunal to notify the other party;
—Setting forth new procedures for calculating costs and fees, and providing that the IACAC Arbitrator Nominating Committee may request advance deposit of costs;
—Setting forth internal IACAC procedures for cases administered under the rules, including a schedule of increased fees, establishing an Arbitrator Nominating Committee, and specifying that IACAC National Sections will generally carry out secretarial functions under the rules.

List of Subjects in 22 CFR Part 194

Administrative practice and procedure, Foreign relations, Government contracts.

Jeffrey D. Kovar,
Assistant Legal Adviser for Private International Law.

[FR Doc. 99–25732 Filed 10–1–99; 8:45 am]

BILLING CODE 4710–08–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 132

[FRL–6447–4]

RIN 2040–AD32

Proposal To Amend the Final Water Quality Guidance for the Great Lakes System To Prohibit Mixing Zones for Bioaccumulative Chemicals of Concern

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is today proposing to amend the Final Water Quality Guidance for the Great Lakes System (Guidance)(40 CFR Part 132) to prohibit mixing zones for bioaccumulative chemicals of concern (BCCs) in the Great Lakes System, subject to a limited exception for existing discharges. For existing discharges, the regulation would prohibit mixing zones for BCCs starting 10 years after the publication date of the final BCC mixing zone rule. New discharges of BCCs would be subject to the mixing zone prohibition immediately upon commencing discharge. EPA had promulgated a mixing zone provision similar to this proposed regulation on March 23, 1995, as part of the Water Quality Guidance for the Great Lakes System required by section 118(c)(2) of the Clean Water Act. The provision was vacated by the U.S. Court of Appeals for the District of Columbia Circuit in the case of *American Iron & Steel Institute* v. *EPA*, 115 F.3d 979 (D.C. Cir. 1997), and was remanded to the Agency for further consideration. This proposed regulation

reflects EPA's reconsideration of the factual record in response to that remand.

DATES: EPA will accept public comments on the proposal until December 3, 1999.

ADDRESSES: An original and 4 copies of all comments on the proposal should be addressed to Mary Willis Jackson, Water Quality Branch (WT–15J), U.S. EPA Region 5, 77 West Jackson Blvd., Chicago, Illinois, 60604. The public docket for this rulemaking, including the proposed rule, economic analysis and other supporting documents are available for inspection and copying at U.S. EPA Region 5, 77 West Jackson Blvd., Chicago, IL 60604 by appointment only. Appointments may be made by calling Mary Willis Jackson (telephone 312–886–3717).

FOR FURTHER INFORMATION CONTACT: Mark L. Morris (4301), U.S. EPA, 401 M Street, SW, Washington, D.C. 20460 (202–260–0312).

SUPPLEMENTARY INFORMATION:

Potentially Affected Entities

Entities potentially affected by today's action are those discharging or intending to discharge BCCs to waters of the United States in the Great Lakes System. Categories and entities that may ultimately be affected include:

Category	Examples of potentially affected entities
Industry	Industries discharging or intending to discharge BCCs to waters in the Great Lakes System as defined in 40 CFR 132.2.
Municipalities	Publicly owned treatment works discharging or intending to discharge BCCs to waters of the Great Lakes System as defined in 40 CFR 132.2.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. This table lists the types of entities that EPA is now aware could potentially be affected by this action. Other types of entities not listed in the table could also be affected. To determine whether your facility is affected by this action, you should carefully examine the definition of ''Great Lakes System'' in 40 CFR 132.2 and examine the preamble to 40 CFR Part 132, which describes the Part 132 regulations. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

I. Legal Authority

This regulation is being proposed under the authority of sections 118, 301, 303, 402, and 501 of the Clean Water Act.

II. Background

Section 118(c)(2) of the Clean Water Act (CWA), as amended by the Great Lakes Critical Programs Act of 1990, required EPA to publish proposed and final water quality guidance on minimum water quality standards, antidegradation policies, and implementation procedures for the Great Lakes System. On March 23, 1995, EPA published a final rule entitled ''Final Water Quality Guidance for the Great Lakes System'' in order to satisfy this requirement. *See* 60 FR 15366. The 1995 Guidance included ambient water quality criteria for 29 pollutants, including BCCs, that reflect the maximum ambient concentrations of those pollutants that could be present in waters of the Great Lakes Basin without impairing aquatic life, wildlife or human health. The 1995 Guidance also included implementation procedures that Great Lakes States and Tribes are to use to prepare total maximum daily load (TMDL) analyses and to develop water quality-based effluent limits (WQBELs) for facilities discharging these pollutants. *See* 40 CFR Part 132. The Great Lakes States are the States of Illinois, Indiana, Michigan, Minnesota, Ohio, New York, Pennsylvania, and Wisconsin. The Great Lakes Tribes are those Tribes as defined in 40 CFR 132.2. Great Lakes Tribes consist of any Tribe within the Great Lakes Basin for which EPA has approved water quality standards under section 303 or that EPA has authorized to administer a National Pollutant Discharge Elimination System (NPDES) program under section 402 of the CWA.

Among the implementation procedures in the 1995 Guidance was Procedure 3.C. in Appendix F. Under this procedure, NPDES permits would have been prohibited from including mixing zones in the calculation of water quality-based effluent limits for new discharges of BCCs after March 23, 1997, or for existing discharges of BCCs after March 23, 2007. EPA also codified limited exceptions for existing discharges to account for water conservation and technical and economic considerations.

Great Lakes States and Tribes were required to adopt regulations consistent with the criteria and implementation procedures specified in the 1995 Guidance by March 23, 1997, and to submit those regulations to EPA for approval or disapproval. *See* 40 CFR 132.5. In the event EPA disapproves a State's or Tribe's submission, EPA would promulgate criteria and implementation procedures as necessary to be consistent with the Guidance. *See* CWA section 118(c)(2)(C).

After being promulgated, the Guidance was challenged in the U.S. Court of Appeals for the District of Columbia Circuit. On June 6, 1997, the Court issued a decision upholding virtually all of the provisions contained in the 1995 Guidance. *American Iron and Steel Institute, et al.* v. *EPA* (*AISI*), 115 F.3d 979 (D.C. Cir. 1997). However, the Court vacated the provisions of the Guidance that would eliminate mixing zones for BCCs. 115 F.3d at 985. The Court held that EPA had ''failed to address whether the measure is cost-justified,'' and remanded the provision to EPA for an opportunity to address this issue. 115 F.3d at 997. On April 23, 1998, EPA published a notice amending the 1995 Guidance to remove the BCC mixing zone provisions from 40 CFR Part 132. *See* 63 FR 20107 (April 23, 1998).

III. Discussion of the Proposed Regulations

A. Introduction

Today EPA is proposing to amend 40 CFR Part 132, Appendix F, Procedure 3, to reinstate the mixing zone provisions for BCCs. As discussed in more detail below, EPA has determined that the proposed BCC mixing zone provisions at Procedure 3.C. are important for several reasons. First, phasing out existing mixing zones for BCCs and prohibiting new ones will ensure that the Guidance codified at 40 CFR Part 132 conforms, as required by statute, with the objectives and provisions of the international agreement between the United States and Canada to restore and maintain the environmental integrity of the Great Lakes Basin ecosystem. See CWA section 118(c)(2)(A). *See also AISI*, 115 F.3d at 1001–02 (finding that the BCC mixing zone provisions conform to the Great Lakes Water Quality

Agreement). *See also* the Great Lakes Water Quality Agreement, Article IV(1)(f). Second, EPA has determined that because of their highly bioaccumulative nature BCCs present a significant potential risk to human health, aquatic life and wildlife in the Great Lakes System when discharged at levels above water quality criteria. The persistent and toxic nature of BCCs is amplified in the Great Lakes by the tendency of the Lakes to act as ''sinks'' for pollutants discharged to the Great Lakes Basin. Third, the effect of BCC contamination on salmonid sport fisheries and other uses is already documented in the Great Lakes. As a result, EPA has concluded that the benefits associated with the proposed BCC mixing zone provisions justify the costs that would be imposed upon regulated entities. EPA also recognizes, however, that some dischargers may suffer unreasonable economic effects if mixing zones for existing BCC discharges are not authorized. Therefore, EPA is proposing a limited exception that would allow minimal BCC mixing zones under these circumstances. (For a discussion of the potential costs and benefits of the proposed rule, see section V below.)

A mixing zone is the area beyond a point source outfall in which ambient concentrations of a particular pollutant are allowed to exceed the otherwise applicable water quality criterion for that pollutant. In other words, when a discharger wishes to use the receiving water to dilute its polluted effluent, the mixing zone comprises the area of dispersal in the receiving water where the pollutants in the effluent are not yet sufficiently diluted to meet the applicable water quality criteria. Outside the mixing zone, the water quality criterion applies, and the discharger's permit limit must be calculated so that the criterion is met at the edge of the mixing zone. In the absence of a mixing zone, the discharger's permit limit would need to be calculated so that the applicable water quality criterion or criteria are met at the end of the discharger's pipe. In those situations, the discharger would be prohibited from using the receiving water to dilute its effluent, and instead would need to rely on wastewater treatment or pollution prevention measures to assure that its effluent meets the applicable water quality criteria. Because a mixing zone assumes that the applicable water quality criteria will be met at the edge or outer circumference of the mixing zone, it necessarily follows that a mixing zone is available only if the receiving water itself is achieving water quality standards for the pollutant(s) for which a mixing zone is sought, or if the receiving water will achieve water quality standards for the pollutant(s) through a TMDL. If the receiving water is impaired, *e.g.*, if pollutants are already present or are expected to remain in the water column at levels that exceed the most stringent applicable water quality criterion for the particular pollutant, it follows that no mixing zone would be available for discharges of that pollutant (because there would be no ''clean'' water available for dilution).

Thus, it is important to note that the proposed regulation prohibiting mixing zones for BCCs in the Great Lakes System would affect only those receiving waters: (1) That are achieving water quality standards for the BCC in question at the time of permit issuance; or (2) that are expected to achieve such standards within a reasonable time through the implementation of a TMDL under CWA section 303(d). As noted above, if water quality standards are not being met in the receiving water for the BCC in question, or are not expected to be met, then no mixing zone would be available for the pollutant irrespective of this proposed rule. *See* discussion in the Supplemental Information Document for the Guidance at pages 338–358 about permissible approaches for establishing permit limits for discharges to non-attained waters, including setting limits at criteria end-of-pipe.

Although the decision whether to authorize a mixing zone in a particular receiving water or for particular pollutants customarily is committed to the States' discretion, EPA has determined for environmental and public policy reasons that all Great Lakes States and Tribes should implement a consistent approach. The proposed regulations therefore describe minimum mixing zone requirements for the Great Lakes System. The Great Lakes States and Tribes would be required to adopt requirements consistent with (as protective as) any final mixing zone BCC procedure for waters within the Great Lakes System. *See* CWA section 118(c)(2)(C). Under the authority reserved to them by CWA section 510, States and Tribes remain free to apply more stringent mixing zone requirements than these proposed regulations would establish.

Five of the Great Lakes States (Illinois, Indiana, Minnesota, Michigan, and Wisconsin) already have adopted requirements to eliminate (for existing discharges, phase-out) mixing zones for BCCs that they submitted to EPA for approval as part of their original Part 132 submissions. EPA has taken no action on those provisions because they are not presently subject to the adoption and submission requirements of 40 CFR 132.4(a) and 132.5(a). However, assuming that the five States retain those requirements and that they are as protective as the final rule, EPA would approve those prior submissions under the procedures set forth in 40 CFR 132.5(f).

Any Great Lakes State or Tribe that has not adopted BCC mixing zone provisions as protective as those ultimately adopted by EPA (*e.g.*, New York, Ohio, and Pennsylvania) would need to adopt such provisions and submit them to EPA for approval or disapproval pursuant to 40 CFR 132.5 within eighteen months after publication in the **Federal Register** of the final BCC mixing zone rule. If a Great Lakes State or Tribe fails to do so or if EPA disapproves the submission, EPA, after giving the State or Tribe an opportunity to make any necessary changes, would publish a final rule six months later identifying the BCC mixing zone provisions that would apply to waters and discharges within that jurisdiction. *See* 40 CFR 132.5(d) and (f). EPA believes that the 18 months time frame for State adoption and submission is reasonable because it accommodates the legislative or rulemaking processes that the Great Lakes States and Tribes may need to undertake in order to adopt provisions consistent with the final rule. It also allows EPA six months following the submission by the Great Lakes State or Tribe to approve the submission or, in the event of a disapproval, to promulgate its own requirements within the two-year period specified by 33 U.S.C. 118(c)(2)(C). In today's action, EPA proposes to amend 40 CFR 132.5(a) and (c) to apply these procedures to the proposed reinstatement of the BCC mixing zone rule.

B. Components of the Today's Proposed Regulation

Procedure 3.C., as proposed by EPA today, would impose the following limitations on the availability of mixing zones for discharges of BCCs to the Great Lakes System. (The Great Lakes System is defined at 40 CFR 132.2.) EPA's regulations applicable to the Great Lakes System define a BCC, in essence, as any chemical that (1) accumulates in aquatic organisms by a human health bioaccumulation factor greater than 1000 (after considering various specified factors), and (2) has the potential upon entering the surface waters to cause adverse effects, either by

itself or in the form of its toxic transformation product, as a result of that accumulation. *See* 40 CFR 132.2.

First, the regulation would prohibit the establishment of mixing zones for new discharges of BCCs to the Great Lakes System. *See* Procedure 3.C.1. That prohibition would take effect as soon as EPA has approved the State's or Tribe's submission with respect to this prohibition or has published a notice identifying that prohibition as applying within the State's or Tribe's jurisdiction. The regulation would define a new discharge, for the purpose of Procedure 3.C., as (i) a ''discharge of pollutants'' (as defined in 40 CFR 122.2) to the Great Lakes System from a building, structure, facility, or installation, the construction of which commences after the date the prohibition in Procedure 3.C.1. takes effect in that State or Tribe; (ii) a new discharge from an existing Great Lakes discharger that commences after the date the prohibition in Procedure 3.C.1. takes effect in that State or Tribe; or (iii) an expanded discharge from an existing Great Lakes discharger that commences after the date the prohibition in Procedure 3.C.1. takes effect in that State or Tribe, except for those expanded discharges resulting from changes in loadings of any BCC within the existing capacity and processes (e.g., normal operational variability, changes in intake water pollutants, increasing the production hours of the facility or adding additional shifts, or increasing the rate of production), and that are covered by the existing applicable control document. *See* Procedure 3.C.2. All other discharges of BCCs would be defined as existing discharges. Second, the regulation would prohibit the establishment of mixing zones for existing discharges of BCCs 10 years after the publication date of the final BCC mixing zone rule, subject to two exceptions. *See* Procedure 3.C.4.

The first exception, to promote water conservation, would allow States and Tribes to grant mixing zones for any existing discharge of BCCs 10 years after the publication date of the final BCC mixing zone rule where it can be demonstrated, on a case-by-case basis, that failure to grant a mixing zone would preclude water conservation measures that would lead to overall load reductions in BCCs, even though higher concentrations of BCCs occur in the effluent. *See* Procedure 3.C.5. The water conservation exception would not be available to new discharges of BCCs because point sources responsible for those discharges can more readily design and engineer new unit operations and processes within the facility that will maintain BCC discharges at levels at or below the applicable water quality criteria, while also conserving water.

The second exception is intended to accommodate technical and economic considerations. Under this exception, a facility with an existing discharge of BCCs could qualify for a mixing zone for one or more BCCs 10 years after the publication date of the final BCC mixing zone rule if the State or Tribe determines that the discharger is complying with all applicable CWA requirements for the BCC in question and is reducing to the maximum extent possible the loading of the BCC for which the mixing zone is sought. *See* Procedure 3.C.6.a. (This exception is described in more detail in section III.B.2. below.) The purpose of this exception is to ensure that the BCC mixing zone phase-out does not result in unjustified economic impacts in situations where the phase-out may be technically and economically infeasible. However, this exception is intended to apply only in limited circumstances.

Any mixing zones authorized under proposed Procedure 3.C. for existing discharges—whether established during the phase-out period prior to the date 10 years from publication date of the final BCC mixing zone rule or after that date pursuant to one of the exceptions identified above—would need to be consistent with 40 CFR Part 132, Appendix F, Procedures 3.D. and 3.E. See Procedure 3.C.7. Those provisions were promulgated as part of the Guidance in 1995 and are currently in effect for the Great Lakes System. For a discussion of those provisions, see the Supplemental Information Document at 273–288. *See also AISI* v. *EPA*, 115 F.2d at 997–998 (upholding their validity).

Today's proposed amendments to Part 132 are similar to the rule EPA promulgated in March 1995 except that the phase-out of mixing zones for BCCs would occur 10 years after the publication date of the new rule rather than on March 23, 2007, as originally promulgated. In addition, EPA has reorganized and revised some of the language in Procedure 3.C. of the proposal to improve clarity, reduce repetitiveness with other Part 132 requirements, and ease implementation.

1. Exception for Water Conservation

The proposed amendments to 40 CFR Part 132 would authorize an exception to the mixing zone phase-out for BCCs for existing discharges from a facility implementing water conservation measures. EPA recognizes that, as a result of water conservation measures, concentrations of a BCC in an effluent may increase slightly, while the mass of the BCC being discharged does not. EPA concludes that because water conservation is desirable, an exception may be appropriate in certain circumstances. The primary concern for BCCs is the mass of the pollutant entering the nearshore waters of the Great Lakes System. This exception would authorize a mixing zone only when the associated water conservation measures will lead to overall reductions in loadings of BCCs. In addition, EPA continues to be concerned about any allowable increases in concentration above criteria and is also proposing to restrict mixing zones under the water conservation provision to those allowed for non-BCCs (*i.e.*, a 10:1 dilution ratio for lakes and 25 percent of design flow for tributaries). *See* 40 CFR Part 132, Appendix F, Procedure 3.D. and 3.E. This proposed mixing zone exception is virtually identical to the provision promulgated in 1995.

2. Exception for Technical and Economic Considerations

Under the proposed exception for technical and economic considerations, a Great Lakes State or Tribe could authorize a mixing zone for existing discharges of BCCs 10 years after the publication date of the final BCC mixing zone rule, but only under the limited circumstances specified below. The State or Tribal permitting authority would be required to make two affirmative findings: (1) The discharger is complying with all applicable requirements of Clean Water Act sections 118, 301, 302, 303, 304, 306, 307, 401, and 402, including existing NPDES water-quality based effluent limitations, for the BCC for which a mixing zone is requested; and (2) the discharger has reduced and will continue to reduce to the maximum extent possible its discharge of the BCC for which a mixing zone is requested. *See* Procedure 3.C.6.a.

The proposed regulation provides that, in making a finding that a discharger has reduced the discharge of BCCs for which the mixing zone is sought to the maximum extent possible, the State or Tribe would need to consider the feasibility and cost-effectiveness of additional controls or pollution prevention measures that are available to the facility for reducing and, if possible, ultimately eliminating the BCC in question. *See* Procedure 3.C.6.a(ii). Relevant treatment or pollution prevention strategies would include strategies applicable to the facility's upstream sources, if appropriate (*e.g.*, a municipality's industrial users). After evaluating feasible BCC reduction strategies

available to the discharger, the State or Tribe would need to document for the record why the implementation of some or all of them could not reasonably be expected to eliminate the discharger's need for a BCC mixing zone. By proposing to require the reduction of the BCC discharges to the maximum extent possible, EPA thus intends to ensure that the exception is available only to dischargers that are doing their best to reduce the level at which that biaccumulative toxic chemical enters the Great Lakes.

When determining whether the discharger is reducing the BCC in question to the maximum extent possible, the State or Tribe would also need to consider whether the discharger, or affected community or communities, will suffer unreasonable economic effects if the mixing zone is eliminated. *See* Procedure 3.C.6.a(ii). In evaluating economic impacts, EPA would expect the State or Tribe to consider the costs of all pollution reduction options including available treatment technologies and control strategies beyond those already being implemented. Costs should reflect design and current operating flow. EPA would also expect the State or Tribe to evaluate information on the facility's current financial health including, where appropriate, existing municipal and pretreatment user charges and existing profitability. Also potentially relevant, where appropriate, would be information on the current profitability and overall financial health of the facility's parent corporation, where such information is available.

Finally, in determining whether unreasonable economic effects would occur, EPA would also expect the State or Tribe to consider the potential effects on employment rates and tax revenues and, where appropriate, on user fees from increased costs associated with meeting water quality criteria in the absence of a mixing zone. The factors to be considered in assessing economic impacts would likely vary on a facility-by-facility basis. (*See* Interim Economic Guidance for Water Quality Standards—Workbook, March 1995, EPA–823–B–95–002.)

As noted, a mixing zone for a BCC would be granted under the proposed exception only if the State or Tribe determines that the discharger is meeting all currently applicable CWA requirements for the BCC in question and is reducing its loadings of that BCC to maximum extent possible, based on a consideration of technical and economic factors. Therefore, under this proposal, an exception to the BCC mixing zone provision would not be granted if cost-effective pollution prevention and/or other control and treatment strategies exist that make it technically possible for the discharger to achieve the applicable water quality criteria at the point of discharge, and if the discharger, or affected community or communities, will not suffer unreasonable (*i.e.*, severe) economic effects in implementing such strategies.

EPA emphasizes that the proposed exception to the elimination of mixing zones for existing discharges of BCCs is intended to be granted only in exceptional circumstances. In addition, the proposed exception would authorize a BCC mixing zone that is very limited in scope. For example, as discussed in more detail below, the mixing zone would need to be designed so that it is no larger than necessary to account for the technical constraints and economic effects to which the discharger is subject. Finally, in no circumstances under the proposed regulation could the amount of allowed mixing exceed the maximum mixing zones specified for non-BCCs in sections D (discharges to Lakes) and E (discharges to tributaries) of 40 CFR Part 132, Appendix F, Procedure 3. These provisions, which were upheld in *AISI*, 115 F.3d at 997–98, apply to all mixing zones in the Great Lakes System, regardless of the type of pollutant being discharged.

If, under the proposed regulation, the State or Tribe decides to allow a mixing zone for existing discharges of BCCs 10 years after the publication date of the final BCC mixing zone rule, the mixing zone would be subject to the following conditions. First, no mixing zone for existing discharges of BCCs could result in limitations that are less stringent than those existing prior to the publication date of the final BCC mixing zone rule. *See* Procedure 3.C.6.b(i). Second, the permitting authority would need to calculate the mixing zone so that it is no larger than necessary to account for the technical constraints and economic effects that justified the mixing zone in the first place. *See* Procedure 3.C.6.b(ii).

The first and second requirements are consistent with the United States' international agreement to virtually eliminate persistent toxic substances from the Great Lakes System and are intended to ensure that the discharger would indeed reduce its discharges of the BCC to the maximum extent possible before being allowed to use the receiving water for dilution. Thus, under these proposed requirements, if the State or Tribe determines that it would be technically and economically feasible for a facility to implement controls or pollution prevention strategies beyond those currently in force in order to reduce its discharge of the BCC in question, then the mixing zone would need to reflect reasonable estimates of the additional anticipated reductions.

In other words, the BCC mixing zone would correspond not to what the facility actually is discharging, but rather to what it could discharge if it employed technically and economically feasible measures to reduce its BCC discharge to the maximum extent possible. Through this provision, EPA intends to encourage all dischargers seeking a BCC mixing zone to implement controls and pollution prevention strategies relevant to that BCC prior to seeking regulatory relief. Because dischargers would have ten years to employ additional controls and strategies in order to phase-out their dependence on mixing zones, EPA believes this would be a reasonable requirement. In the event that further reductions could be achieved (perhaps using technologies or measures identified through the permitting process), a discharger could still qualify for a mixing zone, but would be compelled to achieve those further reductions, as reflected in its new mixing zone.

Third, any BCC mixing zone would need to ensure the attainment of applicable acute and chronic aquatic life, wildlife, and human health criteria and values within and at the edge of the mixing zone, respectively. In non-attained waters, any mixing zone granted for BCCs under the exception would need to be consistent with the TMDL or comparable assessment and remediation plan under Procedure 3.A. of Appendix F of the 1995 Guidance. *See* Procedure 3.C.6.b(iii).

In addition, any permit authorizing a BCC mixing zone under this exception, when appropriate, would need to require the discharger to develop and implement an ambient monitoring plan. *See* Procedure 3.C.6.b(iv). Monitoring data compiled by dischargers could be used to supplement State or Tribal monitoring data and provide additional information on the receiving water's assimilative capacity and on the extent of impacts, if any, associated with the mixing zones. Ambient monitoring data would be used, in attained waters, to ensure that the applicable water quality criterion for the BCC is attained at the edge of the mixing zone and, in non-attained waters, to ensure that the projected improvement in water quality under the TMDL or comparable assessment and remediation plan is occurring. Ambient monitoring data can also be used to provide the basis for future decisions on the granting of

mixing zones for BCCs, including any adjustments to the size of a future mixing zone (*e.g.*, if data show that the receiving water did not assimilate the pollutant as quickly as originally believed). The State or Tribe is encouraged to seek additional information, as necessary, to determine whether a mixing zone for BCCs is warranted for an existing discharge.

Fourth, the proposed regulation would limit the exception to the BCC mixing zone prohibition to one permit term. Mixing zones may not be granted thereafter unless the State or Tribe makes the necessary findings discussed above for each successive permit application in which a mixing zone for BCCs is sought. *See* Procedure 3.C.6.b(v).

EPA expects that exceptions to the BCC mixing zone provision would be granted solely at the discretion of the State or Tribe on a case-by-case basis. Because of the importance of controlling BCCs in the Great Lakes System, it is critical that the public have an opportunity to comment on discharge-specific exceptions to the general policy of prohibiting mixing zones for existing dischargers of BCCs. The proposed amendments to 40 CFR Part 132 would provide that each draft permit that includes a mixing zone for one or more BCCs after the phase-out period must specify, either in the fact sheet or in the statement of basis for the draft permit, the mixing zone provisions used in calculating the permit limits and must identify each BCC for which a mixing zone is proposed. *See* Procedure 3.C.6.c. The draft permit, including the fact sheet or statement of basis, must be publicly noticed and made available for public comment under 40 CFR 124.6(e). The proposed amendments to Part 132 would specify that any mixing zone for existing BCC discharges authorized under Procedure 3.C.3, 3.C.5, or 3.C.6 of Appendix F must also be consistent with Procedure 3.D. and 3.E. of Appendix F of Part 132. *See* Procedure 3.C.7.

Under the proposed amendments to Part 132, the mixing zone prohibition would be limited to BCCs. BCCs are the pollutants of primary concern in the Great Lakes System. Documented widespread impacts warrant the special emphasis on controlling BCCs. *See* section I of the ''Final Water Quality Guidance for the Great Lakes System: Supplementary Information Document'' (SID) (EPA, March 1995, 820–B–95–001), and the preamble to the ''Proposed Water Quality Guidance for the Great Lakes System'' (58 FR 20802, April 16, 1993). In addition, States already have the discretion under section 510 of the CWA to eliminate mixing zones for other persistent chemicals such as lead and cadmium.

The proposed amendments to Part 132 would establish a 10-year phase-out period for existing discharges. However, this would begin after the publication date of the final BCC mixing zone rule. EPA believes that a longer period would not be reasonable to phase out BCC mixing zones for existing discharges because five of the eight Great Lakes States already have similar BCC mixing zone provisions in their State regulations and the remaining States have known since 1997 that EPA intended to reinstate this provision in Part 132 to ensure consistency with the United States' international agreement to virtually eliminate persistent toxic substances from the Great Lakes System. In addition, EPA has not chosen to reduce the phase-out period to less than 10 years (*e.g.*, March 23, 2007, as promulgated in the 1995 Guidance) because EPA believes that affected dischargers will probably need 10 years to come into compliance.

IV. Request for Public Comment on Exceptions for New Discharges of BCCs From Municipalities

As discussed above, today's proposal would prohibit mixing zones for new discharges of BCCs to the Great Lakes System. EPA is requesting comment on providing a narrow exception for new discharges of BCCs from municipalities. Under Michigan's current regulations, a municipality could obtain a variance for a new discharge of BCCs when necessary to prevent a public health threat to the community. Michigan's variance procedure was adopted to address, for example, a situation where a community with failing septic systems had to be connected to a new POTW to avert a potential public health threat from failing septic tanks. Under EPA's proposed rule the State could not authorize a mixing zone for a new POTW discharge to accommodate BCCs contained in the community's wastewater even if it were not technically and economically feasible for the POTW to achieve its criteria-based WQBEL. EPA requests comment on whether it would be appropriate to allow a narrow exception for new discharges of BCCs from municipalities that commence for the purpose of averting a threat to public health. EPA also requests comment whether narrow exceptions for municipalities would be reasonable in other situations.

V. Economic Analysis

As explained more fully below and in section VI.B., EPA's proposed rule would not itself establish any requirements directly applicable to regulated entities. The mixing zone provisions would not be enforceable against new or existing discharges until separate steps are taken by States and Tribes to adopt and implement them. Therefore, this proposed rule does not have an immediate effect on dischargers or the community. Until actions are taken to adopt and implement the final version of this rule, there will be no economic effect on any dischargers or the community.

Even after BCC mixing zone provisions are adopted and implemented, EPA believes that they would not have a significant economic impact on a substantial number of dischargers because most BCCs are already banned from use and/or production or are severely restricted in use. Therefore, EPA does not expect BCCs that are banned or severely restricted to be present in discharger effluent above criteria levels. For the few remaining BCCs that may be contaminating effluent as a result of household products or products and chemicals used in production, municipalities and commercial and industrial users of those products should be able to substitute away from these products, rely on cleaner technologies that do not require their use or produce BCCs as a by-product, or engineer source controls to reduce releases of BCCs to acceptable levels. In addition, for existing discharges, there is some flexibility and discretion in how the proposed rule would be implemented by States and Tribes to account for technical and economic considerations. While EPA expects that implementation of today's rule would ultimately result in some new or revised permit conditions for existing dischargers, promulgation of this proposal would not impose any of these as yet unknown requirements on dischargers.

Nonetheless, consistent with the intent of E.O. 12866, EPA has evaluated (within the limits of these uncertainties) the possible impacts that might ultimately result from this rulemaking. The following sections discuss this evaluation.

A. Need for the Regulation

EPA has devoted considerable effort to identifying BCCs and developing the most appropriate criteria, methodologies, policies, and procedures to address them. The 1995 Guidance incorporated bioaccumulation factors (BAFs) in the derivation of criteria and values to protect human health and wildlife and to identify the BCCs.

Bioaccumulation refers to the uptake and retention of a substance by an aquatic organism from its surrounding medium and from food. For certain chemicals, uptake through the aquatic food chain is the most important route of exposure for wildlife and humans.

The wildlife criteria and the human health criteria and values incorporate appropriate BAFs in order to more accurately account for the total exposure to a chemical. Previous EPA guidelines for the derivation of human health water quality criteria used bioconcentration factors (BCFs), which measure only uptake from water. EPA believes, however, that the BAF is a better predictor of the concentration of a chemical within fish tissues in the Great Lakes System because it includes consideration of the uptake of contaminants from all routes of exposure. Therefore, the Guidance included methods for deriving BAFs for non-polar organic chemicals and identified 22 BCCs by these methods.

Today's proposed rule would prohibit mixing zones for BCCs and thus would require NPDES permit limitations to be set equal to water quality criteria for those pollutants. BCCs are not compatible with mixing zones because of their persistent and bioaccumulative nature. Thus, for BCCs, it is the mass of the pollutant that is problematic, not just the concentration; therefore, mixing zones are not appropriate because by definition they allow an increase in the mass discharged to the receiving waters.

For pollutants that quickly degrade and do not bioaccumulate, limited mixing zones are often acceptable. However, for persistent and highly bioaccumulative pollutants, mixing zones create ''hot spots'' in the environment where bioaccumulation of toxic pollutants in fish and other aquatic organisms can significantly exceed safe levels for consumption by wildlife and humans. Therefore, this proposal reflects EPA's judgment that mixing zones for BCCs (even of the limited size authorized by 40 CFR Part 132 under certain conditions) should be prohibited absent exceptional circumstances.

The Guidance currently allows a minimum 10:1 dilution ratio for lake discharges and 25 percent of the critical stream flow for tributary discharges in calculating mixing zones for all pollutants, including BCCs. Larger mixing zones are also allowed if a demonstration is performed. *See* 40 CFR Part 132, Appendix F, Procedure 3.D. and 3.E. Thus, with the currently allowable dilution, the mass of BCCs discharged from point sources to specific nearshore areas of the Great Lakes System could be reduced significantly, *e.g.*, by a factor of 10 to 100 in certain situations, if mixing zones for BCCs are prohibited.

Virtually all species of Great Lakes fish use the nearshore waters for one or more critical life stages or functions. The nearshore waters are areas of permanent residence for some fishes, migratory pathways for anadromous fishes, and temporary feeding or nursery grounds for other species from the offshore waters. Fish species diversity and production in the nearshore waters are higher than in offshore waters; they are generally highest in the shallower, more enriched embayments with large tributary systems. Thus, because the food web that bioaccumulates BCCs is concentrated near shore where natural sinks exist in the Great Lakes Basin, the elimination of mixing zones for these pollutants will further reduce the probability of adverse effects. The potential problem with allowing mixing zones for BCCs is that the increased loading of these pollutants increases the probability of adverse effects. The goal of virtual elimination of these substances in the international agreement between the United States and Canada reflects these concerns.

B. Potential Benefits Associated With Prohibiting Mixing Zones for BCCs

This proposal to prohibit mixing zones for BCCs targets the types of long-lasting pollutants that accumulate in the food web. The BCCs that have been found to bioaccumulate at levels of concern in the Great Lakes include, but are not limited to, polychlorinated biphenyls (PCBs), mercury, DDT, dioxin, chlordane, and mirex. For humans and wildlife, the main route of exposure to BCCs is through the consumption of Great Lakes fish. Potential adverse effects to aquatic life, wildlife, and humans associated with exposure to BCCs are described below.

In aquatic organisms, effects of BCCs range from death to impairment of reproduction, development, and growth (Sweeney et al., 1993). Effects have been documented at all levels of biological response from changes in physiological function to recruitment and development of benthic communities (Beattie *et al.*, 1996; Landrum *et al.*, 1991; Sasson-Brickson and Burton, 1991). Examples of the types of observed effects include biochemical responses (*e.g.*, decreased calcium and magnesium metabolism, depressed in serum calcium, elevated skeletal magnesium, reduced whole body lipid content, elevated muscle water content); liver abnormalities (*e.g.*, enlarged livers or reduced liver weights); skeletal abnormalities (*e.g.*, scoliosis and lordosis); reproductive toxicity (*e.g.*, egg mortality, fry deformities, reduced fertilization success, reduced embryo survival, reproductive failure); and somatic (non-reproductive) mutations (Palace *et al.*, 1996; Zabel and Peterson, 1996).

In wildlife, birds exposed to BCCs have exhibited biochemical dysfunction and metabolic effects (*e.g.*, abnormal serum chemistry, reduced levels of dopamine, zinc and calcium metabolism, reduced body temperature), behavioral/neurological disorders, and reproductive impairment (*e.g.*, reduced numbers of eggs, abnormal courtship behavior, impaired nest building abilities, reduced eggshell thickness, delayed reproduction, reduced hatchability, reduced sperm concentration, chromosome abnormalities in embryos) (Elliott *et al.*, 1996). Birth defects (*e.g.*, cleft palate, heart defects), hepatic disorders and enlarged liver, and reproductive impairment and/or failure (*e.g.*, high rate of kit death, increased stillbirths and abortions, altered menstrual cycles, lower birth rates) have been observed in small mammals.

Low concentrations of BCCs in birds and mammals have adverse effects on growth and development, reproduction, behavior, motor coordination, vision, hearing, histology, and metabolism (Driver *et al.*, 1991). Chronic effects on wildlife include changes in enzyme production, hormonal balance, calcium metabolism, changes in behavior and reproduction, eggshell thinning, embryo mortality, and decreased hatchling survival. Studies on Great Lakes double-crested cormorant hatchlings revealed significantly increased congenital abnormalities, decreased hatchability, and increased birth defects as a result of exposure to BCCs (Larson *et al.*, 1996). Rats fed BCC-contaminated Great Lakes walleye, whitefish, and lake trout exhibited abnormal neurological/behavioral effects. Farm raised lake trout injected with a single BCC had increased oxidative stress and altered liver function (Palace *et al.*, 1996).

Potential adverse human health effects resulting from the consumption of fish containing BCCs include both the increased risk of cancer and the potential for systemic or noncancer risks such as kidney damage (U.S. EPA, 1997). Acute exposure can result in kidney damage, kidney failure, seizures, gastrointestinal damage, cardiovascular collapse, shock, and death (U.S. EPA, 1997). Chronic exposure can result in neurotoxicity, fetotoxicity, endocrine effects, hematological effects, reproductive dysfunction, sensory and

equilibrium disturbances, involuntary muscle activity, nausea, confusion, weakness, dizziness, headache, tremor, twitching, disorientation, convulsions, liver toxicity, diarrhea, sweating, wheezing, productive cough, pulmonary edema, paralysis, coma, psychosis, irritability, hyperactivity, aggressiveness, impairment of peripheral vision, blindness, slurred speech, disturbances in sensations, impairments of hearing, speech, and motor coordination, immunological, development, and reproductive impairment, and death (U.S. EPA, 1997). BCCs have been found to be mutagenic, genotoxic, and carcinogenic, causing liver and other types of cancer (U.S. EPA, 1997).

Risks to pregnant women and children are of particular concern (U.S. EPA, 1997). BCCs can induce heritable chromosomal changes in women which could result in birth defects in their infants, cross the human placenta contributing to exposure of the fetus through placental transfer, and accumulate in body tissues persisting for long periods of time. Unfortunately, exposure prior to pregnancy can contribute to the overall maternal body burden and result in exposure of the developing individual. Maternal reproductive dysfunction associated with exposure to BCCs can result in decreased fertility, premature labor, spontaneous abortion, reproductive hormone disorders, increased stillbirths, lack of mammary function, reduced libido, and delayed estrus. Fetal exposure can result in fetotoxicity which includes birth defects such as low birth weight, small head circumference, skeletal anomalies, malformations such as scoliosis and cleft palates, respiratory distress, heart defects and cardiac dysfunction, cranio-facial abnormalities, delayed bone development, central nervous system disorders, cataracts, neurological/behavioral effects, kidney abnormalities, immune dysfunction, and liver disorders and damage.

Children may be at greater risk than adults. BCCs can accumulate in human milk. As a result, lactation may provide a significant dietary source of BCCs in infants of mothers who have been exposed. Lactational exposure is of significant concern because of the rapid transfer of the chemical through breast milk. Risks to infants and children include central nervous system effects, mortality, low IQ scores, cataracts, congestive heart failure, skin disorders such as lesions, cancers such as neuroblastoma and acute leukemia, immune system dysfunction and immunosuppression, skeletal disorders such as osteoporosis, neurological/behavioral effects such as weakness, convulsions, abnormal behavior, seizures, learning disorders, and endocrinological disorders.

However, quantifying and monetizing the potential benefits associated with the water quality improvements is a challenging exercise in the best of circumstances. For today's proposal, the speculative and site-specific nature of the potential impacts further complicate the task. Although EPA has evaluated the potential cost impact of eliminating mixing zones for BCCs under improved analytical detection methods assuming that all other conditions remain unchanged, it is not meaningful to make predictions of the host of site-specific factors that will influence the level of potential benefits in the future. These factors include the site-specific water quality conditions, the health of the aquatic and aquatic-dependent ecosystems, the baseline level of use of the Great Lakes water resources, the availability of substitute water resources, and the willingness-to-pay for improvements in the Great Lakes water resources by the user and non-user populations.

However, because of the persistent and highly toxic nature of the pollutants regulated, EPA expects that the proposed rule will result in a range of benefits including human health risk reductions (for both cancer and noncancer risks) and ecologic values associated with improving the health of aquatic life and wildlife. In this respect, EPA's benefit analysis is unchanged from the analysis performed at the time EPA promulgated the 1995 Guidance. In evaluating that provision, the Court in the *AISI* case found that EPA ''appears adequately to have explained the environmental justification for its decision.'' *AISI*, 115 F.3d at 997.

C. Potential Costs Associated With Today's Proposal To Prohibit Mixing Zones for BCCs

In the *AISI* litigation, Petitioners pointed to a comment made in a public hearing on the 1995 Guidance by a municipal discharger that was concerned about spending $300,000 to remove less than a pound of mercury from its discharge. These Petitioners argued that even after employing adjustments for relative toxicity, EPA had not provided adequate justification for requiring dischargers to incur these extraordinary costs. The *AISI* Court agreed and remanded this portion of the 1995 Guidance to EPA to address whether the BCC mixing zone prohibition is cost-justified.

EPA believes that this proposal to prohibit mixing zones for BCCs is justified even in view of the costs it could pose. As a preliminary matter, EPA notes that the costs associated with the proposed rule are highly speculative for a number of reasons. First, EPA assumes that this proposed rule would have no effect in waters where water quality standards are not being met for the BCC in question or are not expected to be met, because no mixing zone would be available for the pollutant irrespective of this proposed rule since no dilution (''clean'' water) would be available for mixing with the discharge. For those waters, this proposed rule would have no cost impact until the water attains water quality standards for BCCs or until a TMDL or comparable mechanism is established that will lead toward water quality standards attainment. EPA is unable to forecast at this time when and where those events might occur and, correspondingly, what point source discharges might be affected and to what degree. Second, irrespective of this proposal, some Great Lakes States already prohibit mixing zones for BCCs or have incorporated flexibility into their regulations to ensure that control of BCCs, such as mercury, do not result in extraordinary costs. Therefore, this proposed rule would have little or no effect in those States. Third, as noted above, the proposal contains a mechanism for existing discharges by which Great Lakes States can mitigate conditions of potential widespread social and economic hardship resulting from today's proposed rule. Thus, some potential costs may never materialize.

Nonetheless, EPA evaluated potential cost impacts to the universe of point source facilities located in the Great Lakes Basin based on two conservative assumptions: (1) that, but for the proposal, all facilities would receive a mixing zone for BCCs; and (2) that few facilities would obtain an exception to the mixing zone prohibition contained in the proposed rule. In other words, EPA's cost analysis assumes that every facility discharging or planning to discharge BCCs to the Great Lakes System would need to reduce the BCCs in its effluent to levels corresponding to criteria end-of-pipe, regardless of current water quality conditions or State regulations. At the time EPA issued the Final Water Quality Guidance for the Great Lakes System in 1995, EPA had evaluated potential costs of all of its provisions, including the original provision to prohibit mixing zones for BCCs. EPA presented the findings of these analyses in the ''Assessment of

Compliance Costs Resulting from Implementation of the Final Great Lakes Water Quality Guidance'' (EPA, 1995,820–B–95–010). As part of this rulemaking, EPA has evaluated just the incremental impact of today's proposal to prohibit mixing zones for BCCs.

For this proposed rule, EPA departed from its 1995 Guidance cost evaluation in two respects. First, EPA considered new effluent data that was not evaluated as part of the cost analysis for the 1995 Guidance. Second, EPA changed the way it estimated the amount of pollutant loads that would need to be removed—and hence the costs incurred—under this proposal. With respect to the data, EPA evaluated the same sample of facilities used for evaluation of the 1995 Guidance. However, EPA subsequently collected additional data on pollutants in the effluent of nine publicly owned treatment works (POTWs) in the sample using ''high-resolution'' and ''super-clean'' methods for detecting pollutants. Thus, EPA supplemented the original data set with this data, which showed the infrequent presence and relatively low concentrations of BCCs in effluents using state-of-the-art analytical methods. This information is particularly significant because these methods are more sensitive than the analytical methods that dischargers are currently required to use, and thus provide a more accurate picture of effluent quality than most of EPA's discharger-generated data. Thus, for this proposal, EPA evaluated potential costs both with and without the new data.

EPA's second departure from its 1995 Guidance analysis involved the methodology for estimating potential compliance costs associated with the BCC mixing zone provision. In 1995, EPA's sensitivity analysis for the BCC mixing zone provision was constrained by analytical method detection levels (MDLs) used for compliance purposes at that time and did not account for improvements in MDLs in the future. While this analysis accurately predicted the impact of the BCC mixing zone provision based on 1995 MDLs, it may have resulted in an underestimate of compliance costs associated with the BCC mixing zone provision if MDLs improved to criteria levels in the future and ''hidden'' loadings of BCCs are discovered and removed. For this proposal, EPA assumed that analytical detection methods would improve so that all BCCs can be quantified at the applicable water quality criteria level. This is significantly different than the evaluation performed in 1995 for the BCC mixing zone provision.

Employing this assumption, EPA made a new estimate of the pollutant load that would need to be reduced if this proposed rule were promulgated, based on the difference between implementing the Guidance as presently codified at 40 CFR Part 132 (with no special BCC mixing zone provisions) and implementing the Guidance if amended by today's proposal (prohibiting mixing zones for BCCs). That is, the increment evaluated is just the impact of prohibiting BCC mixing zones and does not include the total cost of implementing the Guidance.

Apart from these differences, EPA's method for establishing costs followed the methodology used for the 1995 Guidance and the sensitivity analysis for the future impact of detection levels. *See* ''Assessment of Compliance Costs Resulting from Implementation of the Final Great Lakes Water Quality Guidance'' (March 1995). For a sample of 50 facilities representing 588 major municipal and nonmunicipal dischargers, EPA calculated projected limits based on the 1995 Guidance and allowed mixing zones for BCCs (*i.e.,* reflecting the requirements as currently codified at 40 CFR Part 132). This was the baseline. EPA then compared these limits to projected limits based on the 1995 Guidance as amended by today's proposed rule (*i.e.,* prohibiting mixing zones for BCCs). In developing the limits associated with the proposed rule, EPA used the two sets of data described above. The comparison of the limits under the baseline and the proposed rule produced an incremental pollutant load reduction attributable to the proposed rule. EPA then determined the cost of reducing this pollutant load based on the estimated cost per pound of toxic pollutant removed (including BCCs) established for the 1995 Guidance.

The cost per pound to remove toxic pollutants reflects EPA's higher cost estimate for the 1995 Guidance (updated to January 1999 dollars). As described in the ''Regulatory Impact Analysis of the Final Great Lakes Water Quality Guidance'' (March 1995), for EPA's higher cost estimate, capital and operation and maintenance (O&M) costs related to the installation of treatment technologies accounted for over 90 percent of the total annual costs. Further, EPA assumed that the regulatory flexibility available to existing BCC discharges based on economic and technical considerations (as set forth in the 1995 Guidance and, now, in this proposal), was used only under exceptional circumstances.

Based on the pre-1995 data updated with new information from nine POTWs (Scenario 1), EPA estimates annual compliance costs to be approximately $12 million (January 1999 dollars) and BCC load reductions to be just over 225,000 toxic pound-equivalents per year. Pound-equivalents are calculated by multiplying pounds of each pollutant removed by the toxic weight (based on the toxicity of copper) for that pollutant. Under this scenario, POTWs and indirect dischargers to POTWs are expected to incur almost 92 percent of the total annual costs. Nonmunicipal facility categories account for the remaining 8 percent of the total costs. Controls for 2,3,7,8–TCDD, mercury, lindane, and toxaphene account for nearly 97 percent of the estimated annual costs.

Based exclusively on pre-1995 data (Scenario 2), EPA estimates the annual compliance costs to be approximately $35 million. This estimate is based on expected BCC load reductions of approximately 668,000 toxic pound-equivalents per year. Under this scenario, the majority of estimated costs are associated with POTWs and indirect dischargers to POTWs (accounting for just over 97 percent of the total annual costs). Nonmunicipal facility categories account for just under 3 percent of the total costs. Mercury, lindane, 2,3,7,8–TCDD, pentachlorobenzene, and toxaphene account for almost 80 percent of the estimated annual costs. In either scenario, mercury and 2,3,7,8–TCDD account for over 50 percent of all costs.

The costs and loadings reductions were lower for Scenario 1 than for Scenario 2 because Scenario 1 employed more recent effluent data (based on high-resolution/super-clean methods for detecting pollutants) for the nine sample POTWs that indicated the infrequent presence and relatively low concentrations of BCCs in effluents. EPA expects that Scenario 1 better approximates the estimated total annual costs and BCC load reductions attributable to this proposal because use and/or production of many BCCs are already banned (*e.g.,* PCBs and DDT) or are severely restricted by regulation (*e.g.,* dieldrin and toxaphene) and are not expected to be present in effluents above criteria levels.

D. Factors That May Result in Lower Cost Impacts

As previously acknowledged in EPA's 1995 analyses of the BCC mixing zone provisions in the 1995 Guidance, estimating treatment costs for WQBELs below current minimum levels (MLs) of quantification, and most likely below MDLs, is inherently speculative. The ML is the level at which the analytical system or method gives recognizable

signals and an acceptable calibration point. In other words, it is the minimum level at which a pollutant's concentration in the effluent can be reliably quantified. The MDL, in turn, is the minimum level at which the pollutant can even be reliably detected (never mind quantified). This means that EPA cannot reliably quantify BCC loadings in effluents below the MLs for the BCCs in question or predict the effectiveness of control strategies needed to reduce them to achieve WQBELs based on criteria end-of-pipe. This makes it very difficult for EPA to provide a meaningful estimate of the economic impact of this proposed rule on new discharges (which would be subject to its prohibitions within two years of the publication date of the final rule). The same uncertainties interfere with cost estimates applicable to existing discharges, which under the proposal would have ten years from the publication date of the final rule to phase-out their BCC mixing zones. EPA expects that WQBELs for many BCCs will remain well below MLs and possibly MDLs even beyond the time the mixing zone phase-out is fully implemented for existing discharges of BCCs because criteria for many of these pollutants are still far below quantitation levels for the most advanced analytical methods currently being evaluated by the Agency. In any case, even if EPA were confident today that the relevant analytical methods would become more stringent in the next years, it is difficult for EPA to speculate today what the new MLs would be. Equally speculative would be EPA's assumptions regarding dischargers' treatment or pollution prevention response to any future changes in analytical methods, or the States' response to what additional controls would be considered technically and economically feasible. For these reasons, potential economic effects on dischargers in the Great Lakes Basin resulting from prohibiting mixing zones for BCCs are speculative.

For some BCCs, notably mercury, the applicable analytical method used for compliance purposes has a minimum level that is lower than the WQBELs based on criteria end-of-pipe (*i.e.*, the WQBEL that would be calculated if no mixing zone is available). Even in this situation, however, estimating costs associated with that projected WQBEL would be speculative using the new method, which was published by EPA in June of 1999, 64 FR 30417 (June 8, 1999), because the method has not been in use long enough to demonstrate the effectiveness of pollution prevention/waste minimization control strategies, including source controls, or the effectiveness of existing or new and innovative treatment technologies that could be used to reduce mercury to levels needed to achieve WQBELs based on criteria end-of-pipe. In addition, as stated above and discussed in more detail below about Ohio's mercury variance, there is considerable uncertainty in how the technical and economic feasibility exception provision in today's proposal will be implemented by the Great Lakes States.

Notwithstanding the speculative nature of potential future costs on BCC dischargers, however, there are several factors that could ultimately lower the potential cost impacts from today's proposed rule. Some of these factors are discussed below.

1. Lower BCC Levels Than Anticipated

While developing the 1995 Guidance, EPA received numerous comments asserting that, because of the ubiquitous nature of BCCs in the environment, many BCCs will be detected above permitted limits and significantly above criteria in wastewater discharges as improvements to analytical methods are made.

As a result, EPA attempted to determine the potential presence of BCCs in treated wastewater discharges to the Great Lakes Basin using the most sensitive, state-of-the-art analytical methods available to the Agency. Particularly, EPA performed limited sampling of treated wastewater discharges from the nine major POTWs that the Agency had randomly selected as its sample to estimate compliance costs for the Guidance. EPA concentrated its BCC sampling efforts on POTWs because although BCCs could potentially be present in non-POTW discharges, the presence and control of BCCs for non-POTWs are in most cases highly dependent upon the manufacturing processes and raw materials utilized by a facility. In contrast, EPA assumed BCCs to be more ubiquitous at major POTWs, which have less control of the potential sources of BCCs being discharged to their collection systems.

As a result of the sampling effort, EPA found BCCs or suspected BCCs to be present only infrequently in POTW effluent (25 detected analytes or congener mixtures in 288 possible observations, approximately nine percent of all analytes and congener mixtures) and, in those samples, in relatively low concentrations (11 detected concentrations above criteria, less than four percent of all analytes and congener mixtures). Of the pollutants detected in EPA's sampling effort, mercury was detected at each of the POTWs (either as total mercury or in the methyl mercury form). The concentrations of mercury found in POTW effluents exceeded the most stringent Guidance criteria for mercury in only five of the nine POTWs. Other BCCs with Tier I criteria that were detected include lindane (found in seven of nine POTWs, none above the Guidance criteria), hexachlorobenzene (found in four out of nine POTWs, three of which were above the Guidance criteria), and dioxins (found in two out of nine POTWs, both above criteria expressed as a toxicity equivalent factor of 2,3,7,8–TCDD). Coplanar PCBs (treated as a mixture), a suspected BCC without a Tier I criterion, were found in one POTW above the expected Tier II value. Pentachlorobenzene, another BCC without Tier I criterion, was also detected in two of the nine POTWs at levels EPA expects to be below Tier II values established in accordance with Tier II procedures contained in the Guidance.

2. Availability of Lower Cost Control Options

Commenters also expressed concern related to the controls that will be necessary to ensure compliance with associated WQBELs for BCCs once they are detected in wastewater discharges. EPA's estimates of the potential cost of today's proposed rule are based on the cost per pound-equivalent removed that was associated with EPA's higher cost estimate from its analysis of the 1995 Guidance. In 1995, EPA developed the high end estimate of potential compliance costs under the assumption that needed pollutant reductions would largely be met through installation of end-of-pipe treatment.

However, EPA believes that a facility, when faced with the challenge to achieve compliance with WQBELs for BCCs after mixing zones are eliminated, will select the most cost-effective controls. The controls to be applied for a facility, and the effectiveness of those controls, will vary depending upon many factors including, for example, volume of discharge, type of manufacturing processes, raw materials, number and types of BCCs present in the discharge, etc. However, EPA believes that, prior to design and installation of a treatment system, a facility would evaluate whether lower-cost options, such as modernizing certain unit operations and processes within the facility or implementing other waste minimization or pollution prevention techniques, are feasible.

For example, there are several documented instances in the Great Lakes Basin and elsewhere where the development and implementation of aggressive source control programs have resulted in the virtual elimination of pollutants, including BCCs. For example, the Western Lake Superior Sanitary District (WLSSD), which after evaluating the costs involved to meet more stringent WQBELs for mercury with end-of-pipe treatment, concluded that pollution prevention techniques were the preferable control strategy. As a result, WLSSD published a Blueprint for Mercury Elimination, which is a guide designed to ''assist wastewater treatment plant staff with creating and implementing their own mercury reduction projects.'' As a result of the efforts of WLSSD, effluent mercury levels decreased significantly in the wastewater effluent.

EPA understands that lower-cost alternatives may not be feasible or available for all facilities, and that some may require the installation of new or expanded treatment systems when mixing zones are eliminated for BCCs. Depending upon the circumstances of the discharger, the installation of these treatment systems could be expensive and not cost-effective. However, except for mercury which was discussed earlier, because criteria for many of the BCCs covered by the 1995 Guidance and today's proposal are well below quantification levels (MLs), the actual quantity of BCC loads that would need to be removed from a wastestream would be unknown using current Part 136 analytical methods. As such, it is uncertain whether a facility would actually incur the capital costs associated with the construction of new or expanded treatment systems.

3. Availability of Regulatory Alternatives

There are several regulatory alternatives that are available to dischargers of BCCs that could provide some relief in the event that EPA promulgates the proposed restrictions on BCC mixing zones.

a. *Variance from Water Quality Standards*—The Guidance allows States and Tribes to provide existing Great Lakes dischargers relief from a water quality standard in the form of a variance to the standard. *See* 40 CFR Part 132, Appendix F, Procedure 2. Variances are available for BCCs. The variance, in effect, provides a substitute standard for the point source; water quality-based effluent limits would be based on that substitute standard. The intent of the variance provision is to: (1) Provide a mechanism by which permits can be written to meet a modified standard where compliance with the underlying water quality standard is demonstrated to be infeasible; (2) encourage States to maintain original standards as goals rather than to provide relief to point sources by removing uses; (3) identify conditions under which such variances may be granted; (4) identify the requirements for variance applications; and (5) ensure the highest level of water quality achievable while the variance is in effect.

Variances may be available for certain dischargers where the intake water contains a ubiquitous pollutant that is found in almost all water bodies in a watershed at about the same concentration due to watershed-wide contributions from nonpoint sources and where removing the pollutant would cause a substantial and widespread social and economic impact. The State or Tribe may renew the variance every 5 years, or at the time of permit reissuance, whichever is less, by recertifying the eligibility of the discharger. Procedure 2 of Appendix F of the Guidance identifies the terms and conditions that must be met if a State or Tribe wants to grant a variance.

Traditionally, variances are chemical-specific and facility-specific. For situations where a number of dischargers are located in the same watershed and the circumstances for granting a variance are the same, a State or Tribe may wish to process a multiple-source variance for a group of dischargers at one time. The State or Tribe would need to make a showing that all of the individual facilities in a group meet the terms and conditions described in Procedure 2. After the multiple source variance is approved for the initial group of facilities, additional facilities could be included in the multiple source variance, provided they met the terms and conditions of Procedure 2. As with individual variances, a multiple source variance would be subject to review and approval by EPA; however, individual agreements between the States or Tribes and their respective EPA Regional offices could be developed to streamline such review and approval.

In addition to the specific requirements of Procedure 2, a State or Tribe must make a showing that each of the individual facilities in a specific group meets the criteria for granting a variance and must:

1. Identify the facilities proposed for coverage under the variance;

2. Identify the geographic area of the watershed impacted by the variance;

3. Evaluate the geographic area for the existence of any endangered or threatened species listed under section 4 of the Endangered Species Act; and

4. Recertify the eligibility of individual facilities at a minimum of every 5 years, or at the time of permit reissuance, whichever is less.

New and recommencing dischargers are not eligible for variances. As with any variance granted under Procedure 2, dischargers must continue to implement all applicable technology-based treatment and pretreatment requirements of CWA sections 301, 302, 304, 306, 307, 401 and 402 and WQBELs not affected by the variance.

b. *Site-specific Criteria*—Procedure 1 of Appendix F of the 1995 Guidance provides for changing the criteria to account for site-specific environmental conditions that affect the stringency of the criteria (*e.g.*, toxicity to indigenous species). EPA recommends that States and Tribes develop site-specific modifications to human health, wildlife and aquatic life Tier I criteria or Tier II values to reflect local physical, chemical, biological and/or hydrological conditions, especially in situations where such modifications improve the cost-effectiveness of treatment or other control alternatives. Further, site-specific modifications to criteria and values should take into consideration differences in species sensitivity; bioaccumulation factors (BAFs) including food chain multipliers; particulate organic carbon and dissolved organic carbon concentrations; fish lipid content; and fish consumption rate.

An important component of a site-specific modification is the definition of the site to which the modification is applicable. A site may range from being a portion of a watershed to the entire part of the Great Lakes System under the jurisdiction of the State or Tribe proposing the modification. EPA encourages States and Tribes to work with permittees to modify criteria and values, where appropriate, on as large an area as practical to avoid duplication of effort and to conserve resources. However, EPA notes that it could be more cost-effective to develop a site-specific criteria for a very small area as well.

c. *Exceptions to the BCC Mixing Zone Prohibitions for Existing Discharges*—As described earlier in section III.B. of this preamble, today's proposed rule would provide for limited exceptions for existing discharges of BCCs to the Great Lakes System. First, today's proposed rule would allow an exception with respect to existing discharges for facilities implementing water conservation measures. In order to be granted this exception, the discharger must show that the failure to grant a

mixing zone would preclude the use of water conservation measures that would lead to overall load reductions of BCCs even though BCCs would consequently appear in higher concentrations.

Second, the proposal would allow for the granting of mixing zones for existing discharges of BCCs after the phase-out period because of technical and economic considerations. In order to authorize a mixing zone for an existing discharge of BCCs, the permitting authority must determine that: (1) The discharger is in compliance with existing technology-based and water quality-based effluent limitations for the BCC for which a mixing zone is requested; and (2) the discharger has reduced and will continue to reduce the loading of the BCC for which a mixing zone is requested to the maximum extent possible, such that any additional controls or pollution prevention measures to reduce or ultimately eliminate the BCC would result in unreasonable economic effects on the discharger or the affected community because the technology is not feasible or cost-effective.

In addition to the possible alternatives provided for by EPA in the 1995 Guidance and today's proposed rule, States within the Great Lakes Basin can also provide some additional limited relief to dischargers when faced with complying with the phase-out of mixing zones for BCCs. For example, the State of Ohio's water quality standards adopted in compliance with the Guidance contain a variance provision for mercury that relieves dischargers from constructing end-of-pipe treatment for mercury once detection levels improve. The basis for the mercury variance provision was a Statewide analysis that showed that it was not cost-effective to install end-of-pipe treatment to reduce mercury from Ohio's pre-Guidance standard of 12 nanograms per liter (ng/L) to its post-Guidance mercury criteria of 3.1 and 1.3 ng/L for the protection of human health and wildlife, respectively. In exchange for relief from installation of end-of-pipe treatment, a facility is required to implement a pollutant minimization program and must demonstrate that it can, or projects that it can, achieve an average annual mercury effluent concentration of 12 ng/L or less. EPA expects that Great Lakes States will use an analysis similar to the one performed by Ohio on a facility-by-facility basis to support an exception to the mixing zone prohibition for existing discharges of BCCs in those cases where it would be technically or economically infeasible to achieve criteria-based WQBELs for BCCs absent a mixing zone.

VI. Administrative Requirements

A. Regulatory Planning and Review (Executive Order 12866)

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

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

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

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

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

It has been determined that this rule is not a ''significant regulatory action'' under the terms of Executive Order 12866 and is therefore not subject to OMB review.

B. Regulatory Flexibility Act, as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act, generally requires an agency to prepare a regulatory flexibility analysis for any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Under section 605(b) of the RFA, however, if the head of an agency certifies that a rule will not have a significant economic impact on a substantial number of small entities, the statute does not require the agency to prepare a regulatory flexibility analysis. Pursuant to section 605(b), the Administrator certifies that this proposal, if adopted, will not have a significant economic impact on a substantial number of small entities for the reasons explained below. Consequently, EPA has not prepared a regulatory flexibility analysis.

This proposal would amend the Water Quality Guidance for the Great Lakes System to establish requirements that apply in the first instance to Great Lakes States and Tribes. These requirements would restrict the current discretion of States and Tribes, in establishing water quality-based effluent limitations for dischargers discharging BCCs, to allow for mixing zones for BCCs. The proposed changes would do two things. First, in the case of NPDES permits issued to new dischargers, States and Tribes would need to ensure that new discharges of BCCs achieve limits equal to the water quality criteria for those BCCs. Second, in the case of existing discharges, while States and Tribes would retain some discretion to authorize mixing zones for BCCs in limited circumstances, by and large, dischargers of BCCs would also need to achieve limits equal to water quality criteria for those pollutants.

The RFA only requires analysis of the economic impacts of a rule on the small entities that are subject to the requirements of a rule. *United Distribution Cos.* v. *FERC,* 88 F.3d 1105 at 1170 (D.C. Cir. 1996), quoting *Mid-Tex Elec. Co-op* v. *FERC,* 773 F.2d 327, 342 (D.C. Cir. 1985). Today's proposal applies to States and Tribes in the Great Lakes System when issuing NPDES permits. It would establish requirements that States and Tribes must adopt and apply to all new and virtually all existing dischargers, including small entities. The universe of dischargers affected by the rule, if adopted, is certain and States and Tribes have no discretion in implementing the rule with respect to new dischargers and only limited authority to modify the requirements with respect to existing dischargers. In this sense, the proposal would impose requirements on new and existing dischargers in the Great Lakes System.

The proposal would impose requirements on dischargers in much the same way that, for example, effluent limitations guideline regulations do. The guideline regulations do not become binding requirements on dischargers until the guideline discharge limitations are included as conditions in an NPDES permit issued to the discharger. These guideline limitations, however, must be included by NPDES permitting authorities as permit conditions when the permitting authority issues or reissues permits to dischargers in the guideline industry point source category. Based on this consideration, EPA has concluded that small entities will be subject to the proposed regulation for purposes of the RFA and EPA has accordingly evaluated

the impact of the proposal on small entities. Based on its assessment, the Agency concludes that the proposal would not have a significant economic impact on a substantial number of small entities for the reasons explained below.

EPA prepared a screening analysis to evaluate the potential impact to existing small entity dischargers that would be subject to the requirements of the rule, if it is promulgated as proposed (*i.e.*, NPDES permit holders that may discharge BCCs). EPA identified existing small dischargers potentially affected by the mixing zone provisions using the definitions of small businesses, small governmental jurisdictions, and small nonprofit organizations established by the RFA. For this analysis, EPA considered the potential effect of this proposed rule only on direct dischargers. Under these assumptions, EPA estimated that there are approximately 2,329 small entities that potentially would be subject to the requirements of the proposed rule, if promulgated (61.4 percent of the 3,795 total NPDES permit holders that may discharge BCCs to the Great Lakes Basin), consisting of ''small businesses'' and ''small governmental jurisdictions.'' EPA does not expect any existing small nonprofit organization to be potentially subject to the requirements of today's proposed rule.

EPA's screening analysis compared annualized facility-level compliance costs (estimated as described above in section V) with (1) total sales for nonmunicipal establishments, and (2) total government revenues for municipal owners of industrial establishments or domestic wastewater treatment plants. EPA compared the costs of compliance under two different assumptions. EPA's assessment showed that under neither assumption would the proposal have a significant economic impact on a substantial number of small entities.

Under Scenario 1, the cost to comply with the proposal would represent greater than 3 percent of estimated revenues for only 7 (or 0.7 percent) small municipalities, 0 small businesses, and 0 small nonprofit organizations. In aggregate, the cost to comply with the proposal would represent greater than 3 percent of estimated revenues for 7 (or 0.3 percent) small entities.

Under Scenario 2, compliance costs would represent greater than 3 percent of estimated revenues for 43 (or 4.4 percent) small municipalities, 0 small businesses, and 0 small nonprofit organizations. In aggregate, the cost to comply with the proposal would represent greater than 3 percent of estimated revenues for 43 (or 1.9 percent) small entities. Thus, under either scenario, fewer than 100 small entities would experience an economic impact of 3 percent or greater on their revenues.

Moreover, the number of small entities for which compliance costs would represent greater than 1 percent of estimated revenues is 39 (4.0 percent) for small municipalities and 0 for small businesses under Scenario 1. In aggregate, the number is 39 (1.7 percent) small entities under Scenario 1. The number of small entities for which compliance costs would represent greater than 1 percent of estimated revenues is 127 (12.9 percent) for small municipalities and 0 for small businesses under Scenario 2. In aggregate, the number is 127 (5.5 percent) small entities under Scenario 2. EPA concludes that these estimates are not a significant economic impact on a substantial number of small entities. EPA's screening analysis is discussed in greater detail in ''RFA/SBREFA Screening Analysis for the Proposal to Amend the Final Water Quality Guidance for the Great Lakes System to Prohibit Mixing Zones for Bioaccumulative Chemicals of Concern'' (August 1999).

EPA's analysis was based on the projected impact of the rule on existing small entities. However, the proposed rule may also affect small entities that do not yet exist or that do not discharge BCCs at this time but may choose to do so in the future. EPA does not expect that new small entities discharging to the Great Lakes will experience significant economic impacts because in EPA's view, it is highly unlikely that any new discharger would discharge BCCs in quantities to be affected by the proposed mixing zone prohibition. First, most BCCs are already banned from use and/or production or are severely restricted in use. Therefore, EPA does not expect them to be present in a new discharger's effluent above criteria levels. Second, for the few remaining BCCs that may be contaminating effluent as a result of household products or products and chemicals used in production, municipalities and commercial and industrial users of those products should be able to substitute away from these products, rely on cleaner technologies that do not require their use or that do not produce BCCs as a by-product, or employ source controls to reduce releases of BCCs to acceptable levels. These pollution prevention alternatives often are significantly more cost-effective than the end-of-pipe treatment technologies that could be used in their place.

In other words, while EPA expects that implementation of today's proposed rule would ultimately result in some new or revised permit conditions for small entities, for the reasons set forth above EPA expects that neither new nor existing small entities will actually experience estimated economic impacts as great as those quantified under Scenario 2. In addition, for existing discharges, there is some flexibility and discretion in how the proposed rule would be implemented by States and Tribes within the NPDES permit program.

The Agency thus is certifying that today's proposed rule would not have a significant economic impact on a substantial number of small entities, within the meaning of the RFA.

C. Paperwork Reduction Act

An agency may not consider or sponsor a collection of information, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Once this proposed rule is promulgated, the Great Lakes States and Tribes must adopt and submit to EPA provisions that are as protective as this amendment. *See* 40 CFR 132.1 and 132.5(a). EPA has already received approval from OMB for that information collection as part of the 1995 rulemaking. The OMB control number is 2040–0180.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal Mandates'' that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before EPA promulgates a rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and to adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective

or least burdensome alternative if the Administrator publishes with the rule an explanation why that alternative was not adopted.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of the affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

As noted above, this proposed rule would amend Part 132 to prohibit mixing zones for BCCs in the Great Lakes System. EPA has determined that this proposed rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. The total annual impact of this rule on State, local, and Tribal governments and the private sector is not expected to exceed $12 million to $35 million. Thus, today's proposal to amend Part 132 to prohibit mixing zones for BCCs in the Great Lakes System is not subject to the requirements of sections 202 and 205 of the UMRA.

EPA has determined that this proposed rule contains no regulatory requirements that might significantly or uniquely affect small governments. As described above, EPA does not expect that small governments, including Tribal governments with responsibility for implementing this rule, and small governments operating POTWs discharging to the Great Lakes, will experience significant economic impacts because most BCCs are already banned from use or are severely restricted in use. In those rare instances where the few remaining BCCs (*i.e.*, BCCs that are not already banned or severely restricted) are found contaminating effluent to unacceptable levels as a result of household products or products and chemicals used in production, municipalities and commercial and industrial users of those products should be able to substitute away from these products, rely on cleaner technologies that do not require their use or that do not produce BCCs as a by-product, or employ source controls to reduce releases of BCCs to acceptable levels. In addition, for existing discharges, there is some flexibility and discretion in how the proposed rule would be implemented by States and Tribes within the NPDES permit program. Thus, today's rule is not subject to the requirements of section 203 of UMRA.

E. Executive Orders on Federalism

Under Executive Order 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or Tribal government unless the Federal Government provides the funds necessary to pay the direct compliance costs incurred by those governments or to provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected State, local and Tribal governments, the nature of their concerns, any written communications from the governments and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process allowing elected officials and other representatives of State, local and Tribal governments ''to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates.''

In compliance with Executive Order 12875, EPA has extensively involved Great Lakes State, Tribal and local governments in the development of this proposed amendment, notably during the process of developing the 1995 Guidance, which contained the original version of this proposed rule. The rulemaking that promulgated the Guidance in 1995 was subject to Executive Order 12875. The process used to develop the Guidance marked the first time that EPA had developed a major rulemaking effort in the water quality standards program through a regional public forum. The public process, which lasted over a seven year period and involved Great Lakes States, EPA, and other Federal agencies in open dialogue with citizens, Tribal and local governments, and industry in the Great Lakes Basin, is described further in the preamble to the Guidance. *See* 60 FR 15383–15384 (March 23, 1995).

As described above, today's action by EPA proposes to reinstate a provision nearly identical to the provision in the 1995 Guidance that was vacated by the Court in *AISI*. It thus reflects the State, local and Tribal government input EPA received during the 1995 Guidance rulemaking.

On August 4, 1999, President Clinton issued a new executive order on federalism, Executive Order 13132, *see* 64 FR 43255 (August 10, 1999), which will take effect on November 2, 1999. In the interim, the current Executive Order 12612, *see* 52 FR 41685 (October 30, 1987), on federalism still applies. This rule, if promulgated as proposed, will not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 12612. Today's proposed rule simply would require the Great Lakes States to add one discrete provision to the regulations and policies they have already adopted as part of the Great Lakes Water Quality Initiative, 60 FR 15366 (March 23, 1995). Similarly, this proposed rule would not have a substantial direct effect upon the distribution of power and responsibilities among the various levels of government because the Great Lakes States retain primary responsibility for administering their NPDES permit programs, through which this proposed rule would be implemented. It would authorize EPA to promulgate these mixing zone provisions only if a State or Tribe has failed to act. Accordingly, these provisions will not have a substantial direct effect on States or on intergovernmental relationships or responsibilities.

F. Executive Order 13084: Consultation and Coordination With Indian Tribal Governments

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments ''to provide meaningful and timely input in the development of regulatory policies on matters that

significantly or uniquely affect their communities.''

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments or impose substantial direct compliance costs on them. Therefore, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule. Nonetheless, in compliance with Executive Order 12875, EPA has extensively involved Great Lakes State, Tribal and local governments in the development of this proposed amendment, notably during the process of developing the 1995 Guidance, which contained the original version of this proposed rule. Today's action by EPA proposes to reinstate a provision nearly identical to the provision in the 1995 Guidance that was vacated by the Court in *AISI*. It thus reflects the State, local and Tribal government input EPA received during the 1995 Guidance rulemaking.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045: ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This proposed rule is not subject to the Executive Order because it is not economically significant as defined in E.O. 12866. Further, EPA interprets E.O. 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This rule is not subject to E.O. 13045 because it does not establish an environmental standard intended to mitigate health or safety risks. However, as noted earlier, children may be a greater risk to BCCs than adults. If they are at greater risk, they will benefit the most from this rule to prohibit mixing zones for BCCs.

The public is invited to submit or identify peer-reviewed studies and data, of which the agency may not be aware, that assessed results of early life exposure to BCCs.

H. Endangered Species Act

Section 7 of the Endangered Species Act (ESA) requires federal agencies, in consultation with the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS), to ensure their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of habitat of such species which have been designated as ''critical.'' Consultation is designed to assist federal agencies in complying with the requirements of section 7 by supplying a process within which FWS and NMFS provide such agencies with advice on whether an action complies with the substantive requirements of ESA.

In accordance with these requirements, EPA completed consultation with the FWS on the 1995 Guidance, and the FWS issued a biological opinion concluding that the Guidance was not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of species' critical habitat. As explained above, today's proposal essentially reinstates, with some clarification, the BCC mixing zone provisions of the 1995 Guidance. Since the substance of today's proposal has already been the subject of section 7 consultation, the effects of today's proposal have been addressed by the Services' prior biological opinion.

I. National Technology Transfer and Advancement Act

Under section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Pub. L. No. 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through the Office and Management and Budget, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

The proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards. EPA welcomes comments on this aspect of the proposed rulemaking and, specifically, invites the public to identify potentially-applicable voluntary consensus standards and to explain why such standards should be used in this regulation.

VII. References

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List of Subjects in 40 CFR Part 132

Environmental protection, Administrative practice and procedure, Great Lakes, Indians-lands, Intergovernmental relations, Reporting and recordkeeping requirements, Water pollution control.

Dated: September 24, 1999.

Carol M. Browner,

Administrator.

For the reasons set out in the preamble, title 40, chapter I, part 132 of the Code of Federal Regulations is proposed to be amended as follows:

PART 132—WATER QUALITY GUIDANCE FOR THE GREAT LAKES SYSTEM

1. The authority citation for Part 132 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

2. Section 132.5 is amended by revising paragraphs (a) and (c) to read as follows:

§ 132.5 Procedures for adoption and EPA review.

(a) Except as provided herein and in paragraph (c) of this section, the Great Lakes States and Tribes shall adopt and submit for EPA review and approval the criteria, methodologies, policies, and procedures developed pursuant to this part no later than September 23, 1996. With respect to procedure 3.C of appendix F of this part, the Great Lakes States and Tribes shall make its submission to EPA no later than 18 months after the publication date of the final rule to prohibit mixing zones for BCCs.

* * * * *

(c) The Regional Administrator may extend the deadline for the submission required in paragraph (a) of this section if the Regional Administrator believes that the submission will be consistent with the requirements of this part and can be reviewed and approved pursuant to this section no later than March 23, 1997, or, for procedure 3.C. of appendix F of this part, no later than 2 years after the publication date of the final rule to prohibit mixing zones for BCCs.

* * * * *

3. Appendix F of Part 132 is amended by adding Procedure 3.C. to read as follows:

Appendix F of Part 132—Great Lakes Water Quality Initiative Implementation Procedures

* * * * *

Procedure 3: * * *

C. *Mixing Zones for Bioaccumulative Chemicals of Concern (BCCs).* The following requirements shall be applied in establishing TMDLs, WLAs in the absence of TMDLs, and preliminary WLAs for purposes of determining the need for WQBELs under procedure 5 of appendix F, for BCCs:

1. There shall be no mixing zones available for new discharges of BCCs to the Great Lakes System. WLAs established through TMDLs, WLAs in the absence of TMDLs, and preliminary WLAs for purposes of determining the need for WQBELs for new discharges of BCCs shall be set equal to the most stringent applicable water quality criteria or values for the BCCs in question. This prohibition takes effect for a State or Tribe on the date EPA approves the State's or Tribe's submission of such prohibition or publishes a notice under 40 CFR 132.5(f) identifying that prohibition as applying to discharges within the State or Federal Tribal reservation.

2. For purposes of section C of procedure 3 of appendix F, new discharges are defined as: (1) A ''discharge of pollutants'' (as defined in 40 CFR 122.2) to the Great Lakes System from a building, structure, facility, or installation, the construction of which commences after the date the prohibition in section C.1 takes effect in that State or Tribe; (2) a new discharge from an existing Great Lakes discharger that commences after the date the prohibition in section C.1 takes effect in that State or Tribe; or (3) an expanded discharge from an existing Great Lakes discharger that commences after the date the prohibition in section C.1 takes effect in that State or Tribe, except for those expanded discharges resulting from changes in loadings of any BCC within the existing capacity and processes (e.g., normal operational variability, changes in intake water pollutants, increasing the production hours of the facility or adding additional shifts, or increasing the rate of production), and that are covered by the existing applicable control document. All other discharges of BCCs are defined as existing discharges.

3. Up until 10 years from the publication date of the final BCC mixing zone rule, mixing zones for BCCs may be allowed for existing discharges to the Great Lakes System pursuant to the procedures specified in sections D and E of this procedure.

4. Except as provided in sections C.5 and C.6 of this procedure, permits issued on or after the publication date of the final BCC mixing zone rule shall not authorize mixing zones for existing discharges of BCCs to the Great Lakes System 10 years after the publication date of the final BCC mixing zone rule. After 10 years from the publication date of the final BCC mixing zone rule, WLAs established through TMDLs, WLAs established in the absence of TMDLs, and preliminary WLAs for purposes of determining the need for WQBELs under procedure 5 of appendix F for existing discharges of BCCs to the Great Lakes System shall be set equal to the most stringent applicable water quality criteria or values for the BCCs in question.

5. *Exception for Water Conservation.* States and Tribes may grant mixing zones for any existing discharge of BCCs to the Great Lakes System beyond the date specified in section C.4 of this procedure where it can be demonstrated, on a case-by-case basis, that failure to grant a mixing zone would preclude water conservation measures that would lead to overall load reductions in BCCs, even though higher concentrations of BCCs occur in the effluent. Such mixing zones must also be consistent with sections D and E of this procedure.

6. *Exception for Technical and Economic Considerations.* States and Tribes may grant mixing zones beyond the date specified in section C.4 of this procedure for any existing discharges of a BCC to the Great Lakes System upon the request of a discharger subject to the limited circumstances specified in sections C.6.a through C.6.c below.

a. The State or Tribe must determine that:

i. The discharger is in compliance with and will continue to implement, for the BCC in question, all applicable requirements of Clean Water Act sections 118, 301, 302, 303, 304, 306, 307, 401, and 402, including existing National Pollutant Discharge Elimination System (NPDES) water-quality based effluent limitations; and

ii. The discharger has reduced and will continue to reduce the loading of the BCC for which a mixing zone is requested to the maximum extent possible such that any additional controls or pollution prevention measures to reduce or ultimately eliminate the BCC would result in unreasonable economic effects on the discharger or the affected community because the controls or measures are not feasible or cost-effective.

b. Any exceptions granted pursuant to this section shall:

i. Not result in any less stringent limitations than those existing prior to the publication date of the final BCC mixing zone rule;

ii. Reflect all information relevant to ensure that the mixing zone is no larger than necessary to account for the technical constraints and economic effects identified pursuant to paragraph C.6.a above;

iii. Meet all applicable acute and chronic aquatic life, wildlife and human health criteria and values within and at the edge of the mixing zone or be consistent with the applicable TMDL or assessment and remediation plan authorized under procedure 3.A.

iv. As appropriate, require the discharger to implement an ambient monitoring plan to ensure compliance with water quality standards and consistency with any applicable TMDL or such other strategy consistent with section A of this procedure, including the evaluation of alternative means for reducing BCCs elsewhere in the watershed; and

v. Be limited to one permit term unless the permitting authority makes a new determination in accordance with this section for each successive permit application in which a mixing zone for the BCC(s) is sought.

c. For each draft NPDES permit that would allow a mixing zone for one or more BCCs 10 years after the publication date of the final BCC mixing zone rule, the fact sheet or statement of basis for the draft permit that is required to be made available through public notice under 40 CFR 124.6(e) shall:

i. Specify the mixing provisions used in calculating the permit limits; and

ii. Identify each BCC for which a mixing zone is proposed.

7. Any mixing zone authorized under section C.3, C.5 or C.6 must be consistent with sections D and E of this procedure, as applicable.

* * * * *

[FR Doc. 99–25436 Filed 10–1–99; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54, 61, and 69

[CC Docket Nos. 96–262; 94–1; 99–249; 96–45; FCC 99–235]

Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, and Federal-State Joint Board on Universal Service

AGENCY: Federal Communications Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document seeks comment on whether the Commission should adopt, in its entirety, a proposal submitted by the Coalition for Affordable Local and Long Distance Services (CALLS), as requested by the CALLS members. The CALLS proposal is an integrated interstate universal service and interstate access reform plan covering price cap incumbent local exchange carriers. The document also solicits comment on whether there are any aspects of the proposal that the Commission should incorporate into any of the Commission's concurrent proceedings, in the event we do not adopt the CALLS proposal in its entirety. In addition, the document invites commenting parties to propose alternative plans to that submitted by CALLS.

DATES: Comments are due on or before October 29, 1999. Reply comments are due on or before November 19, 1999.

ADDRESSES: Federal Communications Commission, Secretary, Room TW–A325, 445 12th Street SW, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Richard Lerner, Deputy Division Chief, Common Carrier Bureau, Competitive Pricing Division, (202) 418–1520.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's NPRM adopted September 14, 1999, and released September 15, 1999. The plan as submitted by CALLS is attached as Appendix A. The full text of this NPRM, as well as the complete files for the relevant dockets, is available for inspection and copying during the weekday hours of 9:00 a.m. to 4:30 p.m. in the Commission's Reference Center, Room CY–A257, 445 12th St., SW, Washington, DC, (202) 418–0270, or copies may be purchased from the Commission's duplicating contractor, ITS, Inc., 1231 20th St., NW, Washington, DC 20036, (202) 857–3800. The complete text of the NPRM also may be obtained through the Internet, at http://www.fcc.gov/Bureaus/Common_Carrier/Notices/1999/fcc99235.doc.

Synopsis of Notice of Proposed Rulemaking

1. This NPRM seeks comment on an integrated proposal submitted by CALLS. The CALLS proposal is an interstate universal service and interstate access reform plan covering incumbent price cap local exchange carriers (LECs). The proposal was developed through negotiations among those local exchange carriers and interexchange carriers who are coalition members. It is designed to be implemented over a five-year period beginning in January of 2000 and would apply to those carriers who voluntarily elect to participate. CALLS requests that the Commission adopt the plan without modification as an integrated package. CALLS believes this plan will promote comparable and affordable universal service, reduce long distance bills, and promote competition in rural and residential markets.

2. The NPRM seeks comment on the CALLS proposal to revise the current system of common line charges by combining existing carrier and subscriber line charges into one flat-rated subscriber line charge, and permitting deaveraging of those charges subject to specific conditions. In addition, the NPRM invites parties to comment on the proposal by the CALLS members to establish a portable universal service fund that provides explicit support to replace support currently implicit in interstate access charges. The NPRM solicits further comment on the CALLS proposal to establish a ''social contract'' under which traffic-sensitive switched access rates are reduced annually until they reach an agreed level; once that level is reached, rates for all access elements are frozen until July 1, 2004. Finally, as part of the Commission's continuing efforts to reform regulation of universal service and interstate access charges to accelerate the development of competition in all telecommunications markets, commenting parties are invited to submit alternative plans to that proposed by CALLS.

3. Because some of the issues addressed by the CALLS Proposal involve matters that are already the subject of pending Commission and court proceedings (62 FR 31868, June 11, 1997), the Commission initiates this rulemaking to determine whether it should adopt the CALLS proposal in its entirety, as requested by the CALLS members, or whether certain elements of the proposal should be incorporated into any of the Commission's concurrent efforts to reform interstate access charges and universal service.

A. Ex Parte Presentations

4. This NPRM is a permit-but-disclose proceeding and is subject to the permit-but-disclose requirements under 47 CFR 1206(b), as revised. Persons making oral ex parte presentations are reminded that memoranda summarizing the presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. Other rules pertaining to oral and written presentations are set forth in section 1.1206(b), as well.

B. Initial Regulatory Flexibility Act Analysis

5. As required by the Regulatory Flexibility Act (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IFRA) of the possible significant economic impact on small entities by the proposals in this NPRM. *See* 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601 *et seq.*, has been amended by the Contract with America Advancement Act of 1996, Public Law No. 104–121, 110 Stat. 847 (1996) (CWAA). Title II of the CWAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). Written public comments are requested on the IFRA. Comments must be identified as responses to the IFRA and must be filed in accordance with the same filing deadlines as comments on the rest of this NPRM. Parties should address the extent to which the CALLS proposal would affect large and small price cap incumbent local exchange carriers differently, and how small business entities, including small price cap incumbent local exchange carriers, would be affected. The Office of Public Affairs, Reference Operations Division, will send a copy of the NPRM, including this IFRA, to the Chief Counsel for Advocacy of the Small Business Administration. *See* 5 U.S.C. 603(a). In addition, the NPRM and IFRA (or summaries thereof) will be published in the **Federal Register**.

6. *Need for, and Objectives of, the Proposed Rules.* The CALLS members offer the proposal as a comprehensive solution to the members' access charge, universal service, and price cap concerns. The CALLS plan would revise the current system of common line charges by combining existing carrier and subscriber charges into one flat-rated subscriber line charge (SLC), and would provide for limited deaveraging of those charges under specific conditions. The CALLS plan also would establish a portable universal service fund that provides explicit support to replace support currently implicit in interstate access charges. In addition, the CALLS plan would establish a ''social compact'' under which traffic-sensitive switches access rates are reduced annually until they reach an agreed level. CALLS believes this plan will promote comparable and affordable universal service, reduce long distance bills, and promote competition in rural and residential telecommunications markets.

7. *Legal Basis.* This rulemaking action is supported by 47 U.S.C. 154(i), 154(j), 201–205, 254, and 403.

8. *Description and Estimate of the Number of Small Entities to Which the NPRM Will Apply.* The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the term ''small business''. *See* 5 U.S.C. 601(3) (incorporating by reference the definition of ''small business concern'' in 15 U.S.C. 632). In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration. The Small Business Administration has defined a small business for Standard Industrial Classification (SIC) category 4813 (Telephone Communications, Except Radiotelephone) to be a small entity that has no more than 1,500 employees. *See* 13 CFR 121.201.

9. *Total Number of Telephone Companies Affected.* The Commission has included small incumbent LECs in this present RFA analysis. As noted above, a ''small business'' under RFA is one that, *inter alia,* meets the pertinent small business size standard (*e.g.,* a telephone communications business having 1,500 or fewer employees), and ''is not dominant in its field of operation.'' The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not ''national'' in scope. The Commission has therefore included small incumbent LECs in this RFA analysis, although it emphasizes that this RFA action has no effect on FCC analyses and determinations in other, non-RFA contexts.

10. *Price Cap Local Exchange Carriers.* This rulemaking applies only to price cap LECs. The Commission does not have data specifying the number of these carriers that are either dominant in their field of operations, are not independently owned and operated, or have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of price cap LECs that would qualify as small business concerns under the SBA's definition. However, there are only 13 price cap LECs, and we know that these are mostly non-small entities. Consequently, we estimate that significantly fewer than 13 providers of local exchange service are small entities or small price cap LECs that may be affected by these proposals.

11. *Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements.* It is not clear whether, on balance, the proposals made by CALLS would increase or decrease price cap incumbent local exchange carriers' administrative burdens. Some of the rate structure reforms proposed by CALLS may require additional filings, and some of the CALLS proposals may reduce some administrative burdens. For example, if the CALLS proposal to eliminate the presubscribed interexchange carrier charge is adopted, the Commission expects that this would decrease some administrative burdens for price cap incumbent local exchange carriers. Some of the rate structure reforms proposed by CALLS may have a neutral affect in terms of administrative burdens. For example, CALLS proposes that implicit subsidies now collected by price cap incumbent local exchange carriers from interexchange carriers through access charges would be collected as explicit subsidies from the Universal Service Fund Administrator. If this proposal is adopted, the administrative burden for the price cap incumbent local exchange carrier is expected to remain the same.

12. *Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.* The proposals made by CALLS could have varying positive or negative impacts on price cap incumbent local exchange carriers, including any such small carriers. The alternative to consideration of adopting the CALLS proposal at this time would be to continue in effect the existing access charge and universal service fund rules. We seek comment on the economic impact on small entities of the CALLS proposal and urge that the parties support their comments with specific evidence and analysis.

13. *Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules.* None.

C. Deadlines and Instructions for Filing Comments

14. Pursuant to 47 CFR 1.415 and 1.419, interested parties may file comments on or before October 29, 1999 and reply comments on or before November 19, 1999. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See* Electronic Filing Documents in Rulemaking Proceedings, 63 FR 24,121 (1998).

15. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov.e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. Because four docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each of the four docket or rulemaking numbers referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, ''get form <your e-mail address.'' A sample form and directions will be sent in reply.

16. Parties who choose to file by paper must file an original and ten (10) copies of each filing. All paper filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 Twelfth Street, SW, TW-A325, Washington, DC 20554.

D. Ordering Clauses

17. *It is ordered,* pursuant to sections 1, 4(i) and (j), 201–209, 218–222, 254, and 403 of the Communications Act, as amended, 47 U.S.C. 151, 154 (i), 154(j),

201–209, 218–222, 254, and 403, that this Notice of Proposed Rulemaking is hereby adopted and comments are required.

18. *It is further ordered* that the Commission's Office of Public Affairs, Reference Operations Division, shall send a copy of this Notice of Proposed Rulemaking, including the Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects

47 CFR Part 54

Reporting and recordkeeping requirements, Telecommunications, Telephone.

47 CFR Part 61

Access charges, Communications common carriers, Reporting and recordkeeping requirements, Telephone.

47 CFR Part 69

Communications common carriers, Reporting and recordkeeping requirements, Telephone.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

Appendix A: Universal Service and Access Reform Proposal

The companies agree to the following positions, provided these positions are adopted as an integrated package through FCC rulemaking, with an effective date for the changes of January 1, 2000 except as otherwise noted. (We have used January 1, 2000 for discussion purposes. The actual date will have to be adjusted to account for Y2K issues.) The proposal is an integrated proposal addressing and settling the parties' access charge/price cap/universal service concerns. Because of the complexity and interdependence of the various facets of the proposal, the parties view it as a unified proposal that the FCC should either adopt without modification or reject.

1. ILEC Recovery of Universal Service Contributions. Reconsider the requirement that price cap incumbent LECs (ILECs) recover universal service contributions through adjustments to the Price Cap baskets and services that generate end user revenue, and permit price cap incumbent LECs to establish a separate rate element to recover universal service contributions. (*See* May 7, 1997 Access Reform Order at paragraph 379 (stating that price cap ILECs may treat their universal service contributions as exogenous changes to price cap indices, that recovery may only be in baskets that generate end user revenue, and that the baskets generating end user revenue are common line, interexchange and trunking.))

1.1. The USF rate element will be charged to all end users.

1.2. The USF rate element may be assessed on a per line basis or as a percentage of interstate retail revenues, and at the option of the ILEC it may be combined for billing purposes with other end user retail rate elements.

1.3. Upon implementation, ILEC USF assessments (a) are removed from existing price cap baskets at the same percentage adjustment as they went into the price cap baskets using an ''R'' value adjustment methodology similar to that which had been prescribed by the FCC for reversal of sharing, and (b) are not subject to the Price Cap formula in future years.

1.4. An ILEC opting to assess the USF rate element on a per line basis may apply that charge using the ''equivalency'' relationships established for the multiline business PICC for Primary Rate ISDN service, as per 69.153(f)(2), and for Centrex lines, per 69.153(g)(1).

2. Common Line Rate Structure Simplification, Deaveraging of Common Line Rates and Universal Service.

Overview: SLCs, PICCs and CCL are ultimately unified into a single charge, which can be deaveraged, but which will not exceed $7.00 for residential and single line business lines and $9.20 for multiline business lines. Residential and Single Line Business End User and Presubscribed Interexchange Carrier Charges are combined into a single end user charge. For primary residential lines and single line business lines, the combined total in most, but not all, areas will be approximately $5.50 on January 1, 2000. In subsequent years, the primary residential and single line business common line transition continues as the nominal SLC cap for those lines increases to $6.25 on January 1, 2001, to $6.75 on July 1, 2002, and to $7.00 on July 1, 2003. The maximum Primary Residence/Single Line Business SLC in any zone is the lower of the nominal cap, or average price cap common line revenue per line (which includes all charges currently collected through SLCs, PICCs, CCL and a portion of local switching, but does not include ILEC USF contributions) for the highest cost UNE zone in a study area. For non-primary residential lines, the combined total charge will be capped at the lower of $7.00 or the greater of the current rate or average price cap common line revenue per line for the highest average revenue per line UNE zone in a study area.

For multiline business lines, End User and Presubscribed Interexchange Carrier Charges are not combined, and the Multiline Business (MLB) PICC will continue to be charged by the ILEC to the Interexchange Carrier. However, the MLB PICC falls dramatically for most companies as a result of reforms in other flat-rated common line charges, and the MLB PICC is eventually eliminated in most areas. Except where a carrier reduces the rate through voluntary reductions, multiline business SLCs initially will be frozen until the carrier's MLB PICC and CCL are eliminated.

Average Carrier Common Line charges immediately fall dramatically and are eventually eliminated in most areas as a result of an additional $650 million in universal service funding to replace implicit support currently in interstate access charges and of increasing the Primary Residential and Single Line Business SLCs.

Lifeline support would increase to hold Lifeline customers harmless against SLC rate restructuring.

SLCs can be deaveraged subject to certain limitations. Geographic deaveraging does not increase permitted price cap common line revenues (which includes all charges other than ILEC universal service contributions currently collected through SLCs, PICCs, and CCL). ILECs may only geographically deaverage their SLCs on the same geographic basis as state-approved UNE loop zones. ILECs can have up to 4 SLC zones, absent FCC review and approval. ILECs can choose which zones to consolidate if they have more than 4 UNE zones. SLCs in lower cost zones cannot be greater than SLCs in the same customer class in higher cost zones. Within a given zone, the Multiline Business SLC cannot fall below the Non-Primary Residential SLC, which cannot be less than the Primary Residential and Single Line Business SLC. For geographic deaveraging other than through voluntary reductions, an ILEC must eliminate its CCL and MLB PICC before it can begin geographically to deaverage the SLC, and an ILEC's deaveraged SLC in the lowest cost zone cannot be less than a minimum level. A deaveraged price cap common line revenue per line is calculated for each zone. The relative price cap revenue per line in each zone reflects the relative UNE rates in that zone, and the level of revenue per line in each zone is such that the ILEC can recover total permitted price cap common line revenues. The parties do not agree whether limits on deaveraging through voluntary reductions are necessary.

The proposal provides new federal universal service support (separate and distinct from the current universal service support for high cost areas) of $650 million per year to replace implicit support in interstate access charges for price cap LECs. In any UNE loop deaveraging zone where the average common line revenue per line for that zone would exceed $7.00 per line for residential lines and $9.20 for multiline business lines, this additional interstate universal service support would provide a portion of the difference. This proportion would be set to ensure that the overall amount of USF support to replace implicit support in interstate access rates for all price cap LEC areas does not exceed $650 million nationwide. The new interstate USF Support would ensure that, even after deaveraging, the SLC would not exceed $7.00 for residential customers anywhere, or $9.20 for multiline business customers. The amount of universal service support to each study area is also adjusted on a three year phased-in basis so that by July 1, 2003, CCL and multiline business PICC charges will be eliminated in most areas served by price cap ILECs.

This new universal service funding would be portable to other eligible telecommunications carriers. The amount that would be portable for each line would be deaveraged by zone within any study area that receives such support.

Any new interstate USF funds to replace implicit support in interstate access charges for price cap LECs will first offset carrier common line charges, then offset multiline

business PICC charges, and then offset amounts that would otherwise be collected through Subscriber Line Charges, which may be deaveraged.

2.1. Reform and Simplification of Subscriber Line Charges (SLCs) and Presubscribed Interexchange Carrier Charges (PICCs).

2.1.1. Terms.

2.1.1.1. Price Cap Common Line, Marketing, TIC (''CMT'') Revenue. Price Cap Common Line, Marketing, and TIC Revenue is the total revenue a filing entity would be permitted to receive for Subscriber Line Charges, Presubscribed Interexchange Carrier Charges, Carrier Common Line Charges, and the portion of local switching reallocated pursuant to paragraph 3.2. Price Cap CMT Revenue includes marketing expenses presently collected pursuant to FCC rule 69.156(a), and residual interconnection charge revenues collected through PICC charges, but it does not include the current recovery of incumbent LEC universal service contributions that are first removed from existing price cap baskets pursuant to paragraph 1.3.

2.1.1.2. Average Price Cap CMT Revenue Per Line. The Average Price Cap CMT Revenue Per Line is Price Cap CMT Revenue per month as of December 31, 1999 using base period demand, divided by the base period demand number of lines as of December 31, 1999. In filing entities with multiple study areas, if it becomes necessary to calculate the Price Cap CMT Revenue Per Line for a specific study area, then the Price Cap CMT Revenue Per Line for that study area is determined as follows, using base period demand revenues, BFPs and lines as of December 31, 1999:

$$PriceCapCMTRevenuePerLine_{StudyArea} = PriceCapCMTRevenue_{FilingEntity} \times (BFP_{StudyArea} \div BFP_{FilingEntity}) \div Lines_{StudyArea}$$

Nothing in this definition precludes a price cap LEC from continuing to average rates across filing entities containing multiple study areas, where permitted under existing rules.

2.1.1.3. Zone Average Revenue Per Line. Zone Average CMT Revenue Per Line is the Price Cap CMT Revenue Per Line calculated for a particular state-defined zone used for deaveraging of UNE loop prices. The Zone Average Revenue Per Line is computed according to the following formula:

$$ZoneAverageRevenuePerLine = 25\% (Loop_{ZonePrice} + Port_{Price}) + U$$

Where:

U (Uniform Revenue Per Line Adjustment) = ((PriceCapCMTRevenuePerLine$_{StudyArea(s)}$ × Base Period Lines$_{StudyArea(s)}$ − (25% Sum of (Lines$_{UNEZone}$ × Loop&Port Price$_{UNEZone}$ × 12) for each zone))) ÷ Base Period Lines$_{Study\ Area(s)}$ ÷ 12

Loop&Port Price$_{UNE\ Zone}$ = the UNE rates for unbundled loop and switch ports in that UNE zone.(As stated in paragraph 5, nothing in this proposal supercedes, prejudices or otherwise implies a result of the UNE Remand proceeding.)

2.1.2. Primary Residential and Single Line Business Charges.

2.1.2.1. Presubscribed Interexchange Carrier Charge. Beginning on January 1, 2000, eliminate the primary residential line and single line business Presubscribed Interexchange Carrier Charge.

2.1.2.2. Subscriber Line Charge.

2.1.2.2.1. Averaged Subscriber Line Charge. Beginning on January 1, 2000, the maximum averaged Subscriber Line Charge for primary residential and single line business lines in a given entity will be Average Price Cap CMT Revenue per Line up to a nominal cap of $5.50. ($5.50 is equivalent to the current primary residential SLC, PICC-related account fees charged to the vast majority of presubscribed residential long distance subscribers, and the 50 cent increase in the PICC cap for primary residential and single line business subscribers scheduled to go into effect on July 1, 2000.) Beginning on January 1, 2001, in lieu of what would have been scheduled annual increases in the cap on the primary residential line and single line business Presubscribed Interexchange Carrier Charge of $0.50, plus inflation, increase the nominal cap on primary residential and single line business Subscriber Line Charges according to the following schedule:

On January 1, 2001, to $6.25;
On July 1, 2002, to $6.75;
On July 1, 2003, to $7.00 per line.

2.1.2.2.2. Zone Deaveraged Subscriber Line Charge.

2.1.2.2.2.1. Maximum Charge. The maximum zone deaveraged SLC that may be charged in any zone is the lesser of the highest Zone Average Revenue Per Line within the study area, or a nominal cap, which as of January 1, 2000 is $5.50 per line per month. Beginning on January 1, 2001, increase the nominal cap on primary residential and single line business Subscriber Line Charges according to the following schedule:

On January 1, 2001, to $6.25;
On July 1, 2002, to $6.75;
On July 1, 2003, to $7.00 per line.

2.1.2.2.2.2. Minimum Charge. See paragraph 2.1.5.6.2.

2.1.2.3. Lifeline. Increase minimum federal Lifeline support effective January 1, 2000, and coincident with changes in nominal SLC caps thereafter, so that all of the Subscriber Line Charge continues to be waived for Lifeline customers, with carriers reimbursed from the Universal Service Fund. In subsequent years, increase minimum federal Lifeline support in the same amount as increases in the primary residential Subscriber Line Charge.

2.1.3. Non-Primary Residential Lines.

2.1.3.1. Presubscribed Interexchange Carrier Charges. Beginning on January 1, 2000, eliminate the PICC for Non-Primary Residential lines.

2.1.3.2. Subscriber Line Charges.

2.1.3.2.1. Averaged Subscriber Line Charges. Beginning on January 1, 2000, the maximum averaged Subscriber Line Charge for non-primary residential lines in a given entity will be the lesser of:

(a) $7.00 or

(b) The greater of:

(1) The rate as of December 31, 1999 less amounts of SLC reduction pursuant to paragraph 2.1.6, or

(2) Average Price Cap CMT Revenue Per Line.

2.1.3.2.2. Zone Deaveraged Subscriber Line Charge.

2.1.3.2.2.1. Maximum Charge. The maximum Zone Deaveraged Non-Primary Residential Subscriber Line Charge will be the lesser of $7.00 per line per month or the highest Zone Average Revenue Per Line for any zone in the study area.

2.1.3.2.2.2. Minimum Charge. See paragraph 2.1.5.6.2.

2.1.3.2.3. Elimination of Distinction between Primary and Non-Primary Residential Lines. Once the charges for primary and non-primary residential lines are equal within a zone or study area, the ILEC may eliminate the distinction between primary and non-primary lines within that zone or study area.

2.1.4. Multiline Business Lines.

2.1.4.1. Presubscribed Interexchange Carrier Charges.

Beginning on January 1, 2000, the cap on the Multiline Business PICC is reduced to $4.00 per line. Multiline Business PICCs remain assessed to the interexchange carrier. This charge will be eliminated over time in most areas pursuant to paragraph 2.1.6.

2.1.4.2. Subscriber Line Charges.

2.1.4.2.1. Averaged Subscriber Line Charges. Beginning on January 1, 2000, and in the absence of voluntary reductions, the averaged Subscriber Line Charge for multiline business lines in a given entity that has not deaveraged SLCs will be the lesser of:

(a) $9.20 or

(b) The greater of:

(1) The rate as of December 31, 1999, less amounts of SLC reductions pursuant to paragraph 2.1.6 or

(2) Average Price Cap CMT Per Line.

Except when the incumbent LEC reduces the rate through voluntary reductions, the averaged multiline business SLC initially will be frozen until the entity's multiline business PICC and CCL are eliminated.

2.1.4.2.2. Zone Deaveraged Subscriber Line Charge.

2.1.4.2.2.1. Maximum Charge. The maximum Zone Deaveraged Multiline Business Subscriber Line Charge will be the lesser of $9.20 per line per month or the highest Zone Average Revenue Per Line for any zone in the study area.

2.1.4.2.2.2. Minimum Charge. See paragraph 2.1.5.6.2.

2.1.5. Limitations on Deaveraging of Subscriber Line Charges. Except as otherwise noted, these limitations apply both to deaveraging pursuant to 2.1.6(4) and to deaveraging through voluntary reductions.

2.1.5.1. All Geographic Deaveraging According to UNE zones. All geographic deaveraging of SLCs by customer class must be done according to UNE zones. If a state has not created geographically deaveraged UNE rates for loops, the incumbent LEC may not deaverage its SLCs in that state. (As stated in paragraph 5, nothing in this proposal supercedes, prejudices or otherwise implies a result of the UNE Remand proceeding.) (footnote omitted.)

2.1.5.2. No More Than 4 Zones for Interstate Pricing and Interstate Universal

Service Purposes Without FCC Approval. Solely for the purposes of determining interstate subscriber line charges and the interstate universal service funding described in Section 2.2, an ILEC may not have more than four geographic SLC/USF zones absent a review by the FCC. Where an ILEC has more than four state-created UNE zones and the FCC has not approved use of additional zones, the ILEC will determine, at its discretion, which state-created UNE zones to consolidate so that it has no more than four zones for the purpose of determining interstate subscriber line charges and interstate universal service funding.

2.1.5.3. Relationship Between Multiline Business, Non-Primary Residential And Primary Residential And Single Line Business SLCs Within A UNE Zone. Within a given UNE zone, the multiline business SLC may not be lower than the SLC for non-primary residential lines, and the non-primary residential line SLC may not be lower than the primary residential and single line business SLC.

2.1.5.4. Relationship Between SLCs for the Same Customer Class in Different UNE Zones in a Study Area. For any given customer class (i.e. Primary Residential and Single Line Business, Non-Primary Residential, or Multiline Business) and any given zone, the Zone Deaveraged SLC in that zone must be greater than or equal to the Zone Deaveraged SLC in the zone with the next lower Zone Average Revenue Per Line. (That is, Zone 4 SLCs must be greater than or equal to Zone 3 SLCs, which must be greater than or equal to Zone 2 SLCs, which must be greater than or equal to Zone 1 SLCs, where Zone 1 is the zone with the lowest Zone Average Revenue Per Line, and Zone 4 (if there is one) is the zone with the highest Zone Average Revenue Per Line).

2.1.5.5. Revenues From all Zones Cannot Exceed Revenues from Averaged SLCs.

The parties have discussed two alternate ways of implementing a restriction that precludes incumbent LEC from increasing permitted Price Cap CMT revenues through deaveraging. The parties will present their respective views to the FCC as to the appropriateness of each alternative.

Alternative 1—Filing Entity

The sum of revenues per month that would be generated from all deaveraged SLCs in all SLC deaveraging zones within a filing entity plus revenues per month from all SLC, multiline business PICC and CCL charges from study areas within that filing entity that have not geographically deaveraged SLCs plus the sum of all Study Area Access Universal Service Support in all study areas within the filing entity, divided by the number of lines cannot exceed Average Price Cap CMT Revenue Per Line for the filing entity.

Alternative 2—Study Area and Filing Entity

The sum of all revenues per month that would be generated from all deaveraged SLCs in all zones within a study area plus Study Area Access Universal Service Support for that study area divided by the number of lines in that study area cannot exceed Average Price Cap CMT Revenue Per Line for that study area. In addition, the sum of revenues per month that would be generated from all deaveraged SLCs in all SLC deaveraging zones within a filing entity plus revenues per month from all SLC, multiline business PICC and CCL charges from study areas within that filing entity that have not geographically deaveraged SLCs plus the sum of all Study Area Access Universal Service Support in all study areas within the filing entity, divided by the number of lines cannot exceed Average Price Cap CMT Revenue Per Line for the filing entity.

2.1.5.6. Limitations Applicable Only To Zone SLC Deaveraging Pursuant To Paragraph 2.1.6, or Through Increases in Other Zone Deaveraged SLCs.

2.1.5.6.1. Elimination of PICC and CCL Prior to SLC Deaveraging. Except where an incumbent LEC deaverages through voluntary reductions, before an incumbent LEC may begin geographically deaveraging its SLC rates, its Originating and Terminating CCL and Multiline Business PICC rates must equal $0.00. Deaveraging through voluntary reductions may be undertaken without regard to the levels of the CCL or Multiline Business PICCs.

2.1.5.6.2. Minimum Charge. Except where the incumbent LEC chooses to lower the deaveraged SLC through voluntary reductions, the minimum Zone Deaveraged Subscriber Line Charge in any zone in a study area is at least the lowest Zone Average Revenue Per Line for any zone in that study area. The parties do not agree as to whether the Minimum Charge should also be adjusted to reflect a portion of those Study Area Above Cap Revenues not offset by Study Area Universal Service Support, and the parties will advocate their respective positions to the Commission. The parties do not agree as to whether limits on deaveraging through voluntary reductions are necessary, and will advocate their respective positions to the Commission.

2.1.5.6.3. Voluntary Reduction. A ''Voluntary Reduction'' is one in which the incumbent LEC reduces prices other than through offset of net increase in subscriber line charge revenues or universal service revenues pursuant to paragraph 2.1.6, or through increases in other zone deaveraged Subscriber Line Charges.

2.1.6. Phased Elimination of Carrier Common Line and Multiline Business Presubscribed Interexchange Carrier Charges, and SLC Deaveraging. Each year, the net increase in maximum permitted Subscriber Line Charge revenues (calculated by summing across all line classes in a study area the products of the maximum permitted Averaged Subscriber Line Charge for each class times the number of lines in each class times 12, and subtracting the sum across all line classes in a study area the products of the maximum permitted Averaged Subscriber Line Charge during the base period for each class times the number of lines in each class times 12) from changes specified in paragraph 2, and any universal service revenues received pursuant to paragraph 2.2, will be offset by reducing charges as follows, in order of priority:

(1) Terminating CCL Charges until the Terminating CCL rate is $0.00; then

(2) Originating CCL Charges until the Originating CCL rate is $0.00; then

(3) Multiline Business PICC until the Multiline Business PICC rate is $0.00; then

(4) Subscriber Line Charges, which may be deaveraged pursuant to paragraph 2.1.5, above.

(**Note:** This is the existing order of offsets, once the residential (primary and non-primary) and single line business PICCs are stricken.)

2.2. New Universal Service for Areas Served by Price Cap Incumbent LECs.

2.2.1 Implicit Support in Interstate Access Charges by Price Cap LECs. The total amount of universal service funding that is targeted to offset implicit support in interstate access charge rates (''Access USF'') for areas served by price cap incumbent LECs is $650 million per year. (New federal universal service support to replace implicit support in interstate access charges by price cap LECs does not include support calculated under FCC Rules 54.301 (DEM Weighting), 54.303 (Long Term Support), or 36.601 *et seq.* (Part 36 Universal Service Fund), or support expressly designated by the FCC to offset costs allocated to the intrastate jurisdiction.) This size for Access USF assumes a final nominal residential and single line business SLC cap of $7.00, and a final nominal multiline business SLC cap of $9.20 for multiline businesses. Changes in the level of these caps would change the appropriate level of universal service funding. It also assumes that all price cap LECs are included. It also assumes that the new program will cover the areas currently served by all price cap LECs, except those offered for sale before January 1, 2000, and sold to a non-price cap company. If any such area does not participate in the program, either because the price cap LEC does not participate, or because the area is offered for sale after January 1, 2000, and sold to a non-price cap company, then the funding estimated for that area pursuant to paragraph 2.2.3.1.1 will not be collected or distributed as part of this plan for price cap LECs.

2.2.2. Minimum Access USF StudyArea. For each study area, the minimum amount of Access USF support that study area would receive is calculated as follows:

$$\text{MinimumAccessUSF}_{\text{StudyArea}} = \text{PriceCapCMTRevenues}_{\text{StudyArea}} - ((\$7.00 \times \text{Residential \& SingleLineBusinessLines}_{\text{StudyArea}} \times 12) + (\$9.20 \times \text{MultilineBusinessLines}_{\text{StudyArea}} \times 12),)$$

Where:

$$\text{PriceCapCMTRevenue}_{\text{StudyArea}} = \text{PriceCapCMTRevenue}_{\text{FilingEntity}} \times (\text{BFP}_{\text{StudyArea}} \div \text{BFP}_{\text{FilingEntity}})$$

2.2.3. Calculation of Access USF Per Line.

2.2.3.1. Terms.

2.2.3.1.1. Zone Above SLC Cap Revenues. For each zone, the above cap revenues for that zone are calculated according to the following formula:

ZoneAboveSLCCapRevenues = ((ZoneAverageRevenuePerLine − $7.00) × Residential& SingleLineBusinessLines$_{StudyArea}$ × 12) + ((ZoneAverageRevenuePerLine − $9.20) × MultilineBusinessLines$_{StudyArea}$ × 12)

The zones used for determining universal service will be the same zones that would be used for any SLC deaveraging, as described in paragraph 2.1.5.2. Where an ILEC has consolidated zones pursuant to paragraph 2.1.5.2, the consolidated zone is used for determining universal service.

(a) For the purposes of distributing Access USF, Zone Average Revenue Per Line should be calculated pursuant to paragraph 2.1.1.3, except that Loop&Port Price$_{UNE\ Zone}$ could either be (1) the cost projected by an FCC-approved cost model, or (2) the rates for unbundled UNE loops and switch ports in that UNE zone. Parties differ as to the relative merits of using proxy cost model outputs or state-established UNE rates for this calculation, and will present their respective views.

(b) In states that have not established UNE zones, support will be determined on a study area basis, as described in paragraph 2.2.3.3. For purposes of calculating Access USF support for study areas in states that have not established UNE zones, an interim estimate of Zone Above SLC Cap Revenues will be calculated by using the FCC Proxy Cost Model or other substitute method if no model is available. In order to develop this estimate, zones will be established by assigning the lowest cost one third of lines to Zone 1, the highest cost one third of lines to Zone 3 and the remaining lines to Zone 2.

2.2.3.1.2. Study Area Above Cap Revenues. For each study area, Study Area Above Cap Revenues is calculated by summing the Zone Above SLC Cap Revenues for all zones in the study area.

2.2.3.1.3. Nationwide Total Above Cap Revenues. Nationwide Total Above Cap Revenues is the sum of all Study Area Above Cap Revenues nationwide for all price cap incumbent LEC study areas.

2.2.3.2. Study Area Access USF Support. Each study area's Access USF support is calculated according to the following steps:

Step 1: Calculate Preliminary Access USF Support

Preliminary Access USF Support is calculated according to the following formula:

UniversalServiceSupport = Sum of Above Cap Revenues × ($650 million ÷ Total Nationwide Above Cap Revenues)

Step 2: Calculate the Minimum Support Requirement

If the Minimum Access USF$_{Study\ Area}$ (*See* paragraph 2.2.2.) exceeds the Preliminary Study Area Universal Service Support (''PSAUSS'') then the Minimum Support Requirement for that study area is calculated using the following process:

A. For each study area, calculate the Study Area Minimum Delta. Study Area Minimum Delta = Minimum Access USF$_{Study\ Area}$— Preliminary Study Area Universal Service Support.

B. Nationwide, calculate the Total National Minimum Delta, which equals the sum of all Study Area Minimum Deltas.

C. (1) If the Total National Minimum Delta is less than or equal to $75 million then the Minimum Adjustment Amount is:

Minimum Adjustment Amount = Phase In Percentage × Minimum Delta.

(2) If the Total National Minimum Delta is greater than $75 million, then the Minimum Adjustment Amount is:

Minimum Adjustment Amount = (Phase In Percentage) × (Minimum Delta) × ($75 million ÷ Total National Minimum Delta)

The Phase In Percentage is:

50% on January 1, 2000
5% on January 1, 2001
100% on July 1, 2002

For those study areas with a Minimum Adjustment Amount, the Minimum Support Requirement is:

Minimum Support Requirement = Preliminary Study Area Universal Service Support + Minimum Adjustment Amount.

Step 3: Determine the Study Area Universal Service Support

For study areas with a Minimum Support Requirement, Study Area Universal Service Support equals Minimum Support Requirement.

For study areas with no Minimum Support Requirements:

(1) Determine the Total National Minimum Support Requirement (TNMSR), which equals the sum of all Minimum Support Requirements.

(2) Study Area Universal Service Support is determined as follows:

Study Area Universal Service Support = PSAUSS × ($650 million − TNMSR ÷ Nationwide Sum of PSAUSS for Study Areas where MSR is $0)

The above calculations ensure that the Total Interstate Implicit Support Fund does not exceed $650 million while the Study Area Minimum Support Requirements are phased in as the Primary Residential and Single Line Business Subscriber Line Charge increases to $7.00.

2.2.3.3. No Access USF Above The Minimum Support Requirement For A Study Area That Has No Zone Deaveraged Prices For UNE Loops. Notwithstanding the calculations in paragraph 2.2.3.2, in any study area for which the incumbent LEC has not established zone deaveraged UNE loop prices approved by the state, the incumbent LEC will receive no Access USF Support unless the study area has a Minimum Support Requirement, in which case the Study Area Universal Service Support shall equal the Minimum Support Requirement. If an incumbent LEC establishes deaveraged UNE loop prices after January 1, 2000, then beginning with the subsequent quarter after it implements deaveraged UNE loop rates, that entity will receive the amount of Access USF support previously calculated pursuant to paragraph 2.2.3.2 using the methodology described in paragraph 2.2.3.1.1(b). When Access USF support is subsequently recalculated to redistribute Access USF among Price Cap ILEC service territories, support for that entity will be calculated pursuant to paragraph 2.2.3.1.1.(a). (As stated in paragraph 5, nothing in this proposal supercedes, prejudices or otherwise implies a result of the UNE Remand proceeding.)

2.2.4. Determination of Portable Access USF Support Per Line. Portable Access USF Support Per Line is the amount of new interstate universal service funding to replace implicit support in interstate access that an eligible telecommunications carrier receives for serving a customer. This support is portable between eligible telecommunications carriers as customers change service providers.

2.2.4.1. Portable Access USF Support Per Line When Deaveraged UNE Loop Rates Have Not Been Established. When Deaveraged UNE Loop Rates have not been established in a study area, the Portable Access USF Support Per Line for that study area is Study Area Universal Service Support divided by total lines in the study area.

2.2.4.2. Portable Access USF Support Per Line When Deaveraged UNE Loop Rates Have Been Established.

The parties have discussed two alternate ways to allocate universal service support to zones and line-types within those zones. The parties will present their respective views to the FCC as to the appropriateness of each alternative means of allocating universal service support to lines within a study area.

Alternative 1

Proportionate Allocation. Within each study area, determine the percentage proportion of Study Area Universal Service Support to Study Area Above Cap Revenues. Within each zone and customer class (i.e. residential/single line business and multiline business for each zone), total universal service support for that zone and customer class is that same proportion of the Above Cap Revenues for that zone and customer class. That is:

Universal Service$_{CustomerClassByZone}$ = AboveCapRevenues$_{CustomerClassbyZone}$ × (StudyAreaUniversalServiceSupport ÷ StudyAreaAboveCapRevenues)

Portable Universal Service Support Per Line in any given zone and customer class is Universal Service Customer$_{ClassByZone}$ divided by the total number of lines of the customer class within that zone.

Alternative 2

Highest Cost Zone First. The funding in each study area will be made portable for lines in the highest cost zone first, and will ''cascade'' to lines in lower cost zones to the extent that sufficient funding is available. Beginning with the zone with the highest Zone Average Revenue Per Line, funding will be applied in the following order of priority:

(1) To all lines in the highest zone, to eliminate the amount per line by which Zone Average Revenue Per Line exceeds the higher of $9.20 or the Average Revenue Per Line in the next highest zone;

(2) If the Zone Average Revenue Per Line in the next highest zone is greater than $9.20, then to all lines in both zones to eliminate the amount per line by which Zone Average Revenue per Line exceeds $9.20;

(3) To all residential and single line business lines in the highest zone, to eliminate the amount per line that Zone Average Revenue Per Line for these lines exceeds the higher of $7.00 or Average Revenue Per Line in the next highest zone;

(4) If the Zone Average Revenue per Line in the next highest zone is greater than $7.00, then to all residential and single line business lines in both zones to eliminate the amount per line by which Zone Average Revenue Per Line exceeds $7.00.

This ''cascade'' process will continue until all of the available funding has been assigned to lines by zone and by customer class; it may extend in similar fashion to additional zones, to the extent that their Zone Average Revenue per Line exceeds the $9.20 and $7.00 caps, and available funding permits. The per-line amount assigned to each multiline business line in a given zone would then be portable among eligible telecommunications carriers, as would the per-line amount assigned to each residence line and each single line business line in that zone.

2.2.5. Commencement of New Access USF Support. Universal service distributed pursuant to this section will begin once administrative mechanisms have been established to transfer support among eligible telecommunications carriers in the shortest interval possible given reasonable operational considerations. The parties agree that a three-month lag may be reasonable, provided that an ILEC's entitlement to receive Access USF for service to that customer stops when service stops, and that there are true-ups.

2.2.6. Recalculation of Access USF Amounts. Access USF support for each ILEC service territory will be recalculated on July 1, 2000, and January 1, 2001, and thereafter as determined by the USF Administrator.

3. Reducing Traffic Sensitive Interstate Access Rates.

3.1. Target Traffic Sensitive Interstate Access Charge Rate.

3.1.1. Bell Companies and GTE. For Bell Companies and GTE, the Target Rate for traffic sensitive interstate access charges (defined as the average revenue per switched access minute for the sum of Local Switching (less amounts transferred to CMT), Local Switching Trunk Ports, Signaling Transfer Point Port Termination, switched Direct Trunk Transport, signaling for switched Direct Trunk Transport, entrance facilities for switched access traffic, Tandem Switched Transport, the residual and service-related Transport Interconnection Charges, Information Surcharge, and Signaling for Tandem Switching) is calculated by tariff filing entity and is $0.0055 per minute for each tariff filing entity. For Bell Atlantic, the former NYNEX telephone companies may be treated as a separate tariff filing entity.

3.1.2. All Other Price Cap ILECs. For all other price cap ILECs, the Target Rate for traffic sensitive interstate access charges (defined as the average revenue per switched access minute for the sum of Local Switching, Local Switching Trunk Ports, Signaling Transfer Point Port Termination, switched Direct Trunk Transport, signaling for switched Direct Trunk Transport, entrance facilities for switched access traffic, Tandem Switched Transport, the residual and service-related Transport Interconnection Charges, Information Surcharge, and Signaling for Tandem Switching) is calculated by tariff filing entity and is $0.0065 per minute.

3.2. Local Switching Restructuring. In any study area in which, on December 31, 1999, the average traffic sensitive access charge is greater than the Target Rate, 25% of Local Switching revenues (calculated using base period demand) will be moved to the CMT Basket, except that less than 25% of Local Switching revenues will be moved to the CMT Basket if moving 25% would reduce the average traffic sensitive access charge below the Target Rate. If moving 25% of Local Switching would reduce average traffic sensitive access charges below the Target rate, then the amount of Local Switching moved to the CMT Basket is the amount necessary to reach the Target Rate.

3.3. Interstate X-Factor Levels and Targeting of X-Factor Reductions Effective January 1, 2000. The basic regime set up under this section is that all the price cap reductions flowing from an X-factor of 6.5% are initially targeted to reduce traffic sensitive charges until those charges reach the Target Rate ($0.0055 per minute by tariff filing entity for Bell Companies and GTE, and $0.0065 per minute by tariff filing entity for other price cap ILECs). When the filing entity's average traffic sensitive switched interstate access charge reaches the Target Rate, then the X-factor becomes equal to GDP–PI. All X-factor targeting is done at the tariff filing entity level, not at a holding company level. Beginning July 1, 2001 (i.e. after one full year's X-factor reduction), an ILEC may choose not to target X-factor reductions from special access to reduce switched access rates.

3.3.1 The interstate X-factor will be 6.5% until a Tariff Entity's average traffic sensitive access charge equals the Tariff Entity's Target Rate. The average traffic sensitive charge will be calculated by taking the sum of revenues for Local Switching, Local Switching Trunk Ports, Signaling Transfer Point Port Termination, switched Direct Trunk Transport, signaling for switched Direct Trunk Transport, entrance facilities for switched access traffic, Tandem Switched Transport, the residual and service-related Transport Interconnection Charges, Information Surcharge, and Signaling for Tandem Switching, and dividing that sum of revenues by total switched access minutes of use. If a new element is created from an existing switched access rate element (such as creating a call set-up charge out of the existing local switching rate) the revenues anticipated from that element will be included in the calculation of the average traffic sensitive access charge. The X-factor of 6.5% will be applied only to the extent necessary to reduce the Tariff Entity's average traffic sensitive access charges to the Target Rate. Once the Tariff Entity's average traffic sensitive access charges reach the Target Rate, the X-factor will be GDP–PI.

3.3.2 Until a Tariff Entity's average traffic sensitive interstate access charge equals the Target Rate, the aggregate reductions within a given tariff filing entity from application of the X-factor adjustment in the price cap formula across all of that entity's interstate price cap baskets (less special access reductions, if any, the ILEC chooses to apply beginning July 1, 2001 to reduce special access rates, up to the amount of reductions special access would get through an untargeted application of the X-factor adjustment) will be targeted to reduce the following rates for that tariff filing entity, in order of priority:

(1) To the residual per minute Transport Interconnection Charge, until that rate is $0.00; then

(2) To the Information Surcharge, until that rate is $0.00; then

(3) To the Local Switching charge and Switched Transport charges until the Tariff Entity's average traffic sensitive interstate access charge equals the Target Rate. In making these reductions to Local Switching rates, the percentage of total X-factor reductions directed to Local Switching rates must be greater than or equal to the percentage that local switching revenues represent of the sum of revenues for Local Switching, Local Switching Trunk Ports, Signaling Transfer Point Port Termination, switched Direct Trunk Transport, signaling for switched Direct Trunk Transport, entrance facilities for switched access traffic, Tandem Switched Transport, and Signaling for Tandem Switching (i.e., Local Switching gets at least its proportionate share of reductions).

Once the Tariff Entity's average traffic sensitive interstate access charge equals the Target Rate, no further reductions will be mandated (i.e. if applying the full X-factor reduction for a given year would reduce average traffic sensitive interstate access charges below the Target Rate, the amount of X-factor reduction applied that year will be the amount necessary to reach the Target Rate).

In calculating aggregate X-factor reductions, the Price Cap formula should be applied against the entire common line basket, without removing amounts received through the new interstate universal service support pursuant to paragraph 2.2.

3.3.3. CMT Adjustments After Reaching Target Rate. Once the CCL and PICC are eliminated and the primary residential and single line business SLC reaches the Average Price Cap CMT Revenues Per Line, the X-factor for the CMT Basket will equal GDP–PI as long as GDP–PI is less than or equal to 6.5 percent and greater than 0 percent. If GDP–PI is greater than 6.5% and an entity has eliminated its CCL and multiline business PICC charges, the X-factor for common line will equal 6.5%, and all SLC rates and nominal caps on SLC rates will be increased by the difference between GDP–PI and the X-factor. If GDP–PI is less than 0, the X-factor for common line will be 0.

3.3.4. Exogenous Adjustments. After January 1, 2000, exogenous adjustments will be applied only to services other than those constituting traffic sensitive interstate access charges.

3.3.5. Annual Filings After Reaching Target Rate. With each annual filing, the Average Traffic Sensitive Rate will be recalculated

and set at the new base period level. Due to changes in base period demand and inclusion of new services for that Annual Tariff filing, the absolute level of a Tariff Entity's Average Traffic Sensitive Charge may change. The resulting new Average Traffic Sensitive Charge level will be what that Tariff Entity will measured against during that base period.

4. Other Changes to Interstate Access Charge Rate Levels.

4.1. Changes to the Interstate X-factor. No company will advocate changes to the interstate X-factor other than as outlined in paragraph 3.

4.2. Prospective Interstate Adjustments. The companies agree that Paragraphs 2–3 are a just, reasonable and fair means of moving usage sensitive interstate access rates to a point achieved by the above mechanisms. Therefore, other adjustments, such as changes in the interstate X-factor, changes in interstate access rates for price cap ILECs based on results of present or future Continuing Property Records audits, changes in interstate access rates for price cap ILECs based on changes in the Prescribed Rate of Return, and changes in the rate structure for Common Line, Traffic Sensitive (Local Switching, Local Switching Trunk Ports, Signaling Transfer Point Port Termination, switched Direct Trunk Transport, signaling for switched Direct Trunk Transport, entrance facilities for switched access traffic, Tandem Switched Transport, the residual and service-related Transport Interconnection Charges, Information Surcharge, and Signaling for Tandem Switching) and Other (all other interstate access charges not included in Common Line or Traffic Sensitive, as defined here) charges by price cap ILECs, are unnecessary.

4.3. Retrospective Interstate Adjustments. The companies also agree not to initiate legal or regulatory action to adjust price cap determined rates for interstate access charges billed for access minutes prior to January 1, 2000, although a payee would not be precluded from accepting any refund the FCC ordered to be made and a payor will not object to or resist such a refund on the basis of this paragraph.

4.4. Lower Formula Adjustments. The Lower Formula Adjustment to interstate access rates is eliminated until January 1, 2005.

4.5. Term of Agreements. These agreements in paragraph 4 will run until January 1, 2005.

5. Pricing Flexibility/Non-Dominant Classification/Price Cap Forbearance With Respect To Specific Services/UNE Remand. Except as specifically addressed, the companies are not agreeing as to current or future proposals for pricing flexibility, non-dominant classification of specific services, or price cap forbearance with respect to specific services. The companies agree that the Commission should establish guidelines no later than October 1, 1999, for granting appropriate incumbent LEC pricing flexibility for interstate access services. Nothing in this proposal supercedes, prejudices or otherwise implies a result of the UNE Remand proceeding. Parties will continue to argue for their respective positions in these other proceedings.

6. Long Distance Rates and SLC Changes. This interstate access and universal service plan is in the public interest because the interstate access reductions the plan produces will result in lower long distance bills while the SLC and universal service revenues the plan produces will help to protect and enhance universal service and the local exchange infrastructure. The IXC signatories commit to meet with the FCC to review the effects of the interstate access reductions under the plan on long distance customers, and the incumbent LEC signatories commit to meet with the FCC to review effects of the SLC increases and SLC deaveraging under the plan on local customers.

7. Non-Signatory Price Cap LECs. The signatories agree that this proposal, without modification, is a fair and reasonable compromise plan to resolve issues relating to access and universal service for price cap LECs. Accordingly, signatories agree on behalf of themselves and their current affiliates as of August 1, 1999 to participate in the proposal if it is approved by the FCC.

The signatories agree that non-signatory price cap LECs are not bound by the terms of this plan and that the access rules that will apply solely to non-signatory price cap LECs will be determined by the FCC. All companies, whether signatories or not, would remain free to advocate for whatever changes, if any, are appropriate to the current price cap rules that would apply only to non-signatory price cap LECs.

At their option, price cap LECs that are non-signatories to the proposal at the time of its submission may chose to become signatories to the proposal prior to its implementation following an FCC Order. Additionally, if a non-signatory price cap LEC experiences a change of control during the first six months of the year 2000, that LEC may become a signatory to the proposal before the July 1, 2000 annual filing becomes effective, provided that such a LEC incorporates all provisions of the proposal scheduled to be implemented during the first six months of 2000 no later than the July 1, 2000 annual filing effective date.

[FR Doc. 99–25703 Filed 10–1–99; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 93–191, RM–8088; FCC 99–162]

Radio Broadcasting Services; Pueblo, Colorado

ACTION: Affirmation of denial of petition for rulemaking.

SUMMARY: This document affirms the Federal Communications Commission's earlier decisions denying a petition for rulemaking in this proceeding, *Report and Order,* 60 FR 37041 (July 19, 1995) and *Memorandum Opinion and Order,* 62 FR 84 (January 2, 1997). This action is taken in response to the order of the United States Court of Appeals for the District of Columbia Circuit remanding for further consideration our prior decision denying the exchange of channels, *Sangre de Cristo Communications, Inc.* v. *FCC,* 139 F.3d 953 (D.C. Cir. 1998).

FOR FURTHER INFORMATION CONTACT: Shaun Maher, Mass Media Bureau, 202–418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the *Memorandum Opinion and Order on Remand* in MM Docket No. 93–191, adopted July 2, 1999, and released July 7, 1999, wherein the Commission affirmed the prior denial of a petition for rulemaking proposing a channel exchange between television licensees in the Pueblo, Colorado, television market. The Commission found that the public interest benefits to be derived from the channel exchange proposal were too small to outweigh the greater loss of service that would result. The full text of this decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857–3800, 1231 20th Street, NW, Washington, DC 20036.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 99–25544 Filed 10–1–99; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018

Endangered and Threatened Wildlife and Plants; Reopening of Comment Period for 90-day Finding on a Petition To List the Black-Tailed Prairie Dog

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of reopening of comment period.

SUMMARY: We, the Fish and Wildlife Service (Service), provide notice that we are reopening the comment period on the 90-day finding on a petition to list the black-tailed prairie dog to receive additional information on the status of this species. All interested parties are

invited to comment on a draft Conservation Assessment and Strategy and its potential influence on the status of the black-tailed prairie dog.

DATES: Information will be accepted until November 3, 1999.

ADDRESSES: Requests for a copy of the draft Black-tailed Prairie Dog Conservation Assessment and Strategy should be sent to the Field Supervisor, South Dakota Ecological Services Field Office, U.S. Fish and Wildlife Service, 420 South Garfield Avenue, Suite 400, Pierre, South Dakota 57501. The document also can be obtained at www.r6.fws.gov/btprairiedog/. Written information concerning the status of the black-tailed prairie dog should be sent to the same address or to prairiedog@fws.gov.

FOR FURTHER INFORMATION CONTACT: Pete Gober, Field Supervisor (see **ADDRESSES** section) or at telephone 605/224–8693, extension 24; facsimile 605/224–9974.

SUPPLEMENTARY INFORMATION:

Background

On March 25, 1999 (64 FR 14424), we published a notice of a 90-day Administrative Finding on a petition to list the black-tailed prairie dog *(Cynomys ludovicianus)* under the Endangered Species Act of 1973, as amended. The black-tailed prairie dog occurs within the States of Montana, Wyoming, Colorado, New Mexico, Oklahoma, Texas, Kansas, Nebraska, North Dakota, South Dakota, and Canada and Mexico. In the 90-day finding, we determined that substantial information exists to indicate that listing of the black-tailed prairie dog may be warranted. We are currently involved in a more extensive status review of the species that will culminate in a 12-month finding to determine whether or not listing of this species is indeed warranted. Threats to the black-tailed prairie dog include plague (an exotic disease), habitat loss, poisoning, recreational shooting, and lack of State and Federal regulations to conserve the species.

In recognition of the declining abundance of black-tailed prairie dog colonies and the various threats to this species, the States within the species' range have drafted a Black-tailed Prairie Dog Conservation Assessment and Strategy to guide conservation of this species. This draft Conservation Assessment and Strategy is being made available to the public for review and comment on how it should be considered in the Service's ongoing status review of the black-tailed prairie dog.

Public Comments Solicited

We intend that this status review be as complete and accurate as possible, and that we consider all available information. Therefore, comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this draft Conservation Assessment and Strategy and how it should be incorporated into our status review on the black-tailed prairie dog are solicited.

The original comment period on this 90-day finding closed May 24, 1999. To accommodate requests for additional time for the public to comment, the comment period was reopened for an additional 45 days on June 4, 1999 (64 FR 29983) and closed again on July 19, 1999. We are once again reopening the comment period to allow for public comment on the recently drafted Conservation Assessment and Strategy and its relation to the status review. Written comments may now be submitted until November 3, 1999 to the Service's South Dakota Field Office (see **ADDRESSES** section).

Author: The author of this notice is Patricia Worthing, U.S. Fish and Wildlife Service, Denver Regional Office, P.O. Box 25486, Denver Federal Center, Denver, Colorado 80225.

Authority: The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: September 28, 1999.

Joseph J. Webster,

Acting Regional Director, Denver, Colorado.

[FR Doc. 99–25685 Filed 10–1–99; 8:45 am]

BILLING CODE 4310–55–P

Notices

Federal Register
Vol. 64, No. 191
Monday, October 4, 1999

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. 99–046–1]

International Sanitary and Phytosanitary Standard-Setting Activities

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice and solicitation of comments.

SUMMARY: In accordance with legislation implementing the results of the Uruguay Round of negotiations under the General Agreement on Tariffs and Trade, we are informing the public of international standard-setting activities of the Office International des Epizooties, the Secretariat of the International Plant Protection Convention, and the North American Plant Protection Organization, and we are soliciting public comment on the standards to be considered.

ADDRESSES: Please send your comment and three copies to: Docket No. 99–046–1, Regulatory Analysis and Development, PPD, APHIS, Suite 3C03, 4700 River Road, Unit 118, Riverdale, MD 20737–1238.

Please state that your comment refers to Docket No. 99–046–1.

You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

APHIS documents published in the **Federal Register**, and related information, including the names of organizations and individuals who have commented on APHIS rules, are available on the Internet at http://www.aphis.usda.gov/ppd/rad/webrepor.html.

FOR FURTHER INFORMATION CONTACT: Mr. John Greifer, Director, Trade Support Team, International Services, APHIS, room 1132, South Building, 14th Street and Independence Avenue, SW., Washington, DC 20250; (202) 720–7677; or e-mail: John.K.Greifer@usda.gov.

SUPPLEMENTARY INFORMATION: The World Trade Organization (WTO) was established as the common international institutional framework for governing trade relations among its members in matters related to the Uruguay Round Agreements. The WTO is the successor organization to the General Agreement on Tariffs and Trade. U.S. membership in the WTO was approved by Congress when it enacted the Uruguay Round Agreements Act (Pub. L. 103–465), which was signed into law by the President on December 8, 1994. The WTO Agreements, which established the WTO, entered into force with respect to the United States on January 1, 1995. The Uruguay Round Agreements Act amended title IV of the Trade Agreements Act of 1979 (19 U.S.C. 2531 *et seq.*). Section 491 of the Trade Agreement Act of 1979, as amended (19 U.S.C.2578), requires the President to designate an agency to be responsible for informing the public of the sanitary and phytosanitary (SPS) standard-setting activities of each international standard-setting organization. The designated agency must inform the public by publishing an annual notice in the **Federal Register** that provides the following information: (1) The SPS standards under consideration or planned for consideration by the international standard-setting organization; and (2) for each SPS standard specified, a description of the consideration or planned consideration of that standard, a statement of whether the United States is participating or plans to participate in the consideration of that standard, the agenda for U. S. participation, if any, and the agency responsible for representing the United States with respect to that standard.

''International standard'' is defined in 19 U.S.C.2578b as any standard, guideline, or recommendation: (1) Adopted by the Codex Alimentarius Commission (Codex) regarding food safety; (2) developed under the auspices of the Office International des Epizooties (OIE) regarding animal health and zoonoses; (3) developed under the auspices of the Secretariat of the International Plant Protection Convention (IPPC) in cooperation with the North American Plant Protection Organization (NAPPO) regarding plant health; or (4) established by or developed under any other international organization agreed to by the member countries of the North American Free Trade Agreement (NAFTA) or the member countries of the WTO.

The President, pursuant to Proclamation No. 6780 of March 23, 1995 (60 FR 15845), designated the Secretary of Agriculture as the official responsible for informing the public of the SPS standard-setting activities of Codex, OIE, IPPC, and NAPPO. This responsibility was delegated to United States Department of Agriculture's (USDA's) Food Safety and Inspection Service (FSIS) for Codex activities and Animal and Plant Health Inspection Service (APHIS) for OIE, IPPC, and NAPPO activities.

FSIS is responsible for publishing an annual notice in the **Federal Register** to inform the public of SPS standard-setting activities for Codex. Codex was created in 1962 by two United Nations organizations, the Food and Agriculture Organization (FAO) and the World Health Organization. It is the major international organization for encouraging international trade in food and protecting the health and economic interests of consumers.

APHIS is responsible for publishing notice of OIE, IPPC, and NAPPO activities related to international standards and representing the United States with respect to these standards.

Following are descriptions of the OIE, IPPC, and NAPPO organizations and the standard-setting agenda for each of these institutions. Our intent is to describe the agenda that each of these organizations will address at their annual general sessions, including standards that may be presented for adoption or consideration, as well as other initiatives that may be underway at the OIE, IPPC, and NAPPO.

OIE Standard-Setting Activities

The OIE was established in Paris, France, in 1924 with the signing of an international agreement by 28 countries. It is currently composed of 153 member nations, each of which is represented by a delegate who, in most cases, is the

chief veterinary officer of that country. The WTO has recognized the OIE as the international forum for setting animal health standards, reporting global animal situations and disease status, and presenting guidelines and recommendations on sanitary measures relating to animal health.

The OIE facilitates intergovernmental cooperation to prevent the spread of contagious diseases in animals through the sharing of scientific research among its members. The major functions of the OIE are to collect and disseminate information about distribution and control of animal diseases and to ensure that scientifically justified standards govern international trade in animals and animal products. The OIE aims to achieve this through the development and revision of international standards for diagnostic tests, vaccines, and the safe international trade of animals and animal products.

The OIE provides annual reports on the global distribution of animal diseases, recognizes disease-free status of member countries, categorizes animal diseases with respect to their international significance, publishes bulletins on global disease status and timely reviews of pertinent animal health issues, and provides animal disease control guidelines to member countries.

Positions, policies, and standards established by the OIE can be adopted by consensus or by vote of the delegates upon recommendations from various commissions and working groups within the OIE. These various commissions and working groups undertake the initial analysis and preparation of draft standards. Drafts are then circulated to member countries for review and comment. Draft standards are revised accordingly and then presented to the OIE General Session, which meets annually every May, for review and adoption. Adoption, as a general rule, is based on consensus of the OIE membership.

The next OIE General Session is scheduled for Paris, France, May 22–26, 2000. The Deputy Administrator for APHIS' Veterinary Services is the U.S. delegate to the OIE. The Deputy Administrator intends to participate in the proceedings. The agenda is expected to include the following items:

Election of Officers

Current officers of the various OIE commissions and the current Director General will have completed their respective terms of office. OIE members will elect new officers. The Director General serves for 5 years while other officers serve for 3 years.

Standards up for Adoption or Consideration

- Scrapie: Revisions to the OIE Code, Chapter 3.3.8, on scrapie disease.
- Bee diseases: Revisions to the OIE Code, Chapter 3.8.1—3.8.5.

Current Work Program

Working groups will report their progress to the General Session. For updates on meeting times and for information on the working groups that becomes available following publication of this notice, contact Dr. Gary Colgrove, VS, APHIS, 4700 River Road Unit 38, Riverdale, MD 20737–1231; (301) 734–8364; or e-mail: Gary.S.Colgrove@usda.gov.

The following describes the current undertakings of the working groups, it is not a list of standards up for consideration or adoption:

- Zoning and regionalization: Revisions to the OIE Code, Chapter 1.4.4, on regionalization will be prepared by the next meeting of the Code Commission. It is uncertain whether this revised chapter will be ready for adoption by the General Session in May 2000.
- Model certificate for milk and milk products: An effort will be made to develop guidelines for certifying milk and milk products. The International Dairy Federation will attempt to draft such guidelines by September 1999.
- Enzootic bovine leukosis: Revisions to the OIE Code, Chapter 3.2.4.
- International trade in animals, organs, tissues, or cells intended for xenotransplantation: The OIE working group on biotechnology will prepare a document on this topic for consideration by the May 2000 General Session.
- Equivalence: A proposal for OIE Code language on this topic will be developed and circulated among members for comments.
- Classical swine fever: An ad hoc group will examine possible revisions to the OIE Code, Chapter 2.1.13.
- Newcastle disease: An ad hoc group will be formed to examine possible revisions to the OIE Code, Chapter 2.1.15.
- Paratuberculosis: There may be revisions made to the OIE Code, Chapter 3.1.6.

Bovine Spongiform Encephalopathy (BSE)

- Each spring, the chapter of the OIE Code concerning BSE (3.2.13) is modified, clarified, and improved. However, major questions remain. Expert groups will continue to evaluate the chapter. Portions still under study include:
- Criteria for meeting the OIE definition of a ''BSE Provisionally Free Country.''
- Procedures and measures for importing cattle from a ''BSE Provisionally Free Country or Zone.''
- Procedures and measures for importing cattle from a country or zone with a ''high incidence of BSE.''
- Criteria for importing fresh meat (boned or deboned) and other meat products from cattle from a country or zone with a ''low incidence of BSE.''
- Criteria for importing tallow intended for food, feed, fertilizers, cosmetics, pharmaceuticals, or medical devices from countries ''not affected by BSE.'' Specifically, rendering procedures are under study.

Other Major OIE Topics

The May 2000 General Session will address two other major topics, for which additional standards are not expected to be developed and presented for adoption at the May 2000 General Session:

- Principles of prevention and management of aquatic animal diseases.
- Advances in the control and eradication of tuberculosis in domestic and wild animals.

More information on OIE standards is available on the OIE web page at http://www.oie.int.

The information in this notice includes all the information available to us on OIE standards currently under development or consideration. For updates on meeting times and for information on the working groups that becomes available to us following the publication of this notice, contact Dr. Gary Colgrove, VS, APHIS, 4700 River Road Unit 38, Riverdale, MD 20737–1231; (301) 734–8364; or e-mail: Gary.S.Colgrove@usda.gov.

IPPC Standard-Setting Activities

The IPPC is a multilateral convention adopted in 1952 for the purpose of securing common and effective action to prevent the spread and introduction of pests of plants and plant products and to promote appropriate measures for their control. Under the IPPC, the understanding of plant protection has been, and continues to be, broad, encompassing the protection of both cultivated and noncultivated plants from direct or indirect injury by plant pests. Activities addressed by the IPPC include the development and establishment of international plant health standards, the harmonization of phytosanitary activities through emerging standards, the facilitation of the exchange of official and scientific information among countries, and the

furnishing of technical assistance to developing countries that are signatories to the IPPC.

The IPPC is placed under the authority of the FAO, and the members of the Secretariat of the IPPC are appointed by the FAO. The IPPC is implemented by national plant protection organizations in cooperation with regional plant protection organizations, the Interim Commission on Phytosanitary Measures (ICPM), and the Secretariat of the IPPC. The United States plays a major role in all standard-setting activities under the IPPC and has representation on FAO's highest governing body, the FAO Conference.

The United States became a contracting party to the IPPC in 1972 and has been actively involved in furthering the work of the IPPC ever since. The IPPC was amended in 1979, and the amended version entered into force in 1991 after two-thirds of the contracting countries accepted the amendment. More recently, in 1997, contracting parties completed negotiations on further amendments that were approved by the FAO Conference and submitted to the parties for acceptance. This 1997 amendment updated phytosanitary concepts and formalized the standard-setting structure within the IPPC. The 1997 amended version of the IPPC will enter into force once two-thirds of the current contracting parties notify the Director General of FAO of their acceptance of the amendment. It is projected that the amended IPPC will enter into force, replacing the existing text, by the year 2000.

The IPPC has been, and continues to be, administered at the national level by plant quarantine officials whose primary objective is to safeguard plant resources from injurious pests. In the United States, the national plant protection organization is USDA's Animal and Plant Health Inspection Service (APHIS), Plant Protection and Quarantine (PPQ) unit.

Currently, IPPC standards may be proposed in a number of ways. The IPPC Secretariat may initiate the development of a draft standard by forming a working group to develop a standard deemed a priority by ICPM members. Draft standards or discussion papers may also be submitted to the IPPC Secretariat for consideration by regional or national plant protection organizations or other interested parties. The IPPC Secretariat refers draft standards to the Committee of Experts on Phytosanitary Measures (CEPM), which considers the drafts and recommends action. Drafts approved by the CEPM are then submitted to member countries for consultation and comment. Comments made during country consultation are then considered by the Secretariat, which revises the standard before resubmitting it to the CEPM.

If the CEPM approves the revised draft, it is submitted to the ICPM, the governing body of the IPPC, for adoption. Each member country is represented on ICPM by a single delegate. Although experts and advisers may accompany the delegate to meetings of the ICPM, only the delegate or an authorized alternate may vote on proposed standards or other initiatives. Parties involved in a vote by the ICPM are to make every effort to reach agreement on all matters by consensus. Only after all efforts to reach a consensus have been exhausted may a decision on a standard be passed by a vote of two-thirds of delegates present and voting.

Technical experts from the United States have participated directly in working groups and indirectly as reviewers of all IPPC draft standards. In addition, documents and positions developed by APHIS and NAPPO have served as the basis for many of the standards adopted to date. This notice describes each of the IPPC standards currently under consideration or up for adoption. Access to the full text of each standard will be available electronically on the APHIS Internet web page at http://is.aphis.usda.gov/ppq/standard/#TOP. Interested individuals may review and provide comments on the standards found on this web page.

The next ICPM meeting is scheduled for October 4–8,1999. The Deputy Administrator for APHIS' Plant Protection and Quarantine is the U.S. delegate to the ICPM. The Deputy Administrator intends to participate in the proceedings. The agenda is expected to include the following items:

Report of the Chair

The ICPM chairman will summarize IPPC activities from the past year (e.g., working group activities and meetings), report on outstanding issues, and highlight areas of particular interest confronting members of the ICPM.

Standard-Setting Priorities

The Secretariat will report on topics and priorities for standards identified by ICPM members and regional plant protection organizations. Other topics identified by the Secretariat will also be noted. A working group will be formed to review the information and recommend a work program for the ICPM to give to the Secretariat.

Standards up for Adoption or Consideration

- Requirements for the establishment of pest-free places of production and pest-free production sites: This standard describes the requirements for the establishment and use of pest-free places of production and pest-free production sites as pest risk management options for meeting phytosanitary requirements for the importation of plants, plant products, and other regulated articles.
- Revised Glossary of Phytosanitary Terms: The Glossary of Phytosanitary Terms has been updated and new terms have been added after thorough review by a special working group and the CEPM. The revised glossary represents the first revision of an established IPPC standard returned for approval by the ICPM.

Reports From Various Working Groups

- Standard-setting procedures: A working group was formed at the first ICPM meeting in November 1998 to analyze the current standard-setting procedure to determine whether it requires revision and, if so, to propose a revised procedure to the second ICPM meeting scheduled for October 1999. The chairman of this working group is expected to report on the outcome of those deliberations. A report will be distributed for review, discussion, and approval. If agreed, procedures for standard setting will be annexed to the Rules of Procedure for the ICPM.
- Dispute settlement provisions: A working group was formed at the first ICPM meeting in November 1998 to develop rules and procedures for the operation of the nonbinding dispute resolution procedures contained in the IPPC. A report will be distributed for review, approval, and discussion of further steps.
- Pest reporting requirements: The Secretariat will report on the mechanisms in place, or proposed, that facilitate pest reporting obligations.
- Strength of measures: The Secretariat will report on issues associated with the understanding and implementation of the concept of strength of measures.

Work Program for Harmonization

- Standard-setting: The Secretariat will report on the status of standard-setting activities and the working group will report on topics and priorities for the upcoming work program.
- Information exchange: The Secretariat will report on the status of information exchange activities.
- Technical assistance: The ICPM chairman has held discussions with

interested delegations on the subject of technical assistance for developing countries. The chairman will report on initiatives aimed at developing a technical assistance program in line with the technical cooperation aspects of the IPPC.

Status of IPPC

- Acceptance of the new revised text: Update and report by members
- Interim measures:

—Members designate their official contact points.
—Members report on the voluntary use of the new phytosanitary certificate.

More information on IPPC standards is available on the FAO web page at http://www.ippc.int.

The information in this notice includes all the information available to us on IPPC standards currently under development or consideration. For updates on meeting times and for information on the working groups that becomes available following publication of this notice, contact Dr. Richard Dunkle, Deputy Administrator, PPQ, APHIS, USDA, room 302–E, Whitten Building, 14th Street and Independence Avenue, SW., Washington, DC 20250.

NAPPO Standard-Setting Activities

NAPPO, a regional plant protection organization created in 1976 under the IPPC, coordinates the efforts among Canada, the United States, and Mexico to protect their plant resources from the entry, establishment, and spread of harmful plant pests, while facilitating intra- and inter-regional trade.

NAPPO conducts its business through panels and annual meetings held among the three member countries. The NAPPO Executive Committee charges individual panels with the responsibility for drawing up proposals for NAPPO positions, policies, and standards. These panels are made up of representatives from each member country who have scientific expertise related to the policy or standard being considered.

Proposals drawn up by the individual panels are circulated for review to government and industry by Canada, Mexico, and the United States, which may suggest revisions. Once revisions are made, the proposal is sent to the NAPPO Working Group and the NAPPO Standards Panel for technical reviews and then to the Executive Committee for final approval, which is granted by consensus.

The annual NAPPO meeting is scheduled for October 19–21, in Cancun, Mexico. The Executive Committee meeting will take place on October 17, and a special session will be held on October 18, where industry groups can bring issues to the attention of the Executive Committee. The Deputy Administrator for APHIS' Plant Protection and Quarantine is the U.S. delegate to NAPPO. The Deputy Administrator intends to participate in the proceedings. The agenda will include the following items:

Standards up for Adoption or Consideration

- A revised laboratory accreditation standard will be presented to the Executive Committee for consideration and adoption.
- A paper entitled, ''A Harmonized Procedure for Morphologically Distinguishing Karnal Bunt and the Ryegrass Bunt,'' which has been prepared by the NAPPO Grains Panel, will be presented for Executive Committee approval.

Updates on NAPPO Panel Activities

Working panels will report their progress to the General Committee. For updates on meeting times and for information on the working panels that becomes available following publication of this notice, contact Dr. Richard Dunkle, Deputy Administrator, PPQ, APHIS, USDA, Room 302–E, Whitten Building, 14th Street and Independence Avenue, SW., Washington, DC 20250.

The following is a summary of current panel charges as they relate to the ongoing development of standards and does not include standards up for consideration or adoption:

Accreditation Panel (Laboratory Accreditation)
- Develop an inventory of laboratory tests, analyses, and identification done in support of plant health regulatory activities.

Biological Control Panel
- Develop NAPPO guidelines for the release of non-native entomophagous agents for the biological control of weeds.

Biotechnology Panel
- Develop a NAPPO standard for the review of products of biotechnology which focuses on the assessment of the potential impact on plant resources, including risk assessments, environmental assessments, and whether the product itself can become a pest of plants.

Citrus Panel
- Continue development of a NAPPO citrus standard.

Forestry Panel
- Continue development of a NAPPO dunnage standard.

Fruit Fly Panel
- Describe pest free areas for the Mexican fruit fly (*Anastrepha ludens*) in the NAPPO region and identify areas of low presence and susceptible areas for the establishment of the pest.

Grapevine Panel
- Continue development of a NAPPO grapevine standard.

Fruit Tree Panel
- Initiate development of a NAPPO malus and prunus standard.

Pest Risk Analysis Panel
- Provide PRA support to the NAPPO Forestry and Grains Panels, as requested.
- Work with other plant protection organizations to develop a global potato standard.

Standards Panel
- Coordinate responses to the North American member on the Committee for Experts for Phytosanitary Measures on draft international standards for phytosanitary measures (ISPM's) and contribute to the development of a draft ISPM on regulated nonquarantine pests.
- Provide updates on standards in the NAPPO newsletter.

Presentations

- Biodiversity convention: Speakers will provide an overview of the objectives of the biodiversity convention.
- Biosafety protocol: Speakers will explain the process involved in developing the biosafety protocol. Various countries' positions and approaches will be discussed. An environmental spokesperson will talk about the environmental aspects of the biosafety protocol.
- Risk management: A speaker from academia will explore various societal values and expectations, as well as other factors that are considered in risk management.
- WTO dispute settlement: Speakers will review outcomes of recent WTO dispute settlement cases, highlighting the panel conclusions and lessons to be learned from these disputes.

More information on NAPPO standards is available on the NAPPO web page at http://www.nappo.org.

The information in this notice includes all the information available to us on NAPPO standards currently under development or consideration. For updates on meeting times and for information on the working panels that becomes available following publication of this notice, contact Dr. Richard Dunkle, Deputy Administrator, PPQ, APHIS, USDA, Room 302–E, Whitten Building, 14th Street and Independence Avenue, SW., Washington, DC 20250.

Done in Washington, DC, this 27th day of September 1999.

Craig A. Reed,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 99–25722 Filed 10–1–99; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Willamette Provincial Advisory Committee (PAC)

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Willamette Province Advisory Committee (PAC) will meet on Thursday, October 14, 1999. The meeting is scheduled to begin at 9:00 a.m., and will conclude at approximately 3:00 p.m. The meeting will be held at the Quality Inn; 3301 Market Street NE; Salem, Oregon 97301; (503) 370–7888. The tentative agenda includes: (1) Presentation of proposed Forest Service planning regulations, (2) Presentation of the results of 1999 province monitoring and PAC evaluation of the results, (3) Discussion of Oregon Plan and Federal Measures for anadromous fish recovery, and (4) Roundtable information sharing by Pac members and federal agency representatives.

The Public Forum is tentatively scheduled to begin at 10:00 a.m. Time allotted for individual presentations will be limited to 3–4 minutes. Written comments are encouraged, particularly if the material cannot be presented within the time limits for the Public Forum. Written comments may be submitted prior to the October 14 meeting by sending them to Designated Federal Official Neal Forrester at the address given below.

FOR FURTHER INFORMATION CONTACT: For more information regarding this meeting, contact Designated Federal Official Neal Forrester; Willamette National Forest; 211 East Seventh Avenue; Eugene, Oregon 97401; (541) 465–6924.

Dated: September 27, 1999.

Darrel L. Kenops,

Forest Supervisor.

[FR. Doc. 99–25682 Filed 10–1–99; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Stewardship Contracting Pilot Project; Multiparty Monitoring and Evaluation Process

AGENCY: Forest Service, USDA.

ACTION: Notice; reopen comment period.

SUMMARY: The Forest Service is reopening the comment period on the proposed framework for the multiparty monitoring and evaluation component of the stewardship contracting pilot projects. Notice of this framework was published on August 17, 1999, in the **Federal Register;** and the comment period ended September 16, 1999. The agency has received requests to reopen the comment period from interested parties and from representatives of communities involved in the pilots. The agency realizes that many local groups may not have been aware of the Federal Register notice and may not have had adequate time to provide comment on the proposed framework during the summer field season. Therefore, the agency is reopening the comment period for 30 days.

DATES: Comments must be received, in writing, on or before November 3, 1999.

ADDRESSES: Questions about this notice may be sent to Cliff Hickman, via mail at USDA Forest Service, Forest Management, Mail Stop 1105, P.O. Box 96090, Washington, DC 20090–6090 or electronically to chickman/wo@fs.fed.us.

Electronic copies of the FY 1999 Omnibus Appropriations Act or copies of the draft framework may be obtained via Internet at www.fs.fed.us/land/fm/stewardship/framework.html.

FOR FURTHER INFORMATION CONTACT: Cliff Hickman, Forest Management Staff, (202) 205–1162, or chickman/wo@fs.fed.us.

SUPPLEMENTARY INFORMATION: Section 347 of the FY 1999 Omnibus Appropriations Act authorized the Forest Service to implement up to 28 stewardship end results contracting projects. Notice of the draft framework for multiparty monitoring and evaluation for these projects was published in the **Federal Register** on August 17, 1999 (64 FRO 44685). The Forest Service provided background information about the provisions of Section 347 and its progress in implementing the legislation, in a notice that appeared on the July 9, 1999, issue of the **Federal Register** (64 FR 37096).

Dated: September 27, 1999.

Hilda Diaz-Soltero,

Associate Chief for Natural Resources.

[FR Doc. 99–25659 Filed 10–1–99; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

Record of Decision: Lincoln-Pipestone Rural Water; Existing System North/Lyon County Phase and Northeast Phase Expansion; Environmental Impact Statement

AGENCY: Rural Utilities Service, USDA.

ACTION: Record of decision.

The Rural Utilities Service (RUS) has concluded an Environmental Impact Statement (EIS) it prepared for the Lincoln-Pipestone Rural Water (LPRW), Existing System North/Lyon County (ESN/LC) Phase and Northeast Phase Expansion proposal in southwest Minnesota and is announcing its decision in this Record of Decision (ROD). RUS' decision is to approve LPRW's application for financial assistance to construct the Northeast Phase Expansion proposal. This approval is predicated on LPRW's acceptance of a set of conditions and completion of mitigation measures developed as part of and outlined in RUS' preferred alternative. Prior to loan/grant approval, LPRW must be in compliance with all conditions of the water appropriation permits issued by the Minnesota Department of Natural Resources (MDNR). Upon loan/grant approval and prior to the release of any funds, LPRW must prepare and complete a Water Resource Management Plan (WRMP) to RUS' satisfaction.

The purpose of the EIS was to evaluate the potential environmental impacts of a multiple-phase construction proposal where RUS has and proposes to provide financial assistance for the development and expansion of a public rural water system. The applicant for this proposal is a public body named LPRW and whose main offices are located in Lake Benton, Minnesota. Specific project activities are and have included the development of groundwater sources and production well fields and the construction of water treatment facilities and water distribution networks. The counties in Minnesota affected by this proposal include Yellow Medicine, Lincoln, and Lyon Counties and Deuel County in South Dakota.

In accordance with the National Environmental Policy Act (NEPA) of

1969 (42 U.S.C. 4231 *et seq.*) and RUS regulations (7 CFR part 1794), RUS prepared an EIS concerning these actions. Some of the issues evaluated in the EIS date back to a previous agency decision to fund one of the phases of a multi-phase system expansion project initiated by LPRW in 1991, known as the ESN/LC Phase project. In that phase, LPRW developed, among other system improvements, a water source—the Burr Well Field—and constructed a water treatment facility. These facilities were designed to provide potable water to the northern portion of LPRW's service area. The Burr Well Field is located in southwestern Yellow Medicine County and is adjacent to the South Dakota—Minnesota state line. The two water-bearing formations utilized at this well field—the so-called Burr Unit of the Prairie Coteau aquifer (Burr Unit) and the deeper Altamont aquifer—underlie portions of both South Dakota and Minnesota. The Altamont appears to be hydraulically isolated from the Burr Unit.

During construction of the Burr Well Field (initiated on April 19, 1993) and subsequent to its operation, public and regulatory concerns were raised and continue to be raised regarding the potential environmental effects of groundwater appropriations from the Burr Unit. Because of geologic and hydrologic factors, groundwater from the Burr Unit discharges onto the land surface in both South Dakota and Minnesota. These surface discharges occur as springs or seeps and create in some areas unique wetland features called patterned calcareous fens (fens). In addition, it has been concluded that one of the lakes in the area, Lake Cochrane, also receives a portion of its water budget from groundwater contributions of the Burr Unit.

Fens in the study area are characterized by a partially mineralized peat mass through which a groundwater discharge occurs throughout the peat mass. This peat mass is referred to as a fen dome and in most areas the domes are elevated 5–10 feet above the ground surface. Fens are listed as ''Outstanding Resource Value Waters'' in Minnesota's Rules 7050 and are protected under the Minnesota Wetland Conservation Act of 1991 (Minn. Stat. 103G).

In processing LPRW's application for the ESN/LC phase proposal, the Farmers Home Administration (FmHA) prepared an Environmental Assessment (EA) on the proposal and published a Finding of No Significant Impact on February 7, 1992. Because of concerns raised regarding the Burr Well Field, the EA was amended or supplemented by an agency newly created by a 1993 USDA reorganization, the Rural Development Administration (RDA). RDA published a public notice announcing the availability of the supplemental EA in local newspapers on October 14, 1994. Upon review of the comments received on this document, a decision was made to prepare an EIS. During the time this decision was being made USDA again reorganized its programs and the RDA Water and Waste programs were combined with the utility programs of the Rural Electrification Administration into a new agency—the Rural Utilities Service.

RUS announced its intent to prepare an EIS and hold public scoping meetings in a Notice of Intent, published in the **Federal Register** on June 8, 1995, and in public notices in local newspapers. Public meetings were held on July 18, 1995, in Canby, Minnesota, and July 19, 1995, in Brookings, South Dakota, for the purpose of describing the project and soliciting the public's comments about the issues to be considered in the EIS.

While RUS decided to prepare an EIS on the outstanding concerns related to the FmHA's previous decision (March 24, 1992) to fund the ESN/LC phase proposal it had on file an application from LPRW to complete the last phase of the original system expansion project—the Northeast Phase Expansion. Because the Burr Well Field was originally designed and built to serve as a source of water for not only the Northeast Phase Expansion but two previous construction phases—the ESN/LC Phase and the Yellow Medicine Phase—and other areas within the northern portions of LPRW's service area, it was determined that, because the activities of these construction phases were so completely interrelated and interdependent, separating the phases into separate environmental impact analyses would not be in compliance with the intent of NEPA. Therefore, it was decided to include the environmental impact analyses for the Northeast Phase Expansion proposal into the EIS proposed for the ESN/LC phase project. The basis for this decision, is stated in the Council on Environmental Quality's Procedures for Implementing the Procedural Provisions of the NEPA, 40 CFR 1502.4(a), Major Federal Actions Requiring the Preparation of Environmental Impact Statements, * * * ''Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.''

The more in-depth environmental impact analyses and discussion of alternatives presented in the EIS, particularly as they related to the Burr Well Field, were performed subsequent to a previous decision to fund LPRW's ESN/LC Phase proposal. This situation presented RUS with a procedural dilemma as to the ultimate purpose of the analyses to be presented in the EIS. The dilemma is that NEPA, as a procedural law, requires consideration of the potential environmental impacts of a proposed action before a decision is made. Even though decisions have already been made and significant public funds have been committed for the development and construction of the ESN/LC Phase project, RUS decided, based on information and evidence presented, that the intent of NEPA would be advanced by taking a ''harder'' look at the outstanding issues from the 1992 FmHA EA and the 1994 RDA supplemented EA. Given this reality, the primary decision facing RUS at this time is whether or not to fund the Northeast Phase Expansion.

After considering public comments received in the scoping meetings, RUS determined the significant issues that were evaluated in the EIS. This included the range of alternatives, as required by NEPA, which could meet the purpose and need of the proposed action—that is, to provide a safe, reliable source of potable water to citizens within the northern portion of LPRW's service area. The primary issues evaluated in the EIS, therefore, included the outstanding concerns from the earlier 1992 EA, *i.e.*, the environmental effects on the area's fens and Lake Cochrane (herein referred to as surface water resources (includes resources in both South Dakota and Minnesota)) from groundwater appropriations at the Burr Well Field, and the potential environment impacts from construction of the Northeast Phase Expansion proposal.

On February 23, 1998, the RUS announced the availability of the Draft EIS (DEIS) in the **Federal Register** (63 FR 8901) and local newspapers. The DEIS was sent to interested parties and made available for public review at a number of locations throughout the area in both Minnesota and South Dakota and was available over the Internet at RUS' website (http://www.usda.gov/rus/water/ees/eis.htm). Subsequent to a 60-day public review period, RUS sponsored a public meeting to solicit additional comments from the public. The public meeting was announced in the **Federal Register** (63 FR 3461) on June 24, 1998, and local newspapers. The meeting was held on July 30, 1998, in Canby, Minnesota.

In total, RUS received comments from 26 Federal and State agencies,

Congressional representatives, public bodies, individuals, and environmental interest and industry groups. The number of comments added up to 79 pages. After reviewing, considering, and responding individually and collectively to these comments, RUS announced the availability of the Final EIS (FEIS) on May 27, 1999, in the **Federal Register** (64 FR 28796) and in the same newspapers and website used throughout the EIS process.

A summary of the public's comments received on the FEIS is included in the following table:

Commenter	Affiliation	Number of pages
Minnesota Department of Natural Resources	State Environmental Regulatory Agency	[1] 6
Minnesota Pollution Control Agency	State Environmental Regulatory Agency	2
South Dakota Department of Environment and Natural Resources.	State Environmental Regulatory Agency	2
Subtotal State Agencies	3	10
U.S. Environmental Protection Agency, Region 8	Federal Environmental Regulatory Agency	[1] 2
Subtotal Federal Agencies	1	2
East Dakota Water Development District	Public Body	3
Subtotal Public Bodies	1	3
South Dakota Resource Coalition (includes comments submitted but not received during DEIS).	Environmental Interest Group	7
Minnesota Center for Environmental Advocacy	Environmental Interest Group	3
Subtotal Environmental Interest Groups	2	10
Jim Thompson	Citizen	[1] 4
Lyle Tobin, Representative of Lake Cochrane Improvement Association.	Citizen	2
Shirley Holt	Citizen	2
Clayton Holt	Citizen	4
Subtotal Private Citizens	4	12

[1] With attachments.

In summary, most comments were generally supportive of RUS's preferred alternative and its inclusion of a Contingency Plan into the proposed WRMP, however, some commenters objected to RUS's method of responding to public comments, that is, to respond to comments directly without revising the text of the DEIS. Some commenters asserted opposition to RUS's conclusions and others requested RUS prepare a supplemental EIS to address issues they felt had not been dealt with adequately, such as the need to supplement a Lake Cochrane water budget study previously developed by the South Dakota Department of Environment and Natural Resources (SDDENR).

Comments received on the FEIS can be summarized in general categories. These categories included concerns related to:

- A conflict of interest for RUS to prepare the EIS;
- The use of engineering design, operational, and monitoring data collected by LPRW's engineering consulting firm;
- The use of limited or incomplete data sets in drawing conclusions and that actions taken as a result of these conclusions will not ''minimize or eliminate'' damage to the area's surface water features;
- LPRW's relationship and water supply contract with Marshal Municipal Utilities in that this relationship circumvented RUS regulations with regard to the City of Marshall's eligibility to participate in RUS loan and grant programs; and
- RUS's retraction of the DEIS's requirement for LPRW to develop an agreement with the SDDENR to formalize monitoring protocols and procedures in order to protect South Dakota interests and natural resources.

As required by NEPA, project alternatives to meet the purpose and need of the proposed action (including previous phases were considered; the reasonable alternatives considered are summarized in the following table:

Alternative	Northeast phase expansion status	Burr Well field status
Current Status (as of time of DEIS)	LPRW submitted application to RUS to fund construction of the Northeast Phase Expansion.	LPRW is authorized under their current Water Appropriation Permit to appropriate groundwater at the rate of 750 gpm/400 Mgpy. LPRW submitted an application to the MDNR to increase groundwater appropriations 1,500 gpm/800 Mgpy.
Proposed Action	Fund the Northeast Phase Expansion	Increase groundwater appropriations at the Burr Well Field to 1,500 gpm/800 Mgpy.
Alternative 1	Fund the Northeast Phase Expansion	Discontinue use of Burr Well Field.
Alternative 2	Fund the Northeast Phase Expansion	Discontinue use of Burr Well Field. Supplement water needs from other sources: Adjacent Rural Water Systems, Lewis and Clark System, Altamont Aquifer, Canby Aquifer, Other Aquifers.

Alternative	Northeast phase expansion status	Burr Well field status
Alternative 3	Fund the Northeast Phase Expansion	Maintain current appropriations at Burr Well Field.
Alternative 4	Fund the Northeast Phase Expansion	Maintain current or reduce appropriations at Burr Well Field. Fund and construct new well field and Water Treatment Plant in the Wood Lake area.
Alternative 5	Do not fund the Northeast Phase Expansion; Finance Point-of-Use systems in Northeast Phase Expansion area.	Maintain current appropriations at Burr Well Field.
Alternative 6—No Action Alternative	Do Not Fund the Northeast Phase Expansion.	Maintain current appropriations at Burr Well Field.

The factors RUS used to evaluate the environmental, economic, and technologic feasibilities of the alternatives evaluated in the EIS are outlined in the DEIS. These analyses were not fundamentally changed in response to comments on the DEIS and, subsequent to the public comments on the FEIS, continue to be considered applicable and reasonable at the present time.

Based on the monitoring data collected to date and factoring in the inherent scientific uncertainties of drawing conclusions on limited data, RUS still maintains that the proposed action poses unreasonable environmental risks to surface water features in both South Dakota and Minnesota and that under drought conditions it is likely that significant adverse environmental impacts could occur to these same resources. At the same time, however, RUS still concludes that during and where groundwater appropriations from the Burr Unit were limited to the range between 400–525 gpm (with corresponding annual appropriations) the data appears to indicate that no observable or significant adverse environmental impacts have occurred.

RUS, as previously stated in the DEIS and FEIS, fully acknowledges that the data record that has been compiled to the present has occurred during a sustained period of above normal precipitation and that until more data has been collected the ability to accurately predict the direct, indirect, and cumulative ecological responses to the area's surface water features from Burr Well Field appropriations is limited. It is reasonably certain and foreseeable, however, that the magnitude and relative importance of impacts to surface water features that could occur under specific conditions can be predicted, i.e., sustained pumping of the Burr Unit will reduce the potentiometric surface in the Burr Unit reducing groundwater flow to hydraulically connected resources thus potentially adversely affecting the ecological integrity of affected resources. While this situation is relatively clear, determining the appropriate rate of groundwater appropriations and each affected resources' response to this pumping while taking into account the inherent natural variation in environmental factors can only be established within a reasonable level of certainty through long-term monitoring. The outcome of any monitoring will be to allow environmental regulatory officials to adapt to on-going conditions and set appropriation rates as conditions warrant.

Given these conclusions and from the alternatives considered, RUS has developed a preferred alternative that it believes to be the most environmentally preferable alternative and helps support the overall goal of providing citizens with a safe, reliable source of potable water in an area that has historically had water supply and quality problems. RUS believes that this goal can be accomplished and at the same time minimize or avoid significant adverse environmental impacts while providing for the ecological sustainability of the area's surface water features.

The preferred alternative outlined in the FEIS continues to be RUS' preference and forms the basis for its decision. The preferred alternative is as follows:

- Finance the Northeast Phase Expansion.
- Continue to maintain the Burr Well Field as one of LPRW's primary water sources. To minimize reductions in the potentiometric surface, RUS supports limiting pumping rates from wells developed in the Burr Unit aquifer to 400–525 gpm with a corresponding annual appropriation rate.
- At some future date, supplement existing wells at the Burr Well Field with a new well field in an area south-southeast or north-northeast of the current Burr Well Field or where sufficient aquifer materials can be found. This new well field could utilize both the Burr Unit and Altamont aquifers in a configuration similar to that at the Burr Well Field or any other configuration determined by the MDNR as appropriate. Raw water from this well field could be transported to the Burr Water Treatment Plant for treatment and distribution to LPRW customers.
- RUS recommends that the MDNR consider integrating the proposed Water Resource Management Plan (WRMP) into the Burr Well Field's Water Appropriation Permit.

The WRMP listed in the last bullet is the mitigation measure RUS will establish as a condition of approving LPRW's application for the Northeast Phase Expansion proposal. The basic premise behind the need to develop a WRMP is that the Burr Unit is hydraulically connected to the area's surface water features and that under certain conditions and at a yet-to-be-determined rate groundwater appropriations from the Burr Well Field have the potential to adversely impact these resources.

The goal of the WRMP is to establish a mechanism for evaluating on an on-going, real-time basis responses to surface water resources in both South Dakota and Minnesota from groundwater appropriations at the Burr Well Field and to formalize through impact thresholds established by State regulatory officials an acceptable environmental risk and reasonable margin of safety to each State's natural resources. One of the purposes of the WRMP will be to incorporate and integrate into the Burr Well Field's operations and permit conditions an ''adaptive environmental management plan'' whereby regulatory officials can continually assess ecologic responses in surface water features and can make appropriate modifications to groundwater withdrawals in the Burr Well Field's permit.

One of the public's criticisms to the FEIS was RUS' removal of a requirement that LPRW develop an agreement with the SDDENR to formalize monitoring procedures and protocols that would evaluate the effects of groundwater

withdrawals at the Burr Well Field on South Dakota resources. Notwithstanding a Minnesota and South Dakota written commitment to work together on Burr Well Field permitting issues and a continuing belief that the MDNR's permitting procedures contain the appropriate statutory, regulatory, and administrative processes to officially incorporate South Dakota officials (and citizens') concerns at the Burr Well Field, RUS fully intends to encourage and invite SDDENR's full participation in the development of the WRMP.

As stated in the FEIS, the WRMP should formalize all procedures, protocols, and methodologies to monitor in a comprehensive fashion groundwater appropriations at the Burr Well Field and its effects on the surface water resources hydraulically connected to the Burr Unit in both South Dakota and Minnesota. As a minimum, the following components shall be included in the WRMP:

- Contingency Plan—the plan should incorporate impact thresholds established by MDNR, SDDENR's input, and outline what procedures LPRW will take in the event water appropriations from the Burr Unit are restricted.
- Well Field Operation and Management Plan—this plan should be designed to minimize reductions in the potentiometric surface in the Burr Unit during any specified time periods.
- Supplemental Well Field Exploration Plan—based on previous geologic exploration efforts, this plan should outline future exploration efforts and development activities, including schedules, for a supplemental well field.
- Monitoring Plan—formalize monitoring well locations; establish standard methodologies or procedures for data management, i.e., collection, documentation, and information sharing.

Assuming LPRW continues to pursue its request for financial assistance for the Northeast Phase Expansion and RUS has funds available for and approves the proposal, RUS will formally invite the following participants to contribute to and assist in the development of the WRMP:

- Lincoln-Pipestone Rural Water
- Minnesota Department of Natural Resources
- South Dakota Department of Environment and Natural Resources
- U.S. Environmental Protection Agency (USEPA), Region 8 (while Minnesota is in USEPA Region 5, Region 8, in accordance with their Cooperating Agency Agreement with RUS, has agreed to serve in the lead role for this project).

RUS will support, within the context and time frames of its loan approval process, the planning and development of the WRMP by coordinating meetings between the above participants. As stated previously, RUS shall not release project funding until LPRW successfully completes the WRMP to RUS's satisfaction. RUS will evaluate the technical sufficiency and acceptance of the WRMP primarily through consultations with hydrogeologists at the USEPA, Region 8 and the other regulatory officials. The mechanism for this consultation with USEPA will be provided for through RUS's Cooperating Agency Agreement with USEPA. RUS will further condition the release of funds for the Northeast Phase Expansion area subject to LPRW being able to obtain the appropriate Water Appropriation Permit(s) from the MDNR.

Through the WRMP, RUS hopes to foster a cooperative working environment among all stakeholders to the proposal. The overall goal of RUS' decision is to promote the wise use and sustainability of natural resources, avoiding irreversibility in the ecological integrity of those resources, and provide the area's citizens with a safe, reliable source of potable water. Even though the EIS is a decision document, not a scientific research report, RUS believes it has evaluated current and relevant data and is confident that given a cooperative attitude among stakeholders, significant adverse impacts to the environment can be minimized or avoided through mitigation and adopting an adaptive environmental management approach in monitoring groundwater appropriations at the Burr Well Field.

Dated: September 16, 1999.

Wally Beyer,

Administrator, Rural Utilities Service.

[FR Doc. 99–25721 Filed 10–1–99; 8:45 am]

BILLING CODE 3410–15–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–580–842]

Structural Steel Beams From the Republic of Korea; Postponement of Preliminary Determination of Countervailing Duty Investigation

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Postponement of Preliminary Determination of Countervailing Duty Investigation.

EFFECTIVE DATE: October 4, 1999.

FOR FURTHER INFORMATION CONTACT: Tipten Troidl at (202) 482–1767 and Eric B. Greynolds at (202) 482–6071, Office of CVD/AD Enforcement VI, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230.

POSTPONEMENT OF PRELIMINARY DETERMINATION: On July 27, 1999, the Department initiated the countervailing duty investigation of structural steel beams from the Republic of Korea. *See Notice of Initiation of Countervailing Duty Investigation: Structural Steel Beams from the Republic of Korea*, 64 FR 42088 (August 3, 1999). The preliminary determination currently must be issued by September 30, 1999.

On September 3, 1999 Northwestern Steel & Wire Company, Nucor-Yamato Steel Company, and TXI-Chaparral Steel, Inc. (petitioners) made a timely request pursuant to 19 CFR 351.205(e) for a postponement of the preliminary determination in accordance with section 703(c)(1) of the Tariff Act of 1930, as amended (the Act). Petitioners requested a postponement because of the complicated nature of the case, to allow petitioners adequate time to analyze submitted responses, and to allow time for the Department to determine the extent to which particular subsidies are being used.

For reasons identified by petitioners, we see no compelling reason not to postpone the preliminary determination. *See* Memorandum from Bernard Carreau to Robert S. LaRussa, dated September 15, 1999 (on file in the public file of the Central Records Unit, Room B–099 of the Department of Commerce). Therefore, we are postponing the preliminary determinations under section 703(c)(1)(A) of the Act. We will make our preliminary determination in this investigation no later than December 6, 1999.

This notice of postponement is published pursuant to section 703(c)(2) of the Act.

Dated: September 24, 1999.

Bernard T. Carreau,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 99–25618 Filed 10–1–99; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 092599G]

Gulf of Mexico Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council will convene a public meeting of the Socioeconomic Panel (SEP).

DATES: A meeting of the SEP will be held beginning at 8:30 a.m. and concluding at 4:00 p.m. on Thursday, October 14, and Friday October 15, 1999.

ADDRESSES: The meeting will be held at the Tampa Airport Hilton Hotel, 2225 Lois Avenue, Tampa, Florida 33607; telephone 813–877–6688.

FOR FURTHER INFORMATION CONTACT: Antonio B. Lamberte, Economist, Gulf of Mexico Fishery Management Council, 3018 U.S. Highway 301 North, Suite 1000, Tampa, Florida 33619; telephone 813–228–2815.

SUPPLEMENTARY INFORMATION: The SEP will convene to review available social and economic data on red snapper and red grouper, and to determine the social and economic implications of the levels of acceptable biological catches that may be recommended by the Council's Reef Fish Stock Assessment Panel. The SEP may recommend to the Council a total allowable catch for fishing year 2000.

Although other issues not contained in this agenda may come before the SEP for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal SEP action during this meeting. Panel action will be restricted to those issues specifically identified in this notice.

A copy of the agenda can be obtained by contacting the Gulf Council (SEE **ADDRESSES**).

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Anne Alford at the Council (see **ADDRESSES**) by October 7, 1999.

Dated: September 28, 1999.

Richard W. Surdi,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 99–25677 Filed 9–29–99; 3:59 pm]

BILLING CODE 3510–22–F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 092899C]

Mid-Atlantic Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The Mid-Atlantic Fishery Management Council and its Dolphin/Wahoo Committee, Executive Committee, New England Jurisdictional Committee, Habitat Committee, Comprehensive Management Committee, Law Enforcement Committee, and Squid-Mackerel-Butterfish Committee will hold public meetings.

DATES: The meeting will be held on Tuesday, October 12, 1999, to Thursday, October 14, 1999. See **SUPPLEMENTARY INFORMATION** for specific dates and times.

ADDRESSES: This meeting will be held at the Ramada Inn, 1701 South Virginia Dare Trail, Kill Devil Hills, NC; telephone: 800–635–1824.

Council address: Mid-Atlantic Fishery Management Council, 300 S. New Street, Dover, DE 19904, telephone 302–674–2331.

FOR FURTHER INFORMATION CONTACT: Daniel T. Furlong, Executive Director, Mid-Atlantic Fishery Management Council; telephone: 302–674–2331, ext. 19.

SUPPLEMENTARY INFORMATION:

Tuesday, October 12, 1999, from 9:00 a.m.–10:00 a.m.—the Dolphin/Wahoo Committee will meet.

Tuesday, October 12, 1999, from 10:00 a.m.–12 noon-–the Executive Committee will meet.

Tuesday, October, 12, 1999, from 1:00 p.m.–3:00 p.m.–-the New England Jurisdictional Committee will meet.

Tuesday, October 12, 1999, from 1:00 p.m.–5:00 p.m.–-the Habitat Committee will meet.

Wednesday, October 13, 1999, from 8:00 a.m.–10:00 a.m.—the Comprehensive Management Committee will meet.

Wednesday, October 13, 1999, from 8:00 a.m.–10:00 a.m.–-the Law Enforcement Committee will also meet.

Wednesday, October 13, 1999, 10:00 a.m.–3:00 p.m.—Full Council convenes as a Council Committee of the Whole for demersal species with the Atlantic States Marine Fisheries Commission's (ASMFC) Summer Flounder, Scup and Black Sea Bass Board.

Wednesday, October 13, 1999, 3:00 p.m. there will be a presentation by Admiral John E. Shkor of the United States Coast Guard (USCG) 5th District followed by Council participation in a USCG vessel boarding from 4:00 until 5:30 p.m.

Thursday, October 14, 1999, 8:00 a.m.–10:00 a.m.—the Squid-Mackerel-Butterfish Committee will meet.

Thursday, October 14, 1999, 10:00 a.m.–5:00 p.m.—Council will meet to receive various reports and recommendations, and to address, among other things, submission of the Tilefish Fishery Management Plan (FMP) for Secretarial review.

Agenda items for this meeting include: Review of the South Atlantic Council's actions regarding the Dolphin/Wahoo FMP; FY1999 budget status review, FY2000 grant application, Standard Operating Policies and Procedures update; recommendation on New England Council's advance notice of proposed rulemaking control date for multispecies and sea scallops, develop recommendation regarding proposed rule to implement Amendment 12 of the NEC's Multispecies Fisheries Management Plan; Hudson River Park Project review, general concurrence on NMFS permits, NMFS Habitat Workshop recap, tilefish essential fish habitat, industry advisors; exempted experimental fishing permit review, field program design approval; Council enforcement recognition program, compliance issues; summer flounder constant harvest, summer flounder conservation equivalency, scup allocations (annual and state-by-state); mackerel limited entry, seasons and real time management for *Illex*, spawning closures and control rule for *Loligo*, quota set asides; receipt of committee reports and other fishery management issues; receive Tilefish Committee report and consider adoption of Tilefish FMP for Secretarial submission.

The Regional Administrator (RA) is considering authorizing exempted experimental fishing activities to reduce scup bycatch in small mesh fisheries in areas of the Mid-Atlantic. Investigations should focus on possible fishing method(s), gear type(s), gear configuration(s), and fishing effort by area and season. Exempted

experimental fishing activities may be granted relief from one or more of the following restrictions of the Mid-Atlantic Fishery Management Plans, including but not limited to, the Management Plans for Scup, *Loligo* Squid, Butterfish, and Atlantic Mackerel:

Possession and landing limits associated with incidental catch permits

Area closures (species specific, seasonal, or otherwise)

Minimum mesh sizes

Commercial trip limits

Commercial minimum fish sizes

Commercial landing limits

Commercial gear restrictions

Commercial harvest limits

Catch limits that trigger mesh size modification

To be considered for an Exempted Fishing Permit (EFP) under this notice, a complete and satisfactory exempted experimental fishing application as specified in CFR sections 600.745(b)(3)(i)(A) and (C); (b)(3)(ii)(B), (D), and (F); and (b)(3)(v)(B) and (E), must be submitted to the RA by December 31, 2000. If the RA determines that exempted experimental fishing activities under consideration would be of limited scope, magnitude and duration, with only short term effects on the environment, the requirements to submit an Environmental Assessment may be waived. At the RA's discretion, EFPs may be granted for the specific experimental activities and time periods documented in each individual exempted experimental fishing proposal that is approved. All catches during exempted fishing will be applied to appropriate total allowable levels of fishing or quotas. Upon NMFS approval of the application, plan specific EFPs would be issued to qualified vessels. Interested parties and the public will have an opportunity to comment or provide input regarding this announcement during the RA's report to the Mid-Atlantic Fishery Management Council during its meeting session on October 14, 1999.

Although non-emergency other issues not contained in this agenda may come before this Council for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, such issues may not be the subject of formal Council action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under secion 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Joanna Davis at the Council (see **ADDRESSES**) at least 5 days prior to the meeting date.

Dated: September 28, 1999.

Richard W. Surdi,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 99–25678 Filed 9–29–99; 3:59 pm]

BILLING CODE 3510–22–F

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Performance Review Board; Membership

The following individuals are eligible to serve on the Performance Review Board in accordance with the National Telecommunications and Information Administration's Senior Executive Service Performance Appraisal System.

Ronald Hack
William Hatch
Bernadette McGuire-Rivera
Neil Seitz
Frederick Wentland

Vicki G. Brooks,

Executive Secretary, National Telecommunications and Information Administration, Performance Review Board.

[FR Doc. 99–25727 Filed 10–1–99; 8:45 am]

BILLING CODE 3510–BS–M

CONSUMER PRODUCT SAFETY COMMISSION

Proposed Collection of Information; Comment Request—Baby-Bouncers, Walker-Jumpers, and Baby-Walkers

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: As required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Consumer Product Safety Commission (CPSC) requests comments on a proposed extension of approval, for a period of three years from the date of approval by the Office of Management and Budget (OMB), of information collection requirements in regulations regarding children's articles called baby-bouncers, walker-jumpers, or baby-walkers. The collection of information consists of requirements that manufacturers and importers of these products must establish and maintain records of inspections, testing, sales, and distributions to demonstrate that the products are not banned by rules issued under the Federal Hazardous Substances Act and codified at 16 CFR part 1500.

The CPSC will consider all comments received in response to this notice before requesting approval of this collection of information from OMB.

DATES: The Office of the Secretary must receive written comments not later than December 3, 1999.

ADDRESSES: Written comments should be captioned ''Baby-Bouncers'' and mailed to the Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207, or delivered to that office, Room 502, 4330 East-West Highway, Bethesda, Maryland 20814. Written comments may also be sent to the Office of the Secretary by facsimile at (301) 504–0127 or by e-mail at cpsc-os@cpsc.gov.

FOR FURTHER INFORMATION CONTACT: For information about the proposed extension of approval of the collection of information, or to obtain a copy of 16 CFR part 1500, call or write Linda L. Glatz, Office of Planning and Evaluation, Consumer Product Safety Commission, Washington, DC 20207; telephone (301) 504–0416, extension 2226.

SUPPLEMENTARY INFORMATION: Products called ''baby-bouncers,'' ''walker-jumpers,'' or ''baby-walkers'' are intended to support children younger than two years of age while they sit, bounce, jump, walk, or recline. Regulations issued under provisions of the Federal Hazardous Substances Act (15 U.S.C. 1261, 1262) establish safety requirements for these products.

A. Requirements for Baby-Bouncers, Walker-Jumpers, and Baby Walkers

One CPSC regulation bans any such product if it is designed in such a way that exposed parts present hazards of amputations, crushing, lacerations, fractures, hematomas, bruises or other injuries to children's fingers, toes, or other parts of the body. 16 CFR 1500.18(a)(6).

A second CPSC regulation establishes criteria for exempting baby-bouncers, walker-jumpers, and baby-walkers from the banning rule under specified conditions. 16 CFR 1500.86(a)(4). The exemption regulation requires certain labeling on these products and their packaging to identify the name and address of the manufacturer or distributor and the model number of the

product. Additionally, the exemption regulation requires that records must be established and maintained for three years relating to testing, inspection, sales, and distributions of these products. The regulation does not specify a particular form or format for the records. Manufacturers and importers may rely on records kept in the ordinary course of business to satisfy the recordkeeping requirements if those records contain the required information.

The OMB approved the collection of information requirements in the regulations under control number 3041–0019. OMB's most recent extension of approval expires on December 31, 1999. The CPSC now proposes to request an extension of approval without change for the regulations' information collection requirements.

The safety need for this collection of information remains. Specifically, if a manufacturer or importer distributes products that violate the banning rule, the records required by § 1500.86(a)(4) can be used by the firm and the CPSC (i) to identify specific models of products that fail to comply with applicable requirements, and (ii) to notify distributors and retailers if the products are subject to recall.

B. Estimated Burden

The CPSC staff estimates that about 26 firms are subject to the testing and recordkeeping requirements of the regulations. The CPSC staff estimates further that the burden imposed by the regulations on each of these firms is approximately 2 hours per year. Thus, the total annual burden imposed by the regulations on all manufacturers and importers is about 52 hours.

The CPSC staff estimates that the hourly wage for the time required to perform the required testing and to maintain the required records is about $13, and that the annual total cost to the industry is approximately $650.

During a typical year, the CPSC will expend approximately two days of professional staff time reviewing records required to be maintained by the regulations for baby-bouncers, walker-jumpers, and baby-walkers. The annual cost to the Federal government of the collection of information in these regulations is estimated to be $560.

C. Request for Comments

The Commission solicits written comments from all interested persons about the proposed collection of information. The Commission specifically solicits information relevant to the following topics:

—Whether the collection of information described above is necessary for the proper performance of the Commission's functions, including whether the information would have practical utility;

—Whether the estimated burden of the proposed collection of information is accurate;

—Whether the quality, utility, and clarity of the information to be collected could be enhanced; and

—Whether the burden imposed by the collection of information could be minimized by use of automated, electronic or other technological collection techniques, or other forms of information technology.

Dated: September 27, 1999.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

[FR Doc. 99–25646 Filed 10–1–99; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Leader, Information Management Group, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before November 3, 1999.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Danny Werfel, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW, Room 10235, New Executive Office Building, Washington, DC 20503 or should be electronically mailed to the internet address DWERFEL@OMB.EOP.GOV.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Information Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: September 29, 1999.

William E. Burrow,

Leader, Information Management Group, Office of the Chief Information Officer.

Office of Postsecondary Education

Type of Review: Reinstatement.

Title: Reporting Instructions and Forms for the National Resource Centers and Foreign Language and Area Studies Fellowships Program.

Frequency: Annually.

Affected Public: Individuals or households; Not-for-profit institutions.

Reporting and Recordkeeping Burden: Responses: 1,267, Burden Hours: 1,492.

Abstract: These instructions and forms provide the U.S. Department of Education the information needed to determine whether grantees have made substantial progress toward meeting their objectives, and to monitor and evaluate these programs.

Requests for copies of the proposed information collection request should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW, Room 5624, Regional Office Building 3, Washington, DC 20202–4651, or should be electronically mailed to the internet address OCIO__IMG__Issues@ed.gov, or should be faxed to 202–708–9346.

Written comments or questions regarding burden and/or the collection activity requirements should be directed to Joseph Schubart at 202–708–9266 or by e-mail to joe__schubart@ed.gov. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 99–25708 Filed 10–1–99; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Programmatic Environmental Impact Statement for Accomplishing Expanded Civilian Nuclear Energy Research and Development and Isotope Production Missions in the United States Including the Role of the Fast Flux Test Facility (DOE/EIS–0310)

AGENCY: Department of Energy (DOE).

ACTION: Notice of change in scoping meeting location.

SUMMARY: DOE is changing the date and location of the public scoping meeting to be held in the Washington, DC area. In the **Federal Register** of September 15, 1999 (64 FR 50066), DOE announced that the meeting would take place on October 26, 1999, at the Hyatt Regency Hotel located at 2799 Jefferson Davis Highway, Arlington, Virginia. DOE has changed the date and location of this meeting to October 27, 1999 at the Marriott Metro Center Hotel, located at 775 12th Street, NW Washington, DC. The meeting will begin at 2:00 p.m. and end at 5:00 p.m. DOE will announce the dates and locations of all public scoping meetings in the local media at least 15 days prior to the meetings.

FOR FURTHER INFORMATION CONTACT: For further information on this PEIS, please contact Ms. Colette Brown, Office of Nuclear Energy, Science and Technology (NE–50), U.S. Department of Energy, 19901 Germantown Road, Germantown, Maryland 20874. Telephone: (301) 903–6924, Facsimile: (301) 903–1510, Electronic Mail: *Nuclear.Infrastructure-PEIS@HQ.DOE.GOV*. For further information on DOE procedures for implementing the National Environmental Policy Act (NEPA), please contact Ms. Carol M. Borgstrom, Director, Office of NEPA Policy and Assistance (EH–42), U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, DC. 20582–0119, Telephone: (202) 586–4600 or leave a message at 1–800–472–2756.

SUPPLEMENTARY INFORMATION: DOE's civilian nuclear research and isotope production infrastructure has diminished significantly since the early 1990s. As a result, DOE is concerned that it may no longer be able to accommodate new and expanding missions such as: (1) The production of isotopes for medical and industrial uses; (2) the production of plutonium-238 for use in advanced radioisotope power systems for future National Aeronautics and Space Administration space missions; and, (3) the Nation's nuclear research and development needs.

Therefore, pursuant to NEPA, the Secretary of Energy recently announced DOE's intent to prepare a PEIS to evaluate potential enhancements to its infrastructure to meet its expanded mission needs, including the possible role of the Fast Flux Test Facility (FFTF) located at DOE's Hanford Site near Richland, Washington.

This PEIS will analyze the potential environmental impacts of alternative ways to meet the projected irradiation needs for the next 35 years by enhancing the existing infrastructure as follows: (1) Resuming FFTF operation; (2) Constructing and operating a research reactor at a generic DOE site; and (3) Constructing and operating one or more neutron accelerators at a generic DOE site. In addition, the PEIS will analyze the potential environmental impacts of meeting the projected mission needs to the extent possible using existing reactor and neutron accelerator facilities.

DOE published a notice in the **Federal Register** on September 15, 1999, (64 FR 50064), announcing its intent to prepare this PEIS and outlining the alternatives that it plans to analyze. DOE announced that it would conduct seven public scoping meetings to assist in defining the scope of this PEIS including the significant environmental issues to be addressed. Meetings will be held October 13–27, 1999, in Oak Ridge, Tennessee; Idaho Falls, Idaho; Seattle, Washington; Portland, Oregon; Hood River, Oregon; Richland, Washington; and in the Washington DC area. The date and location of the meeting in the Washington, DC area has changed from October 26, 1999, at the Hyatt Regency Hotel in Crystal City, Virginia to October 27, 1999 at the Marriott Metro Center Hotel, located at 775 12th Street, NW, Washington, DC. The meeting will begin at 2:00 p.m. and end at 5:00 p.m.

Signed in Washington, DC, this 28th day of September 1999, for the U.S. Department of Energy.

Robert M. Knipp,

Deputy Director, for Management and Planning, Office of Nuclear Energy, Science and Technology.

[FR Doc. 99–25741 Filed 10–1–99; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Energy Information Administration

Agency Information Collection Under Review by the Office of Management and Budget

AGENCY: Energy Information Administration, Department of Energy.

ACTION: Submission for OMB review; comment request.

SUMMARY: The Energy Information Administration (EIA) has submitted the energy information collection(s) listed at the end of this notice to the Office of Management and Budget (OMB) for review under provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13). The listing does not include collections of information contained in new or revised regulations, which are to be submitted under section 3507(d)(1)(A) of the Paperwork Reduction Act, nor management and procurement assistance requirements collected by the Department of Energy (DOE).

Each entry contains the following information: (1) Collection number and title; (2) Summary of the collection of information (includes the sponsor (*i.e.* DOE component)), current OMB document number (if applicable), type of request (new, revision, extension, or reinstatement), response obligation (mandatory, voluntary, or required to obtain or retain benefits); (3) A description of the need and proposed use of the information; (4) A description of the likely respondents; and (5) An estimate of the total annual reporting burden (estimated number of respondents times the proposed frequency of response per year times the estimated average hours per response.)

DATES: Comments must be filed on or before November 3, 1999. If you anticipate that you will be submitting comments but find it difficult to do so within the time allowed by this notice, you should advise the OMB DOE Desk Officer listed below of your intention to do so as soon as possible. The OMB DOE Desk Officer may be telephoned at (202) 395–3087. (Also, please notify the EIA contact listed below.)

ADDRESSES: Address comments to the Department of Energy Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, 726 Jackson Place, NW., Washington, DC 20503. (Comments should also be addressed to the Statistics and Methods Group at the address below.)

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Grace Sutherland, Statistics and Methods Group, (EI–70), Forrestal Building, U.S. Department of Energy, Washington, DC 20585–0670. Mrs. Sutherland may be telephoned at (202) 426–1068 FAX (202) 426–1083, or e-mail at Grace.Sutherland@eia.doe.gov.

SUPPLEMENTARY INFORMATION: The energy information collection submitted to OMB for review is:

1. EIA–28, ''Financial Reporting System''.
2. Energy Information Administration (sponsor); OMB No. 1905–0149; Revision and three-year extension of a currently approved collection; Mandatory.
3. The Financial Reporting System, Form EIA–28, collects data used to analyze the energy industry's competitive environment as well as energy industry resource development, supply, distribution, and profitability issues. Survey results from major energy producers are published annually and are used by both public and private analysts. Subsequent to the 60-day **Federal Register** Notice, May 14, 1999, Volume 64, Number 93, pages 26387–26388, EIA decided to request that respondents also include ''anthracite'' when reporting on their coal operations.
4. Businesses or other for-profit.
5. 16, 005 hours (33 respondents) × (1 response per year) × (485 hours).

Statutory Authority: Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (Pub. L. No. 104–13).

Issued in Washington, DC, September 28, 1999.

Jay H. Casselberry,

Agency Clearance Officer, Statistics and Methods Group, Energy Information Administration.

[FR Doc. 99–25742 Filed 10–1–99; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER99–1378–000]

Alliance Services Company; Notice of Filing

September 28, 1999.

Take notice that on September 22, 1999, Alliant Energy Corporate Services Inc. (Alliant Energy) tendered for filing an Offer of Settlement in the above-captioned dockets.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Rules 211 or 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions and protests should be filed on or before October 12, 1999. Protests will be considered by the Commission to determine the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the Internet at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance).

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99–25695 Filed 10–1–99; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ES99–61–000]

Duquesne Light Company; Notice of Application

September 28, 1999.

Take notice that on September 24, 1999, Duquesne Light Company filed an application pursuant to Section 204 of the Federal Power Act and Part 34 of the Commission's Regulations seeking authority to issue not more than $900,000,000 of promissory notes and commercial paper and other evidences of short-term indebtedness from time to time with a final maturity date of not later than October 31, 2002.

Any person desiring to be heard or to protest such filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions and protests should be filed on or before October 19, 1999. Protests will be considered by the Commission to determine the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the Internet at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance).

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99–25694 Filed 10–1–99; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL99–94–000]

Fort James Operating Company and PP&L Great Works, LLC; Notice of Filing

September 28, 1999.

Take notice that on September 23, 1999, Fort James Operating Company (Fort James) and PP&L Great Works, LLC (Great Works) tendered for filing a joint petition for a declaratory order pursuant to 18 CFR 385.207 that Fort James will not be a public utility under Section 201(e) of the Federal Power Act as a result of Great Works' sales and deliveries of electricity from the Great Works hydroelectric generating facility (Project No. 2312) following Fort James' transfer of the facility to Great Works.

Any person desiring to be heard or to protest such filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions and protests should be filed on or before October 25, 1999. Protests will be considered by the Commission to determine the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any persons wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the Internet at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 99–25692 Filed 10–1–99; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. GP99–16–000]

Joel T. Strohl, Scott T. Strohl and Sid Strohl; Notice of Request for Equitable Waivers of Any Refund Liability

September 28, 1999.

Take notice that on September 23, 1999, Joel T. Strohl Scott T. Strohl and Sid Strohl, (Petitioners), Box 323, Pretty Prairie Kansas 67570, filed in Docket No. GP99–16–000, pursuant to Section

502(c) of the Natural Gas Policy Act of 1978, a request for equitable relief. Petitioners request relief with respect to claims that have been made or may be made by Northern Natural Gas Company (Northern) asserting petitioners unlawfully overcharged or natural gas sales for the period from October 1983 to the summer of 1988. Petitioners do not seek relief on grounds of ''hardship'' or ''unfair distribution of burdens.'' Additional details are more fully set forth in the request, which is on file with the Commission and open to public inspection. This filing may be viewed on the web at http://www.ferc.fed.us/onLine/htm (call 202–208–2222 for assistance).

Although Petitioners deny that they have any liability at law for refunds of Kansas ad valorem taxes, they assert that equity requires a waiver without even reaching the legal question. Petitioners state that the total of $406.43 (in principal) and $781.56 (in interest) in claims asserted against the three petitioners is part of a larger claim for $6,502.88 (in principal) and $12,505.02 (in interest) among all working interest owners in the Shannon Estate No. 1 well, Edwards County, Kansas. Deducting the royalty, the claim against each individual petitioner would be $114.84 in principal. Petitioners assert that interest is not owed as a matter of law.

Petitoners state that for the period from October 4, 1983 through the summer of 1988, the prices for the gas sold from the well were reduced so that revenues to the producers were reduced by $48,911.61, an amount that more than offsets the amount of Northern's refund claim, even including interest. Since the consumers are thus positively saved more than $30,000, petitioners assert it would be inequitable to demand refunds from working interests and royalty interests for a period of claimed overcharges when any overcharges is more than offset by undercharges.

Petitioners also assert that since the Shannon Estate #1 qualified for stripper well status, the maximum lawful price would be even higher and request the Commission to take notice of the official records in its files in order to verify these facts. Petitioners submit that equity requires that what should have been done then be done now, *nunc pro tunc*, and that any measure of overcharge be based on the stripper well prices.

Any person desiring to be heard or to make a protest with respect to this petition should on or before October 19, 1999, file with the Federal Energy Regulatory Commission, 888 First Street, NE , Washington, DC 20426, a motion to intervene or a protest in accordance with the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99–25653 Filed 10–1–99; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. GP99–17–000]

Joel T. Strohl, Scott T. Strohl and Sid Strohl; Notice of Demand for Full and Fair Adjudication

September 28, 1999.

Take notice that on September 23, 1999, Joel T. Strohl, Scott T. Strohl and Sid Strohl (Petitioners), Box 323, Pretty Prairie, Kansas 67570, filed in Docket No. GP99–17–000, a demand for a full and fair adjudication, including a hearing on the record, for claims that have been made by Northern Natural Gas Company accusing petitioners of unlawful overcharges for the sale of natural gas for the period from October 1983 to the summer of 1988 involving the collection of Kansas ad valorem taxes, all as more fully set forth in the request, which is on file with the Commission and open to public inspection. This filing may be viewed on the web at http://www.ferc.fed.us/onLine/htm (call 202–208–2222 for assistance).

Petitioners state that the total of $406.43 (in principal) and $781.56 (in interest) in claims asserted against the three petitioners is part of a larger claim for $6,502.88 (in principal) and $12,505.02 (in interest) among all working interest owners in the Shannon Estate No. 1 well, Edwards County, Kansas. Deducting the royalty, the claim against each individual petitioner would be $114.84 in principal.

Petitioners demand to be informed of their precise conduct that is now claimed to be unlawful, the damages they have caused to anyone, and the alleged proof of the charges. In addition, Petitioners deny that they are guilty of any overcharge or damage to any person, and deny that they have liability for any refunds, any interest, or any refund or interest associated with any royalty interest.

Petitioners demand a full and fair adjudication, starting with the appointment of an administrative law judge, and reserve their defenses except to plead in bar that the Commission has no jurisdiction to compel them to refund any sums relating to royalty interests. Petitioners assert that recent legislation in Kansas operates as a complete bar, absent a decision of a Kansas Court or the Supreme Court of the United States that the statute is unconstitutional. Petitioners contend that the FERC does not have jurisdiction to overturn a State of Kansas statute and say that the Commission's decision relating to equitable relief is immaterial.

Any person desiring to be heard or to make a protest with respect to this petition should on or before October 19, 1999, file with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, a motion to intervene or a protest in accordance with the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99–25654 Filed 10–1–99; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP97–738–008]

Transok, L.L.C.; Notice of Amendment to Limited Certificate

September 28, 1999.

Take notice that on June 1, 1999, Transok, Inc. (Applicant) tendered for filing, an amendment to its limited jurisdiction NGA Section 7(c) certificate to deliver natural gas under a lease agreement to Kansas Pipeline Company (KPC), all as more fully set forth in the application which is on file with the Commission and open to public

inspection. The application may be viewed on the web at *www.ferc.fed.us/online/rims.htm* (call (202) 208–2222 for assistance).

Applicant states that it and KPC have recently amended the lease agreement. Applicant further states that the material changes to the lease agreement are as follows:

(1) Agreement to a daily maximum imbalance (not previously provided for in the lease agreement.

(2) Elimination of wellhead points and addition of interconnect points as receipt points.

(3) Clarification of language regarding charges for gas delivered to secondary delivery points.

(4) Decreased Charges for volumes delivered to Primary Delivery Points.

(5) Deletion of a penalty for failure to move the minimum monthly volumes.

(6) Simplification in the percentages of supply required to be moved on specific lines (*i.e.,* increased flexibility to KPC).

(7) An increase in the pressure requirement for Transok deliveries to KPC.

(8) An option for KPC to extend the primary term for an additional two years, from 2009 to 2011.

Applicant asserts that the basic parameters of the lease agreement are unchanged. Applicant further states that a copy of this filing is available for public inspection during regular business hours at Applicant's offices located at 110 West 7th Street, Tulsa, Oklahoma 74119. Applicant indicates that the contact person for this filing is Ms. Regina Gregory at (918) 591–2345.

Any person desiring to be heard or to protest this filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, by or before October 8, 1999, in accordance with Sections 385.214 and 385.211 of the Commission's Rules and Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make Protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public reference Room. This application may be viewed on the Commission's website at http://ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance).

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99–25691 Filed 10–1–99; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ES99–60–000]

UtiliCorp United Inc.; Notice of Application

September 28, 1999.

Take notice that on September 21, 1999, UtiliCorp United Inc. (Applicant) filed an application seeking an order under Section 204 of the Federal Power Act authorizing the Applicant to issue, from time to time, up to and including $500,000,000, in the aggregate at any one time outstanding, of short-term notes and other evidences of indebtedness, including guarantees of securities issued by subsidiaries or affiliates. All notes and other evidences of indebtedness would have final maturities of not later than December 31, 2002.

Any person desiring to be heard or to protest such filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions and protests should be filed on or before October 19, 1999. Protests will be considered by the Commission to determine the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any persoN wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the Internet at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance).

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99–25693 Filed 10–1–99; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application Accepted for Filing and Request for Motions To Intervene and Protests

September 28, 1999.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Preliminary Permit.

b. *Project No.:* P–11804–000.

c. *Date filed:* August 16, 1999, and revised on August 27, 1999.

d. *Applicant:* Universal Electric Power Corp.

e. *Name of Project:* Hepburn Street Dam Hydroelectric Project.

f. *Location:* At the existing Hepburn Street Dam, which is owned by the Pennsylvania, Department of Conservation and Natural Resources, on the Susquehanna River, near the Town of Williamsport, Lycoming County, Pennsylvania.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Gregory S. Feltenberger, Universal Electric Power Corp., 1145 Highbrook Street, Akron, Ohio 44301, (330) 535–7115.

i. *FERC Contact:* Susan Tseng (202) 219–2798 or E-mail address at susan.tseng@FERC.fed.us.

j. *Comment Date:* 60 days from the issuance date of this notice.

k. *Description of Project:* The proposed project would consist of the following facilities: (1) The existing Hepburn Street Dam with a storage of 3,924 acre-feet and a surface area of 677 acres at an upstream pool elevation of 512 feet m.s.l; (2) a powerhouse downstream of the dam having an installed capacity of 2,730 kilowatts; (3) a new transmission line; and (4) appurtenant facilities. The proposed average annual generation is estimated to be 16.7 gigawatt hours. The cost of the studies under the permit will not exceed $1,000,000.

m. *Available Locations of Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference and Files Maintenance Branch, located at 888 First Street, NE., Room 2—A, Washington, DC 20426, or by calling (202) 219–1371. A copy is also available for inspection and reproduction at Universal Electric Power Corp., Mr. Gregory S. Feltenberger, 1145 Highbrook Street, Akron, Ohio 44301, (330) 535–7115. A copy of the application may also be viewed or printed by accessing the Commission's website on the Internet at www.ferc.fed.us. For assistance, users may call (202) 208–2222.

Preliminary Permit—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36).

Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b) and 4.36.

Preliminary Permit—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30(b) and 4.36.

Notice of intent—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

Proposed Scope of Studies under Permit—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''NOTICE OF INTENT TO FILE COMPETING APPLICATION'', ''COMPETING APPLICATION'', ''PROTEST'', ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. An additional copy must be sent to Director, Division of Project Review, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99–25652 Filed 10–1–99; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application Accepted for Filing and Request for Motions To Intervene and Protests

September 28, 1999.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Preliminary Permit.

b. *Project No.:* P–11792–000.

c. *Date filed:* July 15, 1999, and revised on August 27, 1999.

d. *Applicant:* Universal Electric Power Corp.

e. *Name of Project:* Green River Lock and Dam #2 Hydroelectric Project.

f. *Location:* At the existing Green River Lock and Dam #2, which is owned by the U.S. Army Corps of Engineers, on the Green River, near the Town of Rumsey, McLean County, Kentucky.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791 (a)–825(r).

h. *Applicant Contact:* Mr. Gregory S. Feltenberger, Universal Electric Power Corp., 1145 Highbrook Street, Akron, Ohio 44301, (330) 535–7115.

i. *FERC Contact:* Susan Tseng (202) 219–2798 or E-mail address at susan.tseng@FERC.fed.us

j. *Comment Date:* 60 days from the issuance date of this notice.

k. *Description of Project:* The proposed project would consist of the following facilities: (1) The existing Green River Lock and Dam #2 with a storage of 24,768 acre-feet and a surface area of 2,752 acres at an upstream pool elevation of 363 feet m.s.l; (2) a powerhouse downstream of the dam having an installed capacity of 11,400 kilowatts; (3) a new transmission line; and (4) appurtenant facilities. The proposed average annual generation is estimated to be 70 gigawatt hours. The cost of the studies under the permit will not exceed $1,900,000.

m. *Available Locations of Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference and Files Maintenance Branch, located at 888 First Street, NE, Room 2–A, Washington, DC 20426, or by calling (202) 219–1371. A copy is also available for inspection and reproduction at Universal Electric Power Corp., Mr. Gregory S. Feltenberger 1145 Highbrook Street, Akron, Ohio 44301, (330) 535–7115. A copy of the application may also be viewed or printed by accessing the Commission's website on the Internet at www.ferc.fed.us. For assistance, users may call (202) 208–2222.

Preliminary Permit—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b) and 4.36.

Preliminary Permit—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a

competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30(b) and 4.36.

Notice of intent—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

Proposed Scope of Studies under Permit—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''NOTICE OF INTENT TO FILE COMPETING APPLICATION'', ''COMPETING APPLICATION'', ''PROTEST'', ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. An additional copy must be sent to Director, Division of Project Review, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99–25655 Filed 10–1–99; 8:45 am]

BILLING CODE 6717–01–M

6DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application Accepted for Filing and Request for Motions to Intervene and Protests

September 28, 1999.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Preliminary Permit.

b. *Project No.:* P–11795–000.

c. *Date filed:* July 16, 1999, and revised on August 27, 1999.

d. *Applicant:* Universal Electric Power Corp.

e. *Name of Project:* Red Rock Dam Hydroelectric Project.

f. *Location:* At the existing Red Rock Dam, which is owned by the U.S. Army Corps of Engineers, on the Des Moines River, near the Town of Harvey, Marion County, Iowa.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791 (a)–825(r).

h. *Applicant Contact:* Mr. Gregory S. Feltenberger, Universal Electric Power Corp., 1145 Highbrook Street, Akron, Ohio 44301, (330) 535–7115.

i. *FERC Contact:* Susan Tseng (202) 219–2798 or E-mail address at susan.tseng@FERC.fed.us.

j. *Comment Date:* 60 days from the issuance date of this notice.

k. *Description of Project:* The proposed project would consist of the following facilities: (1) The existing Red Rock Dam with a storage of 265,000 acre-feet and a surface area of 19,000 acres at an upstream pool elevation of 742 feet m.s.l; (2) a powerhouse downstream of the dam having an installed capacity of 33,150 kilowatts; (3) a new transmission line; and (4) appurtenant facilities. The proposed average annual generation is estimated to be 203 gigawatt hours. The cost of the studies under the permit will not exceed $3,000,000.

1. *This notice also consists of the following standard paragraphs:* A5, A7, A9, A10, B, C, and D2.

m. *Available Locations of Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference and Files Maintenance Branch, located at 888 First Street, NE, Room 2–A, Washington, DC 20426, or by calling (202) 219–1371. A copy is also available for inspection and reproduction at Universal Electric Power Corp., Mr. Gregory S. Feltenberger 1145 Highbrook Street, Akron, Ohio 44301, (330) 535–7115. A copy of the application may also be viewed or printed by accessing the Commission's website on the Internet at www.ferc.fed.us. For assistance, users may call (202) 208–2222.

Preliminary Permit—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b) and 4.36.

Preliminary Permit—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30(b) and 4.36.

Notice of intent—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

Proposed Scope of Studies under Permit—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''NOTICE OF INTENT TO FILE COMPETING APPLICATION'', ''COMPETING APPLICATION'', ''PROTEST'', ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. An additional copy must be sent to Director, Division of Project Review, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99–25656 Filed 10–01–99; 8:45 am]

BILLING CODE 6717–01–M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6450–6]

Interagency Project to Clean Up Open Dumps on Tribal Lands: Request for Proposals

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability.

SUMMARY: The national Tribal Solid Waste Interagency Workgroup (Workgroup) is soliciting proposals for its Tribal Open Dump Cleanup Project (Cleanup Project) for Fiscal Year (FY) 2000. In FY 1999 the Workgroup made more than $1.6 million available to fund eleven proposed projects. The Workgroup believes that a similar dollar amount will be available to fund projects in FY 2000. In selecting Cleanup Project proposals, the Workgroup plans to use a two-step process. The first step is to submit a pre-proposal which generally outlines the proposed project and provides a general budget estimate. This will allow the tribes that are considering submitting full proposals to present their ideas to the Workgroup and receive feedback prior to submitting full proposals. It will also allow the Workgroup agencies to assess and plan for potential financial and technical needs early in the process. The second step of the proposal submission process is to submit a full proposal. Please note that tribes are eligible to submit full proposals even if they do not submit a pre-proposal.

The Cleanup Project is intended to demonstrate the Federal government's ability to work closely with tribal governments to provide comprehensive solid waste management funding and technical support for the closure or upgrade of ''high priority'' waste disposal sites and the development and strengthening of tribal or multi-tribal solid waste management programs. In determining whether a site is high priority, the Workgroup will generally rely on the Indian Health Service's Report to Congress on open dumps on Indian lands. The Workgroup recognizes that an individual tribe may have information on high priority sites that are not included in the IHS Report. To address such sites, the Request for Proposals package includes criteria that allow a tribe to demonstrate that a site represents a serious threat to human health and the environment and should be considered high priority.

The Tribal Solid Waste Interagency Workgroup was established in April 1998 to design a Federal plan for helping tribes bring their waste disposal sites into compliance with the municipal solid waste landfill criteria (40 CFR part 258), *i.e.*, closing or upgrading open dumps and planning for appropriate alternative disposal. Current Workgroup members include representatives from EPA, the Bureau of Indian Affairs, the Indian Health Service, the Federal Aviation Administration, the National Oceanic and Atmospheric Administration, the U.S. Geological Survey, and the Departments of Agriculture and Defense.

Criteria

Eligible recipients of assistance under the Cleanup Project include federally recognized tribes and multi-tribe 501(c)(3) organizations whose membership consists of federally recognized tribes. A full explanation of the submittal process, the qualifying requirements, and the criteria that will be used to evaluate proposals for this Project may be found in the Request for Proposals package.

DATES: For consideration, pre-proposals must be received no later than November 19, 1999 and full proposals must be received no later than February 25, 2000.

FOR FURTHER INFORMATION CONTACT: Copies of the Request for Proposals package may be downloaded from the Internet at <www.epa.gov/tribalmsw> by clicking on ''What's New'' or ''Funding.'' Copies may also be obtained by contacting your regional EPA, IHS or BIA area office or one of the following Workgroup representatives:

EPA—Melanie Barger Garvey, 202–564–257, Beverly Goldblatt, 703–308–7278, or Clara Mickles, 202–260–7519.

IHS—Steve Aoyama, 301–443–1046.

BIA—Jerry Gidner, 202–208–5696.

Dated: September 27, 1999.

Elizabeth A. Cotsworth,

Acting Director, Office of Solid Waste.

[FR Doc. 99–25712 Filed 10–1–99; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6451–1]

Science Advisory Board; Notification of Public Advisory Committee Meeting

Pursuant to the Federal Advisory Committee Act, Public Law 92–463, notice is hereby given that the Chloroform Risk Assessment Review Subcommittee (CRARS) of the Science Advisory Board's (SAB) Executive Committee will meet on Wednesday and Thursday, October 27–28, 1999, at the Holiday Inn Georgetown, 2101 Wisconsin Ave., NW, Washington, DC 20007. The hotel telephone number is 202–338–4600. The meeting will begin at 9:00 am and end no later than 5:30 pm on each day (All times noted are Eastern Time). The meeting is open to the public, however, seating is limited and available on a first come basis.

Purpose of the Meeting

The CRARS is meeting to provide advice and comment to EPA on the Office of Water's Draft Health Risk Assessment/Characterization of the Drinking Water Disinfection Byproduct Chloroform. The overall purpose of the Subcommittee's review is to determine if significant changes need to be made to the risk assessment before it is finalized. The Subcommittee will also address specifically the risk assessment's conclusions as to a chloroform's mode of action; the strength of the analyses supporting the choice of a nonlinear approach to dose-response; and the adequacy (given the data available) of the assessment of children's risk from exposure to chloroform in drinking water. The complete draft Charge for this meeting will be posted on the SAB Website (http://www.epa.gov/sab) by September 30, 1999.

Availability of Review Materials

Copies of EPA primary background documents for the meeting may be obtained by contacting Ms. Arleen Plunkett (4304), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; telephone: (202) 260–5389; or via e-mail to: plunkett.arleen@epa.gov. These documents are not available from the SAB. Anyone desiring additional information on the substantive issues to be addressed should also contact Ms. Plunkett as noted above.

For further information contact: Members of the public desiring additional information about the conduct of the public meeting itself should contact Mr. Samuel Rondberg, (1400A), Designated Federal Officer, CRARS, Science Advisory Board, U.S. EPA, 401 M Street, SW, Washington, DC 20460; telephone/voice mail at (301) 812–2560; fax at (410) 286–2689; or via e-mail at samuelr717@aol.com. A copy of the draft agenda will be available on the SAB Website (http://www.epa.gov/sab) or upon request from Ms. Dorothy Clark at (202) 564–4537, or by FAX at (202) 501–0582 or via e-mail at clark.dorothy@epa.gov no later than October 8, 1999.

Members of the public who wish to make a brief oral presentation to the Committee must contact Mr. Rondberg in writing (by letter, or by e-mail—see previously stated information) no later than 12 noon Eastern Time, October 18, 1999 in order to be included on the Agenda. These oral comments will be limited to ten minutes per speaker or organization. The request should identify the name of the individual making the presentation, the organization (if any) they will represent, any requirements for audio visual equipment (*e.g.*, overhead projector, 35 mm projector, chalkboard, etc.), and include at least 35 copies of an outline of the issues to be addressed, or of the presentation itself.

Providing Oral or Written Comments at SAB Meetings

The Science Advisory Board expects that public statements presented at its meetings will not be repetitive of previously submitted oral or written statements. In general, each individual or group making an oral presentation will be limited to a total time of ten minutes. Written comments (at least 35 copies) received in the SAB Staff Office sufficiently prior to a meeting date (usually one week before the meeting), may be mailed to the relevant SAB committee or subcommittee; comments received too close to the meeting date will normally provided to the committee at its meeting, or mailed soon after receipt by the Agency. Written comments may be provided to the relevant committee or subcommittee up until the time of the meeting.

Additional information concerning the Science Advisory Board, its structure, function, and composition, may be found on the SAB Website (http://www.epa.gov/sab) and in the Annual Report of the Staff Director which is available from the SAB Publications Staff at (202) 564–4533 or via fax at (202) 501–0256.

Meeting Access

Individuals requiring special accommodation at this meeting, including wheelchair access, should contact the DFO at least five business days prior to the meeting so that appropriate arrangements can be made.

Dated: September 28, 1999.

Donald G. Barnes,

Staff Director, Science Advisory Board.

[FR Doc. 99–25713 Filed 10–1–99; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OPP–30414A; FRL–6385–1]

Pesticide Product Registrations; Conditional Approval

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces Agency approval of applications submitted by Novartis Crop Protection Inc., to conditionally register the pesticide products Emamectin Benzoate Technical, Denim Insecticide, and Proclaim Insecticide, products containing a new active ingredient not included in any previously registered products pursuant to the provisions of section 3(c)(7)(C) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

FOR FURTHER INFORMATION CONTACT: By mail: Linda Arrington, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; telephone number: 703–305–5446; and e-mail address: arrington.linda@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected categories and entities may include, but are not limited to:

Categories	NAICS codes	Examples of potentially affected entities
Industry	111 112 311	Crop production Animal production Food manufacturing

Categories	NAICS codes	Examples of potentially affected entities
	32532	Pesticide manufacturing

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in the table could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether or not this action might apply to certain entities. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the ''FOR FURTHER INFORMATION CONTACT.''

B. How Can I Get Additional Information, Including Copies of this Document and Other Related Documents?

1. *Electronically*. You may obtain electronic copies of this document, and certain other related documents that might be available electronically, from the EPA Internet Home Page at http://www.epa.gov/. To access this document, on the Home Page select ''Laws and Regulations'' and then look up the entry for this document under the ''**Federal Register**--Environmental Documents.'' You can also go directly to the **Federal Register** listings at http://www.epa.gov/fedrgstr/.

To access a fact sheet which provides more detail on this registration, go to the home page for the Office of Pesticide Programs at http://www.epa.gov/pesticides/, and select ''factsheet.''

2. *In person*. The Agency has established an official record for this action under docket control number OPP–30414A. The official record consists of the documents specifically referenced in this action, any public comments received during an applicable comment period, and other information related to this action, including any information claimed as Confidential Business Information (CBI). This official record includes the documents that are physically located in the docket, as well as the documents that are referenced in those documents. The public version of the official record does not include any information claimed as CBI. The public version of the official record, which includes printed, paper versions of any electronic comments submitted during an applicable comment period, is available for inspection in the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The PIRIB telephone number is (703) 305–5805.

In accordance with section 3(c)(2) of FIFRA, a copy of the approved label, the list of data references, the data and other scientific information used to support registration, except for material specifically protected by section 10 of FIFRA, are available for public inspection in the Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, Rm. 119, Crystal Mall #2, Arlington, VA ((703) 305–5805). Requests for data must be made in accordance with the provisions of the Freedom of Information Act and must be addressed to the Freedom of Information Office (A–101), 401 M St., SW., Washington, DC 20460. Such requests should: Identify the product name and registration number and specify the data or information desired.

A paper copy of the fact sheet, which provides more detail on this registration, may be obtained from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161.

II. Did EPA Conditionally Approve the Application(s)?

A conditional registration may be granted under section 3(c)(7)(C) of FIFRA for a new active ingredient where certain data are lacking, on condition that such data are received by the end of the conditional registration period and do not meet or exceed the risk criteria set forth in 40 CFR 154.7; that use of the pesticide during the conditional registration period will not cause unreasonable adverse effects; and that use of the pesticide is in the public interest. The Agency has considered the available data on the risks associated with the proposed use of emamectin benzoate, and information on social, economic, and environmental benefits to be derived from such use. Specifically, the Agency has considered the nature and its pattern of use, application methods and rates, and level and extent of potential exposure. Based on these reviews, the Agency was able to make basic health and safety determinations which show that use of emamectin benzoate during the period of conditional registration will not cause any unreasonable adverse effect on the environment, and that use of the pesticide is, in the public interest.

Consistent with section 3(c)(7)(C) of FIFRA, the Agency has determined that these conditional registrations are in the public interest. Use of the pesticides are of significance to the user community, and appropriate labeling, use directions, and other measures have been taken to ensure that use of the pesticides will not result in unreasonable adverse effects to man and the environment.

III. Conditionally Approved Registrations

EPA issued a notice, published in the **Federal Register** of July 10, 1996 (61 FR 36372)(FRL–5377–9), which announced that Merck Research Laboratories, P.O. Box 450 Hillsborough Rd., Three Bridges, NJ 0887–0450, had submitted applications to register the products Emamectin Benzoate Technical, Proclaim 0.26 EC Insecticide, and Proclaim 5 SG Insecticide (EPA File Symbols 618–RNI, 618–RNT, and 618–RNA) containing the active ingredient emamectin benzoate 4″-epi-methylamino-4″-deoxavermectin B_1 benzoate [A mixture of a minimum of 90″-epi-methylamino-4″-deoxyavermectin B_1 and a maximum of 10″-epi-methylamino-4″-deoxyavermectin B_1 benzoate at 95%, 2.15%, and 5% respectively. The technical product is the only one containing emamectin benzoate and 4% of related compounds. These products were not previously registered.

These products were subsequently transferred to Novartis Crop Protection, Inc., P.O. Box 18300, Greensboro, NC 27419–8300, and were asssigned new EPA Registration Numbers.

The applications were approved on May 19, 1999, for one technical and two end-use products:

1. Emamectin Benzoate Technical for formulation use only (EPA Registration Number 100–902.

2. Denim Insecticide (formerly Proclaim 0.16 EC) for use on cavalo broccolo (EPA Registration Number 100–903).

3. Proclaim Insecticide for control of certain lepidopteran pests on head and stem *Brassica* vegetables, celery, and lettuce (EPA Registration Number 100–904).

Authority: 7 U.S.C. 136.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: September 23, 1999.

James Jones,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 99–25714 Filed 10–1–99; 8:45 am]

BILLING CODE 6560–50–F

FARM CREDIT ADMINISTRATION

Sunshine Act Meeting

AGENCY: Farm Credit Administration.

SUMMARY: Notice is hereby given, pursuant to the Government in the Sunshine Act (5 U.S.C. 552b(e)(3)), of the forthcoming special meeting of the Farm Credit Administration Board (Board).

DATE AND TIME: The special meeting of the Board was held at the Double Tree Hotel in Falls Church, Virginia, on September 29, 1999 from 12:55 p.m. until such time as the Board concluded its business.

FOR FURTHER INFORMATION CONTACT: Vivian L. Portis, Secretary to the Farm Credit Administration Board, (703) 883–4025, TDD (703) 883–4444.

ADDRESSES: Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102–5090.

SUPPLEMENTARY INFORMATION: This meeting was closed to the public. The matter considered at the meeting was:

**Closed Session*

A. *New Business*
Other
—Legislative Strategy

*Session closed-exempt pursuant to 5 U.S.C. 552b(c)(9).

Dated: September 29, 1999.

Vivian L. Portis,

Secretary, Farm Credit Administration Board.

[FR Doc. 99–25800 Filed 9–30–99; 1:18 pm]

BILLING CODE 6705–01–P

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collections Approved by Office of Management and Budget

September 27, 1999.

The Federal Communications Commission (FCC) has received Office of Management and Budget (OMB) approval for the following public information collections pursuant to the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid control number. For further information contact Shoko B. Hair, Federal Communications Commission, (202) 418–1379.

Federal Communications Commission

OMB Control No.: 3060–0653.
Expiration Date: 01/31/2002.
Title: Consumer Information—Posting by Aggregators—Sections 64.703(b) and (c).
Form No.: N/A.
Respondents: Business or other for-profit.
Estimated Annual Burden: 56,200 respondents; 3.6 hours per response (avg.); 206,566 total annual burden hours for all collections.
Estimated Annual Reporting and Recordkeeping Cost Burden: $0.
Frequency of Response: On occasion.
Description: Section 226(c)(1)(A) of the Communications Act and Section 64.703(b) of the Commission's rules require that each aggregator post on or near the telephone instrument in plain view of consumers: (1) The name, address, and toll-free telephone number of the provider of operator services; (2) written disclosure that the rates for all operator-assisted calls are available on request, and that consumers have a right to obtain access to the interstate common carrier of their choice and may contact their preferred interstate common carriers for information on accessing that carrier's service using that telephone; and (3) the name and address of the Enforcement Division of the Common Carrier Bureau of the Commission, to which the consumer may direct complaints regarding operator services. This requirement was a response to a widespread failure of aggregators to disclose information necessary for informed consumer choice in the marketplace. See 47 CFR 64.703(b). Section 64.703(c) establishes a 30-day outer limit for aggregators to update the posted information. An aggregator may meet the 30-day outer limit rule, where its maintenance technicians would not otherwise visit the particular payphone location within 30 days, by having its coin collection or other agent affix a temporary sticker to the payphone. Such temporary sticker must be replaced with permanent signage during the next regularly scheduled maintenance visit. Section 64.703(c) is intended to provide updated OSP information to consumers and enable consumers to make informed choices when placing operator service calls. See 47 CFR 64.703(c). Aggregators will disclose the required information to consumers via printed notice that is posted on or near each of the aggregator's phones. Pursuant to Section 64.703(c), this information must be updated within 30 days in changes of OSPs. Consumers will use this information to determine whether they wish to use the services of the identified OSP. Obligation to respond: Mandatory.

OMB Control No.: 3060-0704.
Expiration Date: 9/30/2002.
Title: Policy and Rules Concerning the Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended, CC Docket No. 96–61.
Form No.: N/A.
Respondents: Business or other for-profit.
Estimated Annual Burden: 519 respondents; 306.2 hours per response (avg.); 158,935 total annual burden hours for all collections.
Estimated Annual Reporting and Recordkeeping Cost Burden: $435,000.
Frequency of Response: Annually; On occasion; Third party disclosure; Recordkeeping.
Description: In the Second Order on Reconsideration issued in CC Docket No. 96–61, released March 31, 1999, the Commission reinstates the public disclosure requirement and also requires that nondominant interexchange carriers that have Internet websites past this information on-line in a timely and easily accessible manner. These carriers also continue to be required to file annual certifications pursuant to section 254(g); maintain price and service information; and are forborned from filing certain tariffs. These collections of information are necessary to provide consumers ready access to information concerning the rates, terms, and conditions governing the provision of interstate, domestic, interexchange services offered by nondominant IXCs in a detariffed and increasingly competitive environment. The information collected under the information disclosure requirement and the Internet posting requirement must be disclosed to the public to ensure that consumers have access to the information they need to select a telecommunications carrier and to bring to the Commission's attention possible violations of the Communications Act without a specific public disclosure requirement. The information collected under the tariff cancellation requirement must be disclosed to the Commission, and will be used to implement the Commission's detariffing policy. The information collected under the recordkeeping and other requirements will be used by the Commission to ensure that affected interexchange carriers fulfill their obligations under the Communications

Act, as amended. Obligation to comply: Mandatory.

Public reporting burden for the collections of information is as noted above. Send comments regarding the burden estimate or any other aspect of the collections of information, including suggestions for reducing the burden to Performance Evaluation and Records Management, Washington, DC 20554.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 99–25647 Filed 10–1–99; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meeting

Pursuant to the provisions of the ''Government in the Sunshine Act'' (5 U.S.C. 552b), notice is hereby given that at 8:35 a.m. on Wednesday, September 29, 1999, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session to consider (1) reports of the Office of Inspector General, and (2) matters relating to the Corporation's corporate activities.

In calling the meeting, the Board determined, on motion of Vice Chairman Andrew C. Hove, Jr., seconded by Director Ellen S. Seidman (Director, Office of Thrift Supervision), concurred in by Ms. Julie L. Williams, acting in the place and stead of Director John D. Hawke, Jr. (Comptroller of the Currency), and Chairman Donna Tanoue, that Corporation business required its consideration of the matters on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(2) and (c)(10) of the ''Government in the Sunshine Act'' (5 U.S.C. 552b(c)(2) and (c)(10)).

The meeting was held in the Board Room of the FDIC Building located at 550—17th Street, N.W., Washington, D.C.

Dated: September 29, 1999.

Federal Deposit Insurance Corporation.

James D. LaPierre,

Deputy Executive Secretary.

[FR Doc. 99–25776 Filed 9–29–99; 5:02 pm]

BILLING CODE 6714–01–M

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of Banks or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than October 19, 1999.

A. Federal Reserve Bank of New York (Betsy Buttrill White, Senior Vice President) 33 Liberty Street, New York, New York 10045-0001:

1. Angelo DeCaro, Sands Point, New York; to acquire additional voting shares of Patriot National Bancorp, Inc., Stamford, Connecticut, and thereby indirectly acquire additional voting shares of Patriot National Bank, Stamford, Connecticut.

B. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63102-2034:

1. Holmes County Capital Corporation ESOP, Lexington, Mississippi; Marshall Holt Smith, as co-trustee, Lexington, Mississippi; and Douglas Eugene Aldridge, as co-trustee, West, Mississippi; to acquire additional voting shares of Holmes County Capital Corporation, Lexington, Mississippi, and thereby indirectly acquire additional voting shares of Holmes County Bank & Trust Company, Lexington, Mississippi.

Board of Governors of the Federal Reserve System, September 29, 1999.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 99–25724 Filed 10–1–99; 8:45 am]

BILLING CODE 6210–01–F

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than October 28, 1999.

A. Federal Reserve Bank of Richmond (A. Linwood Gill III, Assistant Vice President) 701 East Byrd Street, Richmond, Virginia 23261-4528:

1. Greenville First Bancshares, Inc., Greenville, South Carolina; to become a bank holding company by acquiring 100 percent of the voting shares of Greenville First Bank, N.A., Greenville, South Carolina (in organization).

B. Federal Reserve Bank of Atlanta (Cynthia Goodwin, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303-2713:

1. LandMark Financial Holding Company, Sarasota, Florida; to become a bank holding company by acquiring 100 percent of the voting shares of LandMark Bank of Florida, Sarasota, Florida (in organization).

2. Regions Financial Corporation, Birmingham, Alabama; to merge with LCB Corporation, Fayetteville, Tennessee, and thereby indirectly acquire Lincoln County Bank, Fayetteville, Tennessee.

3. Regions Financial Corporation, Birmingham, Alabama; to merge with Minden Bancshares, Inc., Minden, Louisiana, and thereby indirectly acquire Minden Bank & Trust Company, Minden, Louisiana.

Board of Governors of the Federal Reserve System, September 28, 1999.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 99–25649 Filed 10–1–99; 8:45 am]

BILLING CODE 6210–01–F

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than October 29, 1999.

A. Federal Reserve Bank of New York (Betsy Buttrill White, Senior Vice President) 33 Liberty Street, New York, New York 10045-0001:

1. Caisse Nationale de Credit Agricole, Paris, France; to become, through its investment in Bespar-Sociedade Gestora de Participacoes Sociais, S.A., Lisbon, Portugal, and Banco Espirito Santo e Commercial de Lisboa, S.A. (''BESCL''), both of Lisbon, Portugal, a bank holding company as a result of the acquisition by BESCL of 100 percent of the voting shares of Espirito Santo Bank, Miami, Florida.

B. Federal Reserve Bank of Richmond (A. Linwood Gill III, Assistant Vice President) 701 East Byrd Street, Richmond, Virginia 23261-4528:

1. South Branch Valley Bancorp, Inc., Moorefield, West Virginia; to acquire 100 percent of the voting shares of Potomac Valley Bank, Petersburg, West Virginia.

Board of Governors of the Federal Reserve System, September 29, 1999.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 99–25725 Filed 10–1–99; 8:45 am]

BILLING CODE 6210–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice of a Meeting of the National Bioethics Advisory Commission (NBAC)

SUMMARY: Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is given of a meeting of the National Bioethics Advisory Commission. The Commission will address (1) the international project and (2) the comprehensive system of human subjects protections. Some Commission members may participate by telephone conference. The meeting is open to the public and opportunities for statements by the public will be provided on October 21, 1999 from 11:30 am to 12 noon.

Dates/times	Location
October 21, 1999, 8:30 am–5:00 pm.	Holiday Inn Georgetown, Mirage Ballroom, 2101 Wisconsin Avenue, NW., Washington, DC 20007.
October 22, 1999, 8:30 am–12 Noon.	Same Location as Above.

SUPPLEMENTARY INFORMATION: The President established the National Bioethics Advisory Commission (NBAC) on October 3, 1995 by Executive Order 12975 as amended. The mission of the NBAC is to advise and make recommendations to the National Science and Technology Council, its Chair, the President, and other entities on bioethical issues arising from the research on human biology and behavior, and from the applications of that research.

Public Participation

The meeting is open to the public with attendance limited by the availability of space on a first come, first serve basis. Members of the public who wish to present oral statements should contact Ms. Patricia Norris by telephone, fax machine, or mail as shown below and as soon as possible at least 4 days before the meeting. The Chair will reserve time for presentations by persons requesting to speak and asks that oral statements be limited to five minutes. The order of persons wanting to make a statement will be assigned in the order in which requests are received. Individuals unable to make oral presentations can mail or fax their written comments to the NBAC staff office at least five business days prior to the meeting for distribution to the Commission and inclusion in the public record. The Commission also accepts general comments at its website at bioethics.gov. Persons needing special assistance, such as sign language interpretation or other special accommodations, should contact NBAC staff at the address or telephone number listed below as soon as possible.

FOR FURTHER INFORMATION CONTACT: Ms. Patricia Norris, National Bioethics Advisory Commission, 6100 Executive Boulevard, Suite 5B01, Rockville, Maryland 20892–7508, telephone 301–402–4242, fax number 301–480–6900.

Dated: September 28, 1999.

Eric M. Meslin,

Executive Director,

National Bioethics Advisory Commission.

[FR Doc. 99–25735 Filed 10–1–99; 8:45 am]

BILLING CODE 4160–17–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[INFO–99–43]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506 (c) (2) (A) of the Paperwork reduction Act of 1995, the Center for Disease Control and Prevention is providing opportunity for public comment on proposed data collection projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call the CDC Reports Clearance Officer on (404) 639–7090.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) The accuracy of the agency's estimate of the burden of the

proposed collection of information; (c) Ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques for other forms of information technology. Send comments to Seleda Perryman, CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS–D24, Atlanta, GA 30333. Written comments should be received within 60 days of this notice.

Proposed Projects

Multi-Center Cohort Study to Assess the Risk and Consequences of Hepatitis C Virus Transmission from Mother to Infant (0920–0344)—Renewal—The National Center for Infectious Diseases (NCID)—The purpose of the proposed study is (1) To determine the incidence of vertical hepatitis C virus (HCV) transmission, (2) To assess risk factors for vertical HCV transmission, (3) To assess the clinical course of disease among infants with HCV infection, and (4) To assess diagnostic methods for detecting HCV infection in infants. HCV is a blood-borne pathogen and is the major etiologic agent of what was previously referred to as parenterally-transmitted non-A, non-B hepatitis. Diagnostic tests for HCV infection have recently been developed and HCV has been demonstrated to account for about 20% of all cases of viral hepatitis in the United States. Virtually all adults with acute HCV infection may become chronically infected and 50%–60% may develop chronic liver disease with persistently elevated liver enzymes. Of adults with chronic liver disease, 30%–60% may develop chronic active hepatitis and 5%–20% may develop cirrhosis within five years after illness onset. HCV is also a major contributing cause of hepatocellular carcinoma. An estimated 8,000–10,000 chronic liver disease deaths per year in the United States are attributable to HCV infection. There are no costs to respondents other than their time to participate.

Form name	No. of respondents	No. responses per respondent	Burden hours per respondent	Total burden hours
Form A	300	1	0.25	75
Form B	1200	1	0.25	300
Form C	300	1	0.10	30
Form E	300	1	0.25	75
Form G	300	8	0.10	240
Total				720

2. Chronic Fatigue Syndrome (CFS) Surveillance and Related Studies, Prevalence and Incidence of Fatiguing Illness in Sedgewick County, Kansas (0920–0401)—Renewal—The National Center for Infectious Diseases (NCID)—A Population-Based CFS Study was done previously in Kansas in 1997. Data from this cross-sectional, random-digit-dial survey of prolonged fatiguing illness in Wichita, Kansas will be added to the data previously obtained during the past 24-months from this population.

The proposed study continues the Sedgwick County study using identical methodology and data collection instruments. Beginning with a random-digit-dial telephone survey to identify previously identified fatigued and non-fatigued individuals, followed by a detailed telephone interview to obtain additional data on participants' health status during the last 12-month period. Study objectives remain to refine estimates of CFS in Wichita, identify similarities and differences among fatigued and non-fatigued subjects and to describe the clinical course of fatiguing illness in this population.

Respondents	No. of respondents	No. of responses/respondent	Average burden/respondent (in hrs.)	Total burden (in hrs.)
Individuals screened	4,500	1	0.083	374
Individuals interviewed	4,500	1	0.25	1,125
Total				1,499

Nancy Cheal,

Acting Associate Director for Policy, Planning, and Evaluation, Centers for Disease Control and Prevention (CDC).

[FR Doc. 99–25683 Filed 10–1–99; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Availability of Funds for Loan Repayment Program for Repayment of Health Professions Educational Loans

AGENCY: Indian Health Service, HHS.

ACTION: Notice.

SUMMARY: The Administrations budget request for fiscal year (FY) 2000 includes $11,000,000 for the Indian Health Service Loan Repayment Program for health professions educational loans (undergraduate and graduate) in return for full-time clinical service in Indian health programs. It is anticipated that $11,000,000 will be available to support approximately 275 competing awards averaging $40,000 per award.

This program announcement is subject to the appropriation of funds. This notice is being published early to coincide with the recruitment activity of the IHS, which competes with other Government and private health management organizations to employ qualified health professionals. Funds must be expended by September 30 of the fiscal year. This program is authorized by Section 108 of the Indian Health Care Improvement Act (IHCIA) as amended, 25 U.S.C. 1601 *et seq.* The IHS invites potential applicants to request an application for participation in the Loan Repayment Program.

DATES: Applications for the FY 2000 Loan Repayment Program will be accepted and evaluated monthly beginning January 14, 2000, and will

continue to be accepted each month thereafter until all funds are exhausted. Subsequent monthly deadline dates are scheduled for Friday of the second full week of each month. Notice of awards will be mailed on the last working day of each month.

Applicants selected for participation in the FY 2000 program cycle will be expected to begin their service period no later than September 30, 2000.

Applications shall be considered as meeting the deadline if they are either:

1. Received on or before the deadline date; or

2. Sent on or before the deadline date. (Applicants should request a legibly dated U.S. Postal Service post mark or obtain a legibly dated receipt from a commercial carrier or U.S. Postal Service. Private metered postmarks are *not* acceptable as proof of timely mailing.)

Applications received after the monthly closing date will be held for consideration in the next monthly funding cycle. Applicants who do not receive funding by September 30, 2000, will be notified in writing.

FORM TO BE USED FOR APPLICATION: Applications will be accepted only if they are submitted on the form entitled ''Application for the Indian Health Service Loan Repayment Program,'' identified with the Office of Management and Budget approval number of OMB #0917–0014 (expires 11/30/99).

ADDRESSES: Application materials may be obtained by calling or writing to the address below. In addition, completed applications should be returned to: IHS Loan Repayment Program, 12300 Twinbrook Parkway—Suite 100, Rockville, Maryland 20852, PH: 301/443–3396 [between 8:00 a.m. and 5:00 p.m. (EST) Monday through Friday, except Federal holidays].

FOR FURTHER INFORMATION CONTACT: Please address inquiries to Mr. Charles Yepa, Chief, IHS Loan Repayment Program, Twinbrook Metro Plaza—Suite 100, 12300 Twinbrook Parkway, Rockville, Maryland 20852, PH: 301/443–3396 [between 8:00 a.m. and 5:00 p.m. (EST) Monday through Friday, except Federal holidays].

SUPPLEMENTARY INFORMATION: Section 108 of the IHCIA, as amended by Public Laws 100–713 and 102–573, authorizes the IHS Loan Repayment Program and provides in pertinent part as follows:

The Secretary, acting through the Service, shall establish a program to be known as the Indian Health Service Loan Repayment Program (hereinafter referred to as the ''Loan Repayment Program'') in order to assure an adequate supply of trained health professionals necessary to maintain accreditation of, and provide health care services to Indians through, Indian healh programs.

Section 4(n) of the IHCIA, as amended by the Indian Health Care Improvement Technical Corrections Act of 1996, Pub. L. 104–313, provides that:

''Health Profession'' means allopathic medicine, family medicine, internal medicine, pediatrics, geriatric medicine, obstetrics and gynecology, pediatric medicine, nursing, public health nursing, dentistry, psychiatry, osteopathy, optometry, pharmacy, psychology, public health, social work, marriage and family therapy, chiropractic medicine, environmental health and engineering, an allied health profession, or any other health profession.

For the purposes of this program, the term ''Indian health program'' is defined in Section 108(a)(2)(A), as follows:

* * * any health program or facility funded, in whole or in part, by the IHS for the benefit of American Indians and Alaska Natives and administered:

a. Directly by the service; or

b. By any Indian tribe or tribal or Indian organization pursuant to a contract under:

(1) The Indian Self-Determination Act; or

(2) Section 23 of the Act of April 30, 1908, (25 U.S.C. 47), popularly known as the Buy Indian Act; or

(3) By an urban Indian organization pursuant to Title V of this act.

Applicants may sign contractual agreement with the Secretary for 2 years. The IHS will repay all, or a portion of the applicant's health profession educational loans (undergraduate and graduate) for tuition expenses and reasonable educational, and living expenses in amounts up to $20,000 per year for each year of contracted service. Payments will be made annually to the participant for the purpose of repaying his/her outstanding health profession educational loans. Repayment of health profession education loans will be made to the participant within 120 days after the entry-on-duty of the participant has been confirmed by the Indian Health Service Loan Repayment Program.

The Secretary must approve the contract before the disbursement of loan repayments can be made to the participant. Participants will be required to fulfill their contract service agreements through full-time clinical practice at an Indian health program site determined by the Secretary. Loan repayment sites are characterized by physical, cultural, and professional isolation, and have histories of frequent staff turnover. All Indian health program sites are annually prioritized with the Agency by discipline, based on need or vacancy.

All health professionals will receive up to $20,000 per year regardless of their length of contract. Where the amount of the Loan Repayment Program award may result in an increase in Federal income tax liability, the IHS will pay an additional 20 percent of the participant's total loan repayments to the Internal Revenue Service for the increased tax liability.

Pursuant to Section 108(b), to be eligible to participate in the Loan Repayment Program, an individual must:

(1) A. be enrolled:

(i) in a course of study or program in an accredited institution, as determined by the Secretary, within a State and be scheduled to complete such course of study in the same year such individual applies to participate in the Loan Repayment Program. (This includes the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the Virginia Islands, Guam, American Samoa, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Paula); or

(ii) in an approved graduate training program in a health profession; or

B. have a degree in a health profession and a license to practice; AND

(2) A. be eligible for, or hold an appointment as a Commissioned Officer in the Regular or Reserve Corps of the Public Health Service; or

B. be eligible for selection for civilian service in the Regular or Reserve Corps of the Public Health Service; or

C. meet the professional standards for civil service employment in the IHS; or

D. be employed in an Indian health program without service obligation; AND

(3) submit to the Secretary an application and contract to the Loan Repayment Program; AND

(4) sign and submit to the Secretary, a written contract agreeing to accept repayment of educational loans and to serve for the applicable period of obligated service in a priority site as determined by the Secretary; AND

(5) sign an affidavit attesting to the fact that they have been informed of the relative merits of the U.S. Public Health Service Commissioned Corps and the Civil Service as employment options.

Once the applicant is approved for participation in the Loan Repayment Program, the applicant will receive confirmation of his/her loan repayment award and the duty site at which he/she will serve his/her loan repayment obligation.

The IHS has identified the positions in each Indian health program for which there is a need or vacancy and ranked

those positions in order of priority by developing discipline-specific prioritized lists of sites. Ranking criteria for these sites include the following:

- Historically critical shortages caused by frequent staff turnover;
- Current unmatched vacancies in a Health Profession Discipline;
- Projected vacancies in a Health Profession Discipline;
- Ensuring that the staffing needs of Indian health programs administered by an Indian tribe or tribal or health organization receive consideration on an equal basis with programs that are administered directly by the Service; and
- Giving priority to vacancies in Indian health programs that have a need for health professionals to provide health care services as a result of individuals having breached Loan Repayment Program contracts entered into under this section.
- Consistent with this priority ranking, in determining applications to be approved and contracts to be accepted, the IHS will give priority to applications made by American Indians and Alaska Natives and to individuals recruited through the efforts of Indian tribes or tribal or Indian organizations.
- Funds appropriated for the LRP in FY 2000 will be distributed among the health professions as follows: allopathic/osteopathic practitioners will receive 30 percent, registered nurses 15 percent, mental health professionals 10 percent, dentists 15 percent, pharmacists 12.5 percent, optometrists 7.5 percent, physician assistants 5 percent, other professions 5 percent. This requirement does not apply if the number of applicants from these groups, respectively, is not sufficient to meet the requirement.
- The IHS will give priority in funding among health professionals to physicians in the following priority specialities: anesthesiology, emergency room medicine, general surgery, obstetrics/gynecology, ophthalmology, orthopedic surgery, otolaryngology/otorhinolaryngology, psychiatry, radiology and dentisty. Funding for these priority specialties is within the 30 percent established for allopathic/osteopathic practitioners.

The following factors are equal in weight when applied, and are applied when all other criteria are equal and a selection must be made between applicants.

One or all of the following factors may be applicable to an applicant, and the applicant who has the most of these factors, all other criteria being equal, would be selected.

- An applicant's length of current employment in the IHS, tribal, or urban program.
- Availability for service earlier than other applicants (first come, first served); and
- Date the individual's application was received.

Any individual who enters this program and satisfactorily completes his or her obligated period of service may apply to extend his/or contact on a year-by-year basis, as determined by the IHS. Participants extending their contract will receive up to the maximum amount of $20,000 per year plus an additional 20 percent for Federal Withholding. Participants who were awarded loan repayment contracts prior to FY 2000 will be awarded extensions up to the amount of $30,000 a year and 31 percent in tax subsidy if funds are available, and will not exceed the total of the individual's outstanding eligible health profession educational loans.

Any individual who owes an obligation for health professional service to the Federal Government, a State, or other entity is not eligible for the Loan Repayment Program unless the obligation will be completely satisfied before they begin service under this program.

This program is not subject to review under Executive Order 12373.

The Catalog of Federal Domestic Assistance number is 93.164.

Dated: September 28, 1999.

Michel E. Lincoln,

Acting Director.

[FR Doc. 99–25696 Filed 10–10–99; 8:45 am]

BILLING CODE 4160–16–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Record of Decision for Issuance of an Endangered Species Permit To Allow Incidental Take of the Endangered Karner Blue Butterfly in Wisconsin

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Record of decision.

SUMMARY: Notice is hereby given that the Fish and Wildlife Service (Service) has decided to issue a permit to allow incidental take of the endangered Karner blue butterfly (*Lycaeides melissa samuelis*) within the State of Wisconsin. The permit is issued under the authority of section 10(a) of the Endangered Species Act of 1973, as amended (ESA), for a duration of 10 years. Issuance of this permit allows for implementation of the Statewide Habitat Conservation Plan (HCP) for Karner Blue Butterfly in Wisconsin. Alternative A, as analyzed by the Environmental Impact Statement (EIS), allows for implementation of a consolidated, statewide plan designed to conserve butterfly habitat while carrying out otherwise lawful land use activities on public and private lands. The lead applicant is the Wisconsin Department of Natural Resources (DNR). In addition, 25 Partners to the HCP will work together to implement this plan. This decision is based upon information and analysis found in the HCP, Implementing Agreement, Partner Species and Habitat Conservation Agreements, EIS, and comments from the public on the HCP/EIS. This Record of Decision was prepared in accordance with the Council on Environmental Quality Regulations (40 CFR 1505.2).

SUPPLEMENTARY INFORMATION:

Background

The listing of the Karner blue butterfly on December 14, 1992, and the attending prohibition on ''take'' of the butterfly or its habitat posed a restraint on many land uses and land management activities in Wisconsin. In order to avoid violation of Section 9 of the ESA, non-Federal landowners must obtain a Section 10(a)(1)(B) permit to authorize incidental take of Federally listed species. Beginning in 1994, the DNR spearheaded an effort to address land use issues throughout Wisconsin through the development of a statewide HCP.

On April 1, 1999, the Service received an application for an incidental take permit under the ESA from the Wisconsin DNR. The application was submitted on behalf of a partnership of 26 landowners that include state agencies, county forest departments, industry, a conservation organization, and others. In accordance with the regulations, an HCP accompanied the permit application. In addition, the DNR prepared the EIS that accompanied this HCP, in coordination with the Service. A **Federal Register** Notice announcing receipt of the permit application, and soliciting comments on the application, was published on April 14, 1999. In addition, notices regarding the availability of the draft and final EIS were published on April 16, May 7, and July 2, 1999. Seven comments were received during the public interest review and responses to those comments were incorporated into the final EIS.

Description of Proposal

The application for an incidental take permit (ITP) seeks authorization for take of the Karner blue butterfly in

conjunction with a variety of land use and land management activities throughout the species range in Wisconsin. These activities include forestry practices, utility right-of-way management, transportation management, agricultural practices, recreation management, and barrens, prairie, and savanna management. A strong commitment to adaptive management and monitoring provides for changing practices over time to ensure long-term conservation of the species. In addition, the HCP incorporates an innovative Participation Plan that allows other landowners to become party to the permit and encourages private landowner participation in conservation of the Karner blue butterfly on a voluntary basis.

The project area encompasses the entire State of Wisconsin. However, the High Potential Range of the butterfly encompasses 7 million acres within Wisconsin, and that is the area where there is a potential to ''take'' the butterfly. Within that range, partners have established a goal of no-net-loss (and possibly a gain) of suitable Karner blue butterfly habitat which will be accomplished with a variety of conservation strategies. Management of forestry tracts, for example, will include pre-treatment surveys to determine whether butterflies are present and, if present, treatments such as cutting or removal of understory will be carried out to allow for the movement of butterflies into newly created early successional habitat. In other words, new habitat will become available for occupation as the older forest becomes less suitable. The effect of this type of forestry management will be to create a shifting mosaic of habitat capable of supporting the butterfly. Another example of a conservation strategy designed to enhance conservation of Karner blue butterflies involves managing of utility rights-of-way. In these circumstances, butterflies are conserved by mowing at certain heights that minimize harm to eggs or larva or by restricting use of certain types of pesticides that are more harmful to lepidopterans. Through changing techniques for managing the R-O-W corridors, the utility partners have minimized harm to the butterfly and, in many cases, will create or maintain habitat that is needed for their existence in those R-O-Ws. Overall, a variety of conservation strategies serve to create a disturbance dependent landscape that must exist for the continued survival of this species.

The DNR is the lead applicant for this effort and is committed to providing administrative oversight during implementation of this HCP. Twenty-five partners to the HCP have entered into legally binding Species and Habitat Conservation Agreements (SHCA) with the DNR. These SHCAs outline the conservation and/or recovery measures that each Partner will take to reach the goals of the HCP. In addition, the DNR has developed an SHCA to outline what will be done on DNR properties to both conserve and recover the butterfly. Processes for inclusion of future partners are included in the HCP. The ITP application requested a permit for a 10-year period.

The HCP was submitted in accordance with the regulations at 50 CFR Part 17.22(b)(1)(iii). The Service determined that the HCP met statutory requirements and based its decision to issue an ITP on the following analysis.

ESA Section 10(a)(2)(A) HCP Criteria

1. The Impact That Will Likely Result From Such Taking

The HCP/EIS, Implementing Agreement, and associated SHCAs adequately describe the proposed activities and the anticipated impact on the Karner blue butterfly and its habitat within the project area. Due to the nature of the species, disturbance of the landscape is necessary for continued survival. The activities that are anticipated to take the butterfly will be the same activities that will ensure availability of suitable habitat. In other words, the take of individuals will occur during land management/land disturbance activities, but the disturbance must occur for the habitat to remain suitable. The Karner blue butterfly will benefit at a population level at those sites in spite of the take of individuals during the manipulation of the landscape. Failure to manage habitats across the Wisconsin landscape would actually result in loss of Karner blue butterflies due to loss of their habitat through natural succession. The HCP and SHCAs provided sufficient information for the Service to evaluate the impacts of the proposed activities. The Service's analysis of the project impact is described its Biological Opinion on the issuance of an Incidental Take Permit, dated September 16, 1999.

2. The Steps That Will Be Taken To Monitor, Minimize, and Mitigate Such Impacts, The Funding That Will Be Available To Implement Such Steps, and the Procedures To Be Used To Deal With Unforeseen Circumstances

The applicant's HCP, along with the partner SHCA's, provide measures to avoid or minimize harm to individuals, mitigation measures to compensate for unavoidable losses, and a monitoring program to assure that suitable habitat is maintained to achieve a goal of no-net-loss throughout the documented range in Wisconsin. The HCP provides adequate funding and includes measures to ensure implementation of the HCP components.

Conservation measures include management of forest habitats in a manner that creates a shifting mosaic of available habitat, management of rights-of-way to minimize harm to individuals during mowing and pesticide application, and creation of suitable habitats across the landscape which contribute to recovery of the Karner blue butterfly. In addition, manipulation of existing Karner blue butterfly habitat in a manner that does not allow for regeneration must meet certain criteria. Larger landowners, for example, must mitigate for permanent loss of habitat.

In order to assure that the goal of no-net-loss is achieved, the DNR and HCP Partners have designed a monitoring program that will measure the outcome of land treatments through pre-treatment surveys and post-treatment surveys, research, and annual monitoring of a representative sample of all known element occurrences of the Karner blue butterfly. The DNR is prepared to share Natural Heritage Data with the Service and the Service will be fully able to participate in oversight activities, site visits, and HCP committee activities as the DNR and Partners move into implementation of this HCP. If the expected outcome of land management activities is not met (i.e., no-net-loss), the HCP Partnership is committed to using adaptive management to address the need to change their activities to be consistent with conservation of the butterfly.

The treatment of unforeseen circumstances in the HCP is consistent with the Service's Habitat Conservation Plan Assurances (''No Surprises'') Rule, dated February 23, 1998.

3. Alternative Actions To The Taking the Applicant Considered and the Reasons Such Alternatives Are Not Proposed To Be Utilized

Alternatives to the proposed project are described in the HCP. Due to the nature of the project (consolidated, statewide plan), alternatives other than a statewide HCP were limited to an HCP with mitigation banking, a reduced scope HCP and no action. The DNR took the lead to develop a statewide plan, along with multiple partners, to enable Wisconsin to conserve this species on a scale that will provide for more long-

term benefits and regulatory certainty to the citizens of Wisconsin. All of the other alternatives would result in the processing of multiple permits by the Service, in response to multiple landowner needs. Alternatives to the proposed project would either not accomplish the anticipated benefit that will be gained as a result of large-scale conservation effort, or were more injurious to Karner blue butterflies through lack of action (disturbance) on the landscape. As described above, the Karner blue butterfly is dependent upon a landscape that requires disturbance. Since natural processes such as fire are not part of today's landscape, the habitat must be actively managed to maintain an early successional component for this species. The no action alternative would result in long-term harm to the butterfly population due to the habitat becoming unsuitable over time.

4. Other Measures That The Director May Require as Being Necessary or Appropriate for the Purposes of the Plan

The HCP Partnership worked closely with the Service in developing this HCP. Over a period of five years, the Service was able to provide input on appropriate conservation measures, minimization of take, steps to promote recovery, and legal and regulatory matters. The Partnership incorporated recommended measures designed to conserve the Karner blue butterfly, including adaptive management and monitoring to ensure that anticipated goals are achieved. Mitigation will compensate for losses and the minimum expected outcome is no-net-loss of available habitat over the 10-year permit period. Positive outreach and education efforts are expected to provide a net increase in available habitat over time, although this has not been ''guaranteed'' due to the voluntary nature of the strategy to involve private citizens. A follow-up evaluation of this private landowner strategy will be conducted after the HCP has been in its implementation phase for three years.

In addition to the requirements that an applicant's Habitat Conservation Plan must meet, the Service is responsible to assure that certain criteria found at 50 CFR 17.22 (b)(2) are met, prior to issuing an incidental take permit. The following paragraphs summarize the Service's findings relative to ITP issuance criteria.

ESA Section 10(a)(1)(B) Permit Issuance Criteria

1. The Take Will Be Incidental

The Service finds that the take will be incidental to otherwise lawful activities, including forestry, utility right-of-way management, transportation corridor management, and other lawful activities as reviewed above. In addition, take of individuals will be primarily in the context of habitat manipulation that is beneficial to the long term survival of this species. Absent disturbance, the habitat will become unsuitable due to natural succession.

2. The Applicant Will, to the Maximum Extent Practicable, Minimize and Mitigate the Impacts of the Taking

The Partners to the HCP have committed to a wide variety of conservation measures, outreach activities, adaptive management, and other strategies designed to minimize harm to the species and mitigate for any unavoidable losses. Take of the butterfly will primarily occur in a manner that can be characterized as ''short-term'' take, or temporary disturbance of habitat that results in habitat improvement for the butterfly. Disturbance of the landscape will occur in a pattern designed to create a shifting mosaic of suitable Karner blue butterfly habitat over time. ''Permanent take,'' in the form of habitat destruction, will be mitigated. The Service's biological opinion authorized this type of take at a level considered to be reasonable with the expectation that not much ''permanent take'' will occur under this ITP. The Service finds that the HCP Partnership has met this criterion under the Act and has provided for mitigation and minimization of take to the full extent requested.

3. The Applicant Will Ensure That Adequate Funding for the HCP and Procedures To Deal With Unforeseen Circumstances Will Be Provided

The HCP Partnership is committed to funding implementation of this Plan. The State of Wisconsin, Department of Natural Resources, has pledged to seek funding through their budget processes and has assured the Service that they will continue to fund HCP implementation to the extent that the State Legislature appropriates funds. The DNR has hired a full-time HCP Coordinator to oversee the HCP. Twenty-five other partners have committed to funding specific measures that are inumerated in their Species and Habitat Conservation Agreements. During the development of this HCP, the DNR and partners committed dollars not only in staff time, but in funding of research for development of protocols, funding of educational materials, and other activities.

The Service's HCP Assurances (''No Surprises'') rule is discussed in the HCP and measures to address changed and unforeseen circumstances have been identified. Adaptive management and monitoring will be implemented to address changes over the life of the permit; coordination mechanisms are in place to address changed circumstances that could be anticipated at the time of HCP development. Unforeseen circumstances would necessitate coordination between the Service and the DNR. The DNR has committed to a coordination process to address such circumstances.

The Service has, therefore, determined that the Partnership's financial commitment(s), along with their willingness to address changed and unforeseen circumstances in a cooperative fashion, is sufficient to meet this criterion.

4. The Take Will Not Appreciably Reduce the Likelihood of the Survival and Recovery of the Species in the Wild

The issuance of this permit has been reviewed by the Service under Section 7 of the Act. The biological opinion rendered a determination that issuance of this ITP will not jeopardize the continued existence of the Karner blue butterfly in the wild. The take that is authorized through the Incidental Take Permit will be largely unquantifiable due to the nature of the action, that is, ''short term'' taking associated with habitat disturbance. However, survival and recovery of this species would be impossible absent habitat disturbance since the species depends on an early successional plant community. Any permanent, long-term take will be mitigated. The level of permanent take has been set at a threshold that the Service has determined is reasonable.

5. Other Measures the Secretary May Require as Being Necessary or Appropriate for the Purposes of This Plan Have Been Met

The Service and the Office of the Field Solicitor, U.S. Department of the Interior, were involved in early discussions regarding the HCP, Implementing Agreement, and partner SHCAs. The Service commented on draft documents, participated on the HCP team and subteams during the development phase, and worked closely with the DNR to assure that conservation of the species would be assured and recovery would not be jeopardized. The HCP incorporates Service recommendations for minimization and mitigation, as well as steps to monitor the effects of this HCP and ensure success. Annual monitoring and reporting mechanisms have been designed to ensure that changes to

management strategies can be implemented if the outcome of proposed management regimes is inconsistent with the HCP goals for the species. It is the Service's position that no additional measures are required to implement the intent and purpose of the HCP.

National Environmental Policy Act Determination and Public Comment

An Environmental Impact Statement (EIS) was prepared to accompany this HCP due to the large scale of the effort and the Service's determination that this HCP was precedent setting. The EIS analyses the Proposed HCP and No Action alternatives in detail. The EIS describes the process that was followed to develop the HCP, including the input of partners and the interested public.

A Notice of Intent to prepare an EIS was announced in the **Federal Register** on June 5, 1995. Public scoping meetings followed at three locations in Wisconsin. The DNR also provided avenues for public involvement in the planning process and development of the HCP. Many interests were represented throughout the development process. Once the ITP application was received by the Service, an announcement of availability of the draft EIS was made in the **Federal Register** on April 16, 1999. The Service's permit requirements also call for announcement of availability of permit applications. Therefore, a more detailed announcement was made in the April 14, 1999, **Federal Register** which included a description of the proposed HCP and the EIS and included a web site address for complete documentation. Several hundred copies of the HCP/EIS were distributed to interested parties, including those that had expressed an interest during the development phase. An additional four requests for the HCP/EIS were received as a result of the announcement of availability of the drafts. Seven comment letters were received during the public review period and responses to the comments have been incorporated into the document(s). The announcement of the final EIS was made on July 2, 1999.

Based on the findings described in this record of decision, the Service has decided to issue an ESA Section 10(a)(1)(B) Incidental Take Permit to the Wisconsin Department of Natural Resources and HCP Partnership for a period of 10 years.

Dated: September 27, 1999.

William F. Hartwig,

Regional Director, Region 3, U.S. Fish and Wildlife Service, Fort Snelling, Minnesota.

[FR Doc. 99–25535 Filed 10–1–99; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Availability of an Environmental Assessment/Habitat Conservation Plan and Receipt of Application for Incidental Take Permit for Construction of Two Single Family Residences on 0.75 acres each of the 54.9 acres Platted as the Diamond Sky Subdivision on City Park Road in Travis County, TX

SUMMARY: Anthony Franzetti (Applicant) has applied to the U.S. Fish and Wildlife Service (Service) for an incidental take permit pursuant to Section 10(a) of the Endangered Species Act (Act). The Applicant has been assigned permit numbers TE–016491–0. The requested permit, which is for a period of 30 years, would authorize the incidental take of the endangered golden-cheeked warbler (*Dendroica chrysoparia*). The proposed take would occur as a result of the construction and occupation of two single family residences on City Park Road, Austin, Travis County, Texas.

The Service has prepared the Environmental Assessment/Habitat Conservation Plan (EA/HCP) for the incidental take applications. A determination of jeopardy to the species or a Finding of No Significant Impact (FONSI) will not be made until at least 30 days from the date of publication of this notice. This notice is provided pursuant to Section 10(c) of the Act and National Environmental Policy Act regulations (40 CFR 1506.6).

DATES: Written comments on the application should be received on or before November 3, 1999.

ADDRESSES: Persons wishing to review the application may obtain a copy by writing to the Regional Director, U.S. Fish and Wildlife Service, P.O. Box 1306, Albuquerque, New Mexico 87103. Persons wishing to review the EA/HCP may obtain a copy by contacting Scott Rowin, Ecological Services Field Office, 10711 Burnet Road, Suite 200, Austin, Texas 78758 (512/490-0063). Documents will be available for public inspection by written request, by appointment only, during normal business hours (8:00 to 4:30) U.S. Fish and Wildlife Service, Austin, Texas. Written data or comments concerning the application(s) and EA/HCPs should be submitted to the Field Supervisor, Ecological Services Field Office, Austin, Texas at the above address. Please refer to permit number TE–016491–0 when submitting comments.

FOR FURTHER INFORMATION CONTACT: Scott Rowin at the above Austin Ecological Services Field Office.

SUPPLEMENTARY INFORMATION: Section 9 of the Act prohibits the ''taking'' of endangered species such as the golden-cheeked warbler. However, the Service, under limited circumstances, may issue permits to take endangered wildlife species incidental to, and not the purpose of, otherwise lawful activities. Regulations governing permits for endangered species are at 50 CFR 17.22.

Applicant: Anthony Franzetti plans to construct two single family residences on 54.9 acres platted as the Diamond Sky Subdivision, on City Park Road Austin, Travis County, Texas. This action will eliminate less than two acres of habitat and indirectly impact less than 18 additional acres of golden-cheeked warbler habitat. The applicant proposes to compensate for this incidental take of golden-cheeked warbler habitat by placing the remaining balance of the property, approximately 53 acres, in a conservation easement in perpetuity.

Alternatives to this action were rejected because not developing the subject property with federally listed species present was not economically feasible and alteration of the project design would increase the impacts.

Thomas L. Bauer,

Acting Regional Director, Region 2, Albuquerque, New Mexico.

[FR Doc. 99–25684 Filed 10–1–99; 8:45 am]

BILLING CODE 4510–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Migratory Bird Permits; Notice of Intent To Prepare Two Management Plans and Environmental Assessments for Take of Wild Peregrine Falcons

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of intent.

SUMMARY: The American peregrine falcon (*Falco peregrinus anatum*) was removed from the protection of the U.S. Endangered Species Act (ESA) on August 25, 1999. The arctic peregrine falcon (*F. p. tundrius*) was removed from ESA protection in 1994. Due to their special status as recently delisted subspecies, we intend to develop two

joint State/Federal management plans to govern take of wild peregrine falcons (*F. peregrinus*) in the United States. We will prepare Environmental Assessments (EAs) for public review as part of the process. One management plan will address take of peregrine falcon nestlings in the United States. The other will address take of immature peregrines that originate in Alaska, Canada, and Greenland, and migrate through the contiguous United States. These management plans will be developed cooperatively by the Service and the States with input from the governments of Canada, Greenland, and Mexico. Once the plans are completed, the States will be responsible for managing the species within the framework of the plans. Our intent is that these management plans will apply only until the Service and the States agree that special management is no longer warranted. Comments on development of harvest strategies and management plans are solicited and will be considered in development of the plans and associated Environmental Assessments.

DATES: Written comments are requested by November 12, 1999.

ADDRESSES: Please submit written comments to the Chief, Office of Migratory Bird Management, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 634, Arlington, Virginia 22203 (fax: 703/358–2272).

FOR FURTHER INFORMATION CONTACT: George Allen, Office of Migratory Bird Management, U.S. Fish and Wildlife Service, at 703/358–1714.

SUPPLEMENTARY INFORMATION: Three subspecies of peregrine falcon are recognized in North America: the maritime, or Peale's peregrine (*F. p. pealei*); the tundra, or arctic peregrine; and the American peregrine. The Peale's peregrine is a year round resident of the coastal areas of western Canada and southern Alaska to the Aleutians. It was never listed as endangered or threatened under the ESA. The arctic peregrine breeds in the northern tundra regions from Alaska across Canada to Greenland. It was listed as endangered, but breeding populations in North America expanded considerably in recent decades, and the subspecies was delisted in 1994 (October 5, 1994; 59 FR 50796). The American peregrine subspecies breeds from the boreal forests of Alaska and Canada south through the western United States and northern Mexico. Numeric recovery goals for breeding pairs in southeastern Canada and the eastern United States have recently been met, and numbers now exceed recovery goals over most of its North American range. We delisted the American peregrine falcon, and removed the similarity of appearance provision for free-flying peregrines in the conterminous states, on August 25, 1999 (64 FR 46542). That action had the effect of eliminating the Endangered Species Act prohibitions against take of wild-caught peregrines for falconry, raptor propagation, scientific collecting, and other purposes permittable under the Migratory Bird Treaty Act. However, except for scientific research, which will be considered on a case-by-case basis, and depredation permits issued for public safety reasons at airports, we have continued the prohibition on take of wild peregrines until we complete management plans to govern harvest.

Migrant juvenile peregrines were captured by falconers along the Atlantic coast barrier islands annually for many years prior to 1970, and migrants and nestlings were taken less regularly elsewhere in the United States. Falconers would like the use of wild peregrines to resume now that peregrines have met recovery goals. Although captive-bred peregrines have been available for falconry since 1983, wild peregrines have not been available due to ESA restrictions, except in Alaska where a limited take of Peale's peregrines is allowed, and a limited take of arctic peregrines has been allowed since its delisting.

Falconry is regulated under a joint State-Federal permitting system (50 CFR 21.28—21.29). Regulations provide for three progressive classes of falconry permits'apprentice, general, and master falconer'depending on the individual's level of experience. Apprentice falconers may possess only one raptor at a time and may take only certain species, which do not include peregrine falcons. General falconers may possess two raptors at a time and may take no more than two from the wild during any 12-month period. Master falconers may possess three raptors and take no more than two from the wild during any 12-month period. Federal and most State falconry regulations permit the removal from the wild of non-endangered raptors for falconry.

In anticipation of high interest in take of wild peregrines for falconry following the delisting of the American peregrine, we have been working with the States to develop harvest criteria that will ensure that recovery achieved under the ESA is sustained and that further population growth is not impeded. We will develop, cooperatively with the States, two management plans. The first plan will deal with take of nestling (eyas) peregrines in the United States. The second plan will deal with take of juvenile migrant (passage) peregrines. Most migrant peregrines will originate in Canada, Greenland, or Alaska. The management plans will include (1) biological criteria for a harvest of peregrine falcons, (2) implementation criteria for the harvest, and (3) procedures for evaluating and adjusting harvest in an adaptive-management framework. The management plans will provide overall guidance for take of peregrines. Within the framework provided by each plan, the States will be responsible for decisions about harvest.

To avoid compromising the restoration of peregrine populations in North America, our preliminary objectives for the combined plans are:

(1) Protect from harvest to the extent possible, nestling and dispersing juvenile American peregrines from natal areas in eastern Canada and eastern United States.

(2) Allow a conservative and sustainable level of take of migrant juvenile peregrines originating from the Alaskan and Canadian arctic and Greenland.

(3) Allow a conservative and sustainable level of take of nestling peregrines from healthy populations in the western United States and Alaska.

The Environmental Assessments will likely include several alternatives, such as various harvest levels from particular management groups. Possible harvest levels include no take, take of 5 percent or 10 percent of annual production, or no restrictions on take beyond the existing falconry regulations (i.e., no management plan).

Because take of nestlings is a United States issue, we expect to complete this plan ahead of the plan for migrants, which will require international coordination with Canada, Greenland, and Mexico. We hope to complete the plan and EA for nestlings by spring and for migrants by fall, 2000, respectively.

The Service has a statutory obligation under the ESA to monitor the status of delisted species in cooperation with the States. The purpose of the ESA monitoring plan is to ensure that recovery is sustained. We intend to publish a draft ESA monitoring plan for the American peregrine falcon in the **Federal Register** in the near future. Take of American peregrines under the MBTA pursuant to the management plans that are the subject of this current notice will be considered during the ESA monitoring program. However, the management plans under MBTA, which will govern take of all North American subspecies of peregrine, and the monitoring plan for the American

peregrine subspecies under ESA are otherwise unrelated.

Dated: September 27, 1999.

Jamie Rappaport Clark,

Director, Fish and Wildlife Service.

[FR Doc. 99–25734 Filed 10–1–99; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Letters of Authorization to Take Marine Mammals

AGENCY: U.S. Fish and Wildlife Service.

ACTION: Notice of issuance of Letters of Authorization to take marine mammals incidental to oil and gas industry activities.

SUMMARY: In accordance with section 101(a)(5)(A) of the Marine Mammal Protection Act of 1972, as amended, and the U.S. Fish and Wildlife Service implementing regulations [50 CFR 18.27(f)(3)], notice is hereby given that Letters of Authorization to take polar bears and Pacific walrus incidental to oil and gas industry exploration, development, and production activities have been issued to the following companies:

Company	Activity	Date issued
BP Exploration (Alaska) Inc.	Development	September 10, 1999.

FOR FURTHER INFORMATION CONTACT: Mr. John W. Bridges at the U.S. Fish and Wildlife Service, Marine Mammals Management Office, 1011 East Tudor Road, Anchorage, Alaska 99503, (800) 362–5148 or (907) 786–3810.

SUPPLEMENTARY INFORMATION:

Letters of Authorization were issued in accordance with U.S. Fish and Wildlife Service Federal Rules and Regulations ''Marine Mammals; Incidental Take During Specified Activities (58 FR 60402; November 16, 1993); modified and extended (60 FR 42805; August 17, 1995).''

Dated: September 20, 1999.

Gary Edwards,

Acting Regional Director.

[FR Doc. 99–25723 Filed 10–1–99; 8:45 am]

BILLING CODE 4310–55–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AK–962–1410–00–P]
[AA–14015]

Notice for Publication; Alaska Native Claims Selection

In accordance with Departmental regulation 43 CFR 2650.7(d), notice is hereby given that a decision to issue conveyance under the provisions of Sec. 14(h)(8) of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. 1601, 1613(h)(8), will be issued to Sealaska Corporation for approximately 186.77 acres. The lands involved are within the Tongass National Forest in southeast Alaska.

Copper River Meridian, Alaska

T. 75 S., R. 82 E.,
Secs. 21 and 30.
T. 73 S., R. 85 E.,
Sec. 12.

A notice of the decision will be published once a week, for four (4) consecutive weeks, in the *Juneau Empire*. Copies of the decision may be obtained by contacting the Alaska State Office of the Bureau of Land Management, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7599 ((907) 271–5960).

Any party claiming a property interest which is adversely affected by the decision, an agency of the Federal government or regional corporation, shall have until November 3, 1999 to file an appeal. However, parties receiving service by certified mail shall have 30 days from the date of receipt to file an appeal. Appeals must be filed in the Bureau of Land Management at the address identified above, where the requirements for filing an appeal may be obtained. Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4, subpart E, shall be deemed to have waived their rights.

Patricia A. Baker,

Land Law Examiner, Branch of ANCSA Adjudication.

[FR Doc. 99–25688 Filed 10–1–99; 8:45 am]

BILLING CODE 4310–01–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–020–1220–00]

Notice of Closure to Camping at the Four Bear Trailhead and the Twin Creek Trailhead and Fishing Access Area and Notice of Seasonal Closure to Public Use Along Twin Creek Trail on Public Land in Park County, WY, Cody Field Office

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of closures.

SUMMARY: Notice is hereby given that effective October 4, 1999 the Four Bear Trailhead and the Twin Creek Trailhead and Fishing Access Areas are closed to camping year round. The trailheads are located on public lands administered by the Bureau of Land Management (BLM), Cody Field Office. The Four Bear Trailhead is located on the north side of U.S. Highway 14–16–20 approximately 19 miles west of Cody in Park County, Wyoming. The Twin Creek Trailhead and Fishing Access Site is located on the north side of Park County Road 6WX approximately 23 miles west of Cody in Park County, Wyoming. This closure also applies to the public land surrounding the developed sites as described in this notice. Day use is allowed as well as overnight parking of unattended vehicles (including horse trailers).

This action is being taken because the sites are small and were designed to serve as trailheads and parking areas for fishermen, hikers, and horseback riders. The sites and immediate surroundings are not designed to provide camping and are not suitable for camping. Camping in the parking lot would fill up the lot and would make parking spots unavailable to persons seeking to use the trailhead. No camping at either location will be allowed unless permitted by the Authorized Officer (BLM Cody Field Manager).

In addition, the Twin Creek Trail is subject to a seasonal closure. Easements exist along the west fork of Twin Creek allowing public access through private lands to the Shoshone National Forest. These easements are subject to a seasonal closure. Consistent with that closure, the BLM portion of the trail is closed to all use from January 1 through April 30 of each year. This trail crosses the South Fork of the Shoshone River. The seasonal closure is in effect where the trail begins on the west side of the river. River bank access will remain open on both sides of the South Fork of the Shoshone River for activities such as fishing and sightseeing. The purpose of

the seasonal trail closure is to protect wintering elk herds. No access into this area will be allowed during the seasonal closure unless permitted by the Authorized Officer.

EFFECTIVE DATES: The camping closure will be effective October 4, 1999. The seasonal trail closure will be effective January 1 through April 30 of each year. The closures will remain in effect until modified or rescinded by the Authorized Officer.

FOR FURTHER INFORMATION CONTACT: Shirley Bye-Jech, Outdoor Recreation Planner, or Michael Blymyer, Cody Field Manager, Cody Field Office, P.O. Box 518, 1002 Blackburn Avenue, Cody, Wyoming 82414–0518. Telephone (307) 587–2216.

SUPPLEMENTARY INFORMATION: The Four Bear Trailhead was constructed in 1995 to meet access needs for hiking, horseback riding, and hunting. The existing access from the Jim Mountain Trailhead on the Shoshone National Forest was no longer suitable for the increasing visitor use due to vehicle crowding and road safety issues. The trailhead and parking lot capable of holding 13 vehicles with horse trailers was constructed to relieve the access pressure in the area. The Twin Creek Trailhead and Fishing Access Site was constructed during the late summer and fall of 1997. Prior to the construction of the site, the hunting and horseback riding public have used this area as an informal parking area and trailhead for a number of years. There was insufficient room for the pickups and horse trailers using the area. The vehicles and trailers congregated on the side of the road and created a severe safety hazard. Therefore, a site was constructed with a parking lot capable of holding 10 vehicles with horse trailers. The site was designed for day use and overnight parking of unattended vehicles. There is insufficient room at the sites to provide camping facilities.

The following described BLM-administered lands are included in this camping closure: For the Four Bear area, all BLM public lands north of U.S. Highway 14–16–20 in section 18, T. 52 N., R. 104 W., for the Twin Creek area, all BLM public lands north of county road 6WX in the northeast quarter of section 7, T. 50 N., R. 104 W.

Authority for closure and restriction orders is provided under 43 CFR subpart 8364.1. Violations of this closure are punishable by a fine not to exceed $1,000 and (or) imprisonment not to exceed 12 months.

Dated: September 23, 1999.

Michael Blymyer,

Cody Field Manager.

[FR Doc. 99–25657 Filed 10–1–99; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–020–1040–00]

Seasonal Use Closure for All Motorized Vehicles in the Carter Mountain Area of Critical Environmental Concern (ACEC), Park County, WY, Cody Field Office

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of seasonal closure.

SUMMARY: The Cody Record of Decision and Approved Resource Management Plan (RMP), dated November 8, 1990, designated vehicular use in the Carter Mountain ACEC as ''limited to designated roads and trails.'' In response to a request from the Wyoming Game and Fish Department, a seasonal closure to all motorized vehicles, including over-the-snow vehicles was effective November 10, 1988 (FR Doc. 88–26011). The closure was then extended to April 30, 1992 (FR Doc. 91–23803). The Carter Mountain ACEC Activity Plan made this seasonal closure permanent (11/10/92). The closure will now be in effect each season from November 15 through June 15 or later if unfavorable weather or road conditions exist which could create resource damage. A steel gate at Little Rose Creek establishes the point beyond which the seasonal closure is in effect. The purpose of this closure is to allow wildlife to migrate free of disturbance in their winter range and to allow elk to move throughout the lower reaches of their winter range to mitigate the impacts of concentrated grazing use. This seasonal closure will allow the BLM to assess the road conditions prior to opening the road in order to prevent resource damage caused by motorized vehicle travel on poor road conditions.

EFFECTIVE DATES: This closure will be effective November 15, 1999. The seasonal closure will be in effect each season from November 15 through June 15 or later if unfavorable weather or road conditions exist which could create resource damage. This closure will remain in effect until modified or rescinded by the Authorized Officer, (BLM Cody Field Manager).

FOR FURTHER INFORMATION CONTACT: Jack Mononi, Range Management Specialist or Michael Blymyer, Field Manager, Cody Field Office, P.O. Box 518, 1002 Blackburn Avenue, Cody, Wyoming 82414. Telephone (307)–587–2216.

SUPPLEMENTARY INFORMATION: The Carter Mountain area (about 7,819 acres) is designated an ACEC. The objective for management of the Carter Mountain ACEC is to protect areas of unique alpine tundra and fragile soils. According to the Carter Mountain ACEC Activity Plan, motorized vehicle use in the ACEC is limited to designated roads and trails. The roads that are open for motorized vehicle use are designated with the white arrow system. Roads, trails and gently sloping areas that are not marked with the white arrow designator are closed to motorized vehicle use at all times. The seasonal closure will close the ACEC to all motorized use, including over-the-snow vehicles from November 15 through June 15 of each season. The Wyoming Game and Fish Department feels that motorized vehicle use can disrupt the migration patterns of all wildlife; however, elk are particularly affected by such use. By restricting motorized vehicle use, the elk will migrate freely in the Carter Mountain area, and remain undisturbed by motorized vehicles in their crucial wintering and calving habitat. This closure will also help in meeting the overall objectives to protect areas of unique alpine tundra and fragile soils in the Carter Mountain ACEC by reducing resource damage that is caused by motorized vehicle use on poor road conditions.

This seasonal use closure applies to public lands in Park County, Wyoming, located approximately 20 miles west of Meeteetse, Wyoming. The designation affects all public lands above 10,000 feet elevation in T. 49., R. 103 W., Sixth Principle Meridian. Motorized vehicle use designations apply to all motorized vehicles with the exceptions of: (1) Any fire, military, emergency, or law enforcement vehicle when used for emergency purposes or any combat support vehicle when used for national defense purposes; (2) any vehicle whose use is expressly authorized by the Bureau of Land Management under permit, lease, license, or contract; and (3) any government vehicle on official business.

Authority for closure orders is provided under 43 CFR subpart 8364.1. Violations of this closure are punishable by a fine not to exceed $1,000 and/or imprisonment not to exceed 12 months.

Dated: September 23, 1999.

Michael Blymyer,

Cody Field Manager.

[FR Doc. 99–25658 Filed 10–1–99; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CA–066–99–1990; CACA–20139 and CACA–22901]

Subject: Proposed Soledad Canyon Sand and Gravel Mining Operation, Los Angeles County, CA

AGENCY: Bureau of Land Management, Department of the Interior, Palm Springs—South Coast Field Office, Desert District, California.

ACTION: Extension of public review period for Draft Environmental Impact Statement.

SUMMARY: The Bureau of Land Management is extending the public comment period on the draft environmental impact statement (EIS) originally released in May 1999 to allow time to consider new information on air quality and possibly other issues. BLM will prepare a supplement to the draft EIS that will primarily consider the new information, and will make the supplement available for public review period by November 17, 1999 for at least 45 days prior to the end of the extended public comment period. The supplement will also analyze a new proposal from the applicant to transport mine materials by a conveyor belt system rather than by open trucks as originally proposed in the original draft EIS released last May and other issues, if necessary.

A separate **Federal Register** Notice of Availability will be published when the supplement is released to the public. BLM will continue to accept comments on the May draft EIS, as well as comments on the supplement, until January 3, 2000. All substantive public comments received, and BLM's responses, will be incorporated in a final EIS to be published in 2000.

DATES: Comments must be submitted in writing no later than January 3, 2000.

ADDRESSES: Written comments shall be mailed to the following address: Mr. James G. Kenna, Field Manager, Bureau of Land Management, Palm Spring—South Coast Field Office, 690 W. Garnet Avenue, P.O. Box 1260, North Palm Springs, California 92258. Comments may also be submitted by electronic mail (e-mail) to the following address: Palm Springs FO CA–EMAIL.

FOR ADDITIONAL INFORMATION CONTACT: Ms. Elena Misquez, BLM, Palm Springs—South Coast Field Office, P.O. Box 1260, North Palm Springs, CA 92258, telephone 760–251–4810.

James G. Kenna,

Field Manager.

[FR Doc. 99–25686 Filed 10–1–99; 8:45 am]

BILLING CODE 4310–40–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–060–1310–00]

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability of the Final Environmental Impact Statement.

SUMMARY: Pursuant to the National Environmental Policy Act (NEPA) and implementing regulations, the Bureau of Land Management (BLM) announces the availability of the Final Environmental Impact Statement (FEIS) for the Wyodak Coalbed Methane Development Project. The FEIS analyzes the potential impacts and cumulative effects of proposed coalbed methane (CBM) development on Federal and non-Federal lands in Campbell, Johnson, and Converse Counties, Wyoming.

The FEIS is published in abbreviated format. Reviewers will need the ''Wyodak Coalbed Methane Project Draft Environmental Impact Statement'' (DEIS), BLM, May 1999, for review of the complete EIS. Additional analysis and/or specific changes (errata) to the text of the DEIS are found in each chapter of this FEIS.

DATES: BLM will accept comments on the FEIS for a period of 30 days from the date the Environmental Protection Agency (EPA) publishes their Notice of Availability (NOA) of the FEIS in the **Federal Register**. We anticipate that EPA will publish its NOA on October 1, 1999.

ADDRESSES: Send written comments to: Field Manager, Bureau of Land Management, Buffalo Field Office, 1425 Fort Street, Buffalo, WY 82834.

FOR FURTHER INFORMATION CONTACT: Richard Zander, phone: (307) 684–1100. Copies of the FEIS may be obtained from the following BLM offices: Buffalo Field Office, 1425 Fort Street, Buffalo, Wyoming 82834, (307) 684–1100; Casper Field Office, 1701 East E Street, Casper, Wyoming 82601 (307) 261–7600; and Wyoming State Office, 5353 Yellowstone Road, Cheyenne, Wyoming 82009, (307) 775–6256.

SUPPLEMENTARY INFORMATION: BLM received fifty-two comment letters on the DEIS addressing six basic topics: groundwater (the water model and monitoring); surface water (amounts produced, water management plans, and wetlands); air quality (modeling, authorizing actions, emissions, and air quality related values); geology (development conflicts, coal fires, methane seepage, and subsidence); wildlife and fisheries (programmatic versus site specific analysis, unanticipated new development, and mitigation); and land use (wilderness study area impacts, access, on lease/off lease Federal authority, and reclamation). All comment letters received have been reproduced in the FEIS. All comments were considered and included as part of the BLM decisionmaking process.

Based on new and additional information provided by commenters, the groundwater model was rerun. This yielded a better calibrated prediction of modeled drawdowns under the Proposed Action and under Alternative One.

Comments, including names and street addresses of respondents, will be available for public review at the Bureau of Land Management, Buffalo Field Office, 1425 Fort Street, Buffalo, Wyoming, during regular business hours (8:00 a.m. to 4:30 p.m.), Monday through Friday, except holidays, and may be published as part of the Record of Decision. Individual respondents may request confidentiality. If you wish to withhold your name or street address from public review or from disclosure under the Freedom of Information Act, you must state this prominently at the beginning of your written comment. Such requests will be honored to the extent allowed by law. All submissions from organizations or businesses, and from individuals identifying themselves as representatives of officials of organizations or businesses, will be made available for public inspection in their entirety.

Dated: September 28, 1999.

Alan L. Kesterke,

Associate State Director.

[FR Doc. 99–25687 Filed 10–1–99; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management.

[AK–910–1410–00]

Alaska Resource Advisory Council Meeting

AGENCY: Bureau of Land Management, Interior

ACTION: Notice of Alaska Resource Advisory Council Meeting.

SUMMARY: The BLM Alaska Resource Advisory Council will meet Wednesday, November 3, 1999, from 9:30 a.m. until 4:30 p.m. and Thursday, November 4, 1999, from 9 a.m. until 3 p.m. The council will review BLM land management issues and take public comment on those issues.

The meeting will be held at the BLM Alaska State Office, located on the 4th floor of the Anchorage Federal Office Building at 7th and C Street. The entire meeting is open to the public with public comment taken from 1–2 p.m. Thursday, November 4. Written comments may be submitted at the meeting or mailed to the address below.

ADDRESSES: Inquiries about the meeting should be sent to External Affairs, Bureau of Land Management, 222 W. 7th Avenue, #13, Anchorage, AK 99513–7599.

FOR FURTHER INFORMATION CONTACT: Teresa McPherson, (907) 271–5555.

Donald L. Hinrichsen,

Acting State Director.

[FR Doc. 99–25594 Filed 10–1–99; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT–952–09–1420–00]

Montana: Filing of Plat of Survey

AGENCY: Bureau of Land Management, Montana State Office, Interior.

ACTION: Notice.

SUMMARY: The plats of survey of the following described land are scheduled to be officially filed in the Montana State Office, Billings, Montana, thirty (30) days from the date of this publication.

The plat, in three sheets, representing the dependent resurvey of portions of the Base Line, through Range 26 East, certain subdivisional lines, adjusted original meanders of the right bank of the Yellowstone River, and certain Certificates of Survey, and the survey of portions of Coburn Road and the Lockwood Ditch, a warranty deed, and new meanders of the right bank of the Yellowstone River, Township 1 North and Township 1 South, Ranges 26 East, Principal Meridian, Montana, was accepted September 20, 1999.

This survey was executed at the request of the Bureau of Land Management, Billings Field Office, and was necessary to identify the boundaries of the Four Dances Public Area.

Copies of the preceding described plats will be immediately placed in the open files and will be available to the public as a matter of information.

If a protest against this survey, as shown on this plat, is received prior to the date of the official filing, the filing will be stayed pending consideration of the protest. This particular plat will not be officially filed until the day after all protests have been accepted or dismissed and become final or appeals from the dismissal affirmed.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, 5001 Southgate Drive, P.O. Box 36800, Billings, Montana 59107–6800.

Dated: September 22, 1999.

Daniel T. Mates,

Chief Cadastral Surveyor, Division of Resources.

[FR Doc. 99–25664 Filed 10–1–99; 8:45 am]

BILLING CODE 4310–DN–P

DEPARTMENT OF THE INTERIOR

National Park Service

Keweenaw National Historical Park Advisory Commission Meeting

AGENCY: National Park Service.

ACTION: Notice of meeting.

SUMMARY: This notice announces an upcoming meeting of the Keweenaw National Historical Park Advisory Commission. Notice of this meeting is required under the Federal Advisory Committee Act (Pub. L. 92–463).

DATES: October 26, 1999; 8:30 a.m. until 4:30 p.m.

ADDRESSES: Keweenaw National Historical Park Headquarters, 100 Red Jacket Road (2nd floor), Calumet, Michigan 49913–0471.

The Chairman's welcome; minutes of the previous meeting; update on the general management plan; update on park activities; old business; new business; next meeting date; adjournment. This meeting is open to the public.

FOR FURTHER INFORMATION CONTACT: Superintendent, Keweenaw National Historical Park, Frank C. Fiala, P.O. Box 471, Calumet, Michigan 49913–0471, 906–337–3168

SUPPLEMENTARY INFORMATION: The Keweenaw National Historical Park was established by Public Law 102–543 on October 27, 1992.

Dated: September 23, 1999.

David N. Given,

Deputy Regional Director, Midwest Region.

[FR Doc. 99–25744 Filed 10–1–99; 8:45 am]

BILLING CODE 4310–70–P

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before September 25, 1999. Pursuant to § 60.13 of 36 CFR Part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, 1849 C St. NW, NC400, Washington, DC 20240. Written comments should be submitted by October 19, 1999.

Carol D. Shull,

Keeper of the National Register.

ARKANSAS

Garland County

Kraemer—Harman House, 513 Second St., Hot Springs vicinity, 99001258

Plaza Apartments, 610 Spring St., Hot Springs vicinity, 99001259

Izard County

Jeffery Cemetery, Approx. 6 mi. W of AR 9, 1 mi. N of Mount Olive access road, Mount Olive vicinity, 99001261

White County

Bradford City Hall—Byers Masonic Lodge, 302 W. Walnut St., Bradford, 99001260

CALIFORNIA

Kern County

Tehachapi Railroad Depot, 101 W. Tehachapi Blvd.,
Tehachapi, 99001263

San Francisco County

Otis Elevator Company Building, 1 Beach St., San Francisco, 99001265

Solano County

Bird and Dinkelspiel Store, 2145 Collinsville Rd., Bird's Landing, 99001264

COLORADO

El Paso County

Lennox House, (Colorado College MPS), 1001 N. Nevada Ave., Colorado Springs, 99001266

IOWA

Mahaska County

McNeill, W.A., House, 1282 C Ave. East, Oskaloosa, 99001267

Woodbury County

Mount Sinai Temple, 1320 Nebraska St., Sioux City, 99001268

MINNESOTA

Norman County

Zion Lutheran Church, Co. Hwy. 3, Shelly vicinity, 99001269

N. MARIANA ISLANDS

Tinian Municipality

Unai Dangkulo Petroglyph Site, Address Restricted, Unai Dangkulo vicinity, 99001270

OHIO

Summit County

Botzum Farm, (Agricultural Resources of the Cuyahoga Valley MPS) 3486 Riverview Rd., Cuyahoga Falls vicinity, 99001271

VERMONT

Chittenden County

Howard Mortuary Chapel, 455 North Ave., Burlington, 99001272

WISCONSIN

Lafayette County

Prairie Spring Hotel, WI 23 S, Willow Springs, 99001273

[FR Doc. 99–25743 Filed 10–1–99; 8:45 am]

BILLING CODE 4310–70–P

DEPARTMENT OF JUSTICE

Antitrust Division

[Civil No. 1:98 CV 1616 (AA)]

United States, States of Ohio, Arizona, California, Colorado, Florida, Maryland, Michigan, New York, Texas, Washington and Wisconsin and Commonwealths of Kentucky and Pennsylvania v. USA Waste Services, Inc., Dome Merger Subsidiary, and Waste Management, Inc.

Response to Public Comments on Antitrust Consent Decree

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that on September 14, 1999, the United States filed its responses to public comments on the proposed Final Judgment in *United States, et al.* v. *USA Waste Services, Inc., et al.*, Civil No. 1:98 CV 1616 (AA) (N.D. Ohio, filed July 16, 1998), with the United States District Court in Cleveland, Ohio.

On July 16, 1998, the United States and 13 states filed a civil antitrust complaint, which alleges that USA Waste Services proposed acquisition of Waste Management would violate Section 7 of the Clayton Act, 15 U.S.C. 18, by substantially lessening competition in waste collection and/or disposal services, or both, in a number of markets around the country, including Baltimore, MD; Akron/Canton, Cleveland and Columbus, OH; Denver, CO; New York, NY; Los Angeles, CA; Detroit, Flint and Northern Michigan; Miami; FL; Houston, TX; Louisville, KY; Milwaukee, WI; Philadelphia, Pittsburgh, and Allentown, PA; Tucson, AR; Portland, OR; and Gainesville, FL.

The proposed Final Judgment, filed on July 16, 1998, requires USA Waste and Waste Management to divest commercial waste collection and/or municipal solid waste disposal operations in each of the geographic areas alleged in the Complaint. A modified version of the proposed Judgment (''Modified Final Judgment''), filed on September 14, 1999, would eliminate the defendants' contingent obligation to divest one New York City transfer station (the Brooklyn Transfer Station, located on Scott Avenue).

Public comment on the proposed Judgment was invited within the statutory 60-day comment period. The public comments and the United States' responses thereto are hereby published in the **Federal Register** and have been filed with the Court. Copies of the Complaint Hold Separate Stipulation and Order, proposed Final Judgment, Competitive Impact Statement, and the United States' Certificate of Compliance with Provisions of the Antitrust Procedures and Penalties Act (to which the public comments and the United States' responses are attached), proposed Modified Final Judgment, and the Memorandum of the United States in Support of Entry of the Proposed Modified Final Judgment are available for inspection in Room 215 of the Antitrust Division, Department of Justice, 325 7th Street, NW, Washington, DC 20530 (telephone: 202–514–2481), and at the Office of the Clerk of the United States District Court for the Northern District of Ohio, Eastern Division, 201 Superior Avenue, Cleveland, OH 44114.

Copies of any of these materials may be obtained upon request and payment of a copying fee.

Constance K. Robinson,]

Director of Operations & Merger Enforcement Antitrust Division.

Memorandum of the United States in Support of Entry of the Proposed Modified Final Judgment

I. Introduction

A. The Procedural Background

On July 16, 1998, the United States, and the states of Ohio, Arizona, California, Colorado, Florida, Maryland, Michigan, New York, Texas, Washington, and Wisconsin, and the commonwealths of Kentucky and Pennsylvania filed a civil antitrust complaint, which alleged that USA Waste Services, Inc.'s (''USA Waste's'') acquisition of Waste Management, Inc. would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The Complaint alleged that in 19 geographic areas around the country, the defendants were two of the most significant competitors in commercial waste collection, or disposal of municipal solid waste (*i.e.*, operation of landfills, transfer stations and incinerators), or both services, and that the elimination of competition as a result of the merger could lead to higher prices or reduced services for purchasers of waste collection or disposal services.

At the time the Complaint was filed, the parties submitted a proposal Final Judgment that would require the defendants to divest assets sufficient to preserve the competition that otherwise would be lost in each of the markets in which an antitrust violation had been alleged. The parties also filed—and the Court (per Chief Judge Matia) entered—a Hold Separate Stipulation and Order, allowing the defendants to complete their merger transaction, provided that they keep the assets required to be divested separate from their own business operations and adhere to the terms of the proposed Final Judgment pending the United States' compliance with the notice and comment provisions of the Antitrust Penalties and Procedures Act, 15 U.S.C. 16(b)–(h) (the ''APA'').[1]

B. The Pending Motion To Enter the Proposed Modified Final Judgment

Today, the United States has filed a Certificate of Compliance with Provisions of the Antitrust Procedures

[1] Nothing in the Hold Separate Order, however, prevents the defendants from promptly selling the assets required to be divested to an acceptable purchaser, and in this instance, the defendants chose to do so prior to APPA compliance. In a series of transaction beginning in September 1998 and ending in February 1999, the defendants divested all of the assets available for sale under the decree (except the Baltimore disposal assets) to Republic Services, Inc. (''Republic'') for approximately $500 million. In October 1998, the defendants sold the Baltimore disposal assets to Browning-Ferris Industries, Inc. (''BFT'') for roughly $60 million over a ten-year time period.

The United States, after consultation with the relevant states, concluded that Republic and BFI were both acceptable purchasers under the terms of the proposed Judgment. The defendants informed the Court of the pending sales of these assets before consummation. (See Letter from James R. Weiss, counsel for defendants USA Waste and Waste Management, to Honorable Ann Aldrich, United States District Judge, dated October 30, 1998).

and Penalties Act, certifying that it has notified the public of the terms of the proposed settlement and fully responded to the public comments that were received. The parties also have submitted, and moved the Court to enter, a slightly modified version of the Final Judgment that was originally proposed. A copy of the proposed Modified Final Judgment is attached hereto as Exhibit A.

The modification affects only a single waste transfer station in a single market, New York City, NY.[2] As originally conceived, the proposed Final Judgment contained a contingent divestiture, requiring the defendants to sell the Brooklyn (or ''Scott Avenue'') Transfer Station, a 1,000 ton/day waste disposal facility located in Brooklyn, NY, if the proposed Nekboh Transfer Station, previously sold by the defendants, has not been licensed or permitted within a year after entry of the proposed Final Judgment. See Final Judgment, §§ II(C)(2)(i) and IV(B). The Modified Final Judgment would eliminate the contingent divestiture of the Scott Avenue Transfer Station (*i.e.*, remove §§ II(C)(2)(i) and IV(B) from the decree) and substitute instead an immediate divestiture of either of two other New York transfer stations, Gesuale (500 ton/day) or Vacarro (400 ton/day).[3]

C. Reasons Why Entry of the Proposed Modification Would Be in the Public Interest

As explained below, the United States strongly believes that entry of the proposed Modified Final Judgment would be in the public interest. The major reasons for including this transfer station in the proposed decree are no longer valid. Divestiture of the Scott Avenue Transfer Station is not necessary to ensure the defendants' continued cooperation in licensing the Nekboh site since the purchaser of the Nikboh permit application has the financial resources and economic incentive to pursue on its own licensing of that transfer station. Further, divestiture of the Scott Avenue Transfer Station is not necessary to promote competition in the disposal of the New York City's commercial waste because that transfer station is incapable of effectively competing for such waste, having entered into a long term contract to dispose of the city's residential waste.

Finally, the United States agreed to join the defendants in a motion to eliminate the Scott Avenue Transfer Station from the pending Final Judgment in response to the defendant's twin commitments to divest either of two smaller, but more capable waste disposal facilities in New York City (Gesuale or Vacarro), and two large New York City waste transfer stations subsequently acquired by the defendants from Eastern Environmental Services, Inc. (PJ's and Atlantic Waste).

In our view, each of these reasons provides an independent basis for concluding that entry of the proposed Modified Final Judgment would be in the public interest, and taken together, they appear dispositive of that issue. (The State of New York, the only state plaintiff whose interests are directly affected by the proposed modification, has authorized us to state that it concurs in the motion to enter the proposed Modified Final Judgment and believes the modification to be in the public interest.)[4]

II. Statement of the Case

A. The Complaint, Proposed Final Judgment and Competitive Impact Statement

Although the Complaint in this case alleges that the defendants' combination would eliminate competition in a number of waste collection and disposal markets around the country, the critical issues here relate to competition in the disposal of New York City waste. In that market, the Complaint alleged, defendant USA Waste's acquisition of defendant Waste Management's transfer stations in Brooklyn and Bronx, NY, would substantially lessen competition in the disposal of the city's commercial waste.[5] The Final Judgment sought to remedy this problem by requiring the defendants to divest Waste Management's only waste disposal asset in the Bronx—the SPM Transfer Station [Final Judgment, §§ II (C)(2)(i)(1) and IV]—and to divest USA Waste's only disposal assets in Brooklyn, the All City Transfer Station [*id*, § II(C)(2)(i)(3) and IV] and an application for a permit to construct and operate a waste transfer station at 2 North 5th Street, a site known as the proposed Nekboh Transfer Station [*id.*, § II(C)(2)(i)(2) and IV(B)]. The proposed Judgment further provided that if the divested Nekboh site was not permitted within one year after entry of the Final Judgment, then the defendants must sell a fourth waste transfer station in New York, the Brooklyn (or ''Scott Avenue'') Transfer Station, located at 458 Scott Avenue [*id.*, § II (c)(2)(i)(4) and IV].

The defendants' divestiture of the proposed Scott Avenue Transfer Station was seen as a way both to ensure the defendant's continued cooperation and assistance in permitting the proposed Nekboh Transfer Station and to promote competition in disposal of New York City's commercial waste if, for some reason, that transfer station was not permitted and built within the prescribed time period.

In August 1998, however, the defendants agreed to divest the Nekboh permit to Republic, one of the nation's largest waste collection and disposal firms, which has over $2 billion in total assets. And in early September 1998, the City of New York awarded the Scott Avenue Transfer Station a three to five-year contract for the disposal of the city's residential waste. With the bulk of the facility's available capacity committed under a long-term municipal contract for disposal of residential

[2] To put the proposed modification in perspective, the proposed Final Judgment orders the defendants to divest ownership rights in twelve waste transfer stations (including four in New York City) and disposal rights in as many as five other transfer stations. In addition, the defendants were ordered to divest disposal or ownership rights in as many as 18 different landfills.

[3] The defendants' commitment to sell either the Gesuale or Vacarro transfer stations and the government's agreement to join the defendants in moving for the entry of the proposed Modified Final Judgment, were key elements of a consent decree, filed in December 1998 in federal district court in Brooklyn, NY, and entered in May 1999 in settlement of an antitrust suit brought by the United States, the State of New York, and others against the defendants' acquisition of a major New York City waste industry rival, Eastern Environmental Services, Inc. See Final Judgment in United States, States of New York and Florida, and Commonwealth of Pennsylvania v. Waste Management, Inc., Eastern Environmental Services, Inc., *et. al*, Civil No. 98–7168 (E.D.N.Y., entered May 25, 1999) (the ''Waste/Eastern'' case), attached hereto as Exhibit B. The federal district court in Brooklyn (J. Block), following public notice, comment, and government response, entered the Waste/Eastern Final Judgment on May 25, 1999, concluding that an exchange of the contingent divestiture of the Scott Avenue Transfer Station in Brooklyn, NY, for an immediate divestiture of the Scott Avenue Transfer Station in Brooklyn, NY, for an immediate divestiture of one of the two smaller New York transfer stations would be ''in the public interest.'' See the Waste/Eastern Judgment, §§ II(D)(2)(c), IV(A)(2), IV(L), and XIII, Ex. B at 5, 7–8, 12 and 22 (emphasis supplied).

Although this Court must decide for itself whether the Modified Final Judgment submitted for entry in this case would be in the public interest, the judgment of the federal district court in Brooklyn, NY with respect to competitive issues concerning New York City waste transfer stations has some bearing on that issue.

[4] The other twelve government plaintiffs also concur and urge the Court to enter the proposed Modified Final Judgment.

[5] *Commercial waste* is municipal solid waste generated by commercial establishments such as restaurants or department stores, private office and apartment buildings. ''Residential waste,'' on the other hand, is municipal solid waste produced by single family households and state and municipal agencies. In New York, commercial waste must be collected and disposed of by private firms. Residential waste is collected and disposed of by the city, which, until recently, maintained its own network of disposal facilities. New York, however, has recently begun contracting with private firms for disposal of the city's residential waste since the city landfill must be closed by 2001.

waste, if the defendants were to divest the Scott Avenue Transfer Station, the new owner could not complete effectively in the processing and disposal of New York City's private commercial waste, the relevant market the government alleged would be adversely affected by the defendants' combination.

B. The Defendants' Acquisition of Eastern Environmental Services, Inc. and the Parties' Resolution of the Competitive Issues Concerning the New York City Waste Disposal Market

In early fall 1998, the defendants [6] agreed to acquire Eastern Environmental Services, Inc. (''Eastern''), a major competitive rival in the disposal of New York City's residential and commercial waste. This agreement precipitated another government antitrust suit, filed in federal district court in Brooklyn, NY, in which the United States and the State of New York alleged that the transaction, if consummated, would substantially reduce competition in waste disposal services in New York.[7] The parties agreed to settle the Waste/Eastern case in late December 1998 and, inter alia, to resolve all of the outstanding issues relating to the defendants' acquisition of competitors in the New York market.

The defendants agreed to divest the two New York waste transfer stations that they would acquire from Eastern, PJ's and Atlantic Waste Disposal. Waste/Eastern a Final Judgment, § § II(D)(2)(1) and (b), IV(A)(1), Ex. B at 5, 7–8. They also agreed to divest either of two smaller waste transfer stations, Gesuale or Vacarro, both located in New York, NY.[8] *Id.* §§ II(D)(2)(c) and IV(A)(2). Because the United States and the State of New York concluded that circumstances had changed and that an immediate divestiture of a transfer station with capacity for disposal of commercial waste was competitively better than a contingent divestiture of Scott Avenue Transfer Station, which no longer had such capacity, they agreed to move for entry of a Modified Final Judgment that would eliminate the requirement that the defendants divest the Scott Avenue Transfer Station if the Nekboh site is not permitted within the prescribed one-year time period. *Id.* § IV(L), Ex. B at 12.

In essence, the United States and the State of New York agreed to a swap, trading a future divestiture of the capacity-constrained Scott Avenue Transfer Station for an immediate divestiture of either one of two small New York transfer stations, both with capacity available for processing commercial waste, and the two waste transfer stations, PJ's and Atlantic Waste, that the defendants had agreed to acquire from Eastern.

The parties filed the proposed Waste/Eastern Judgment on December 31, 1998. Following public notice and response to public comments,[9] the federal district court in Brooklyn entered the Final Judgment in the Waste/Eastern case on May 25, 1999, after concluding that that decree, including the provision requiring the United States and the State of New York to join the defendants in a joint motion to modify the Final Judgment in this case, would be ''in the public interest.'' Waste/Eastern Final Judgment, § XIII, Ex. B at 22.

III. Argument

A. Entry of the Modified Final Judgment Would Be in the Public Interest

At this stage of the proceedings, after the United States has certified its compliance with the public notice and response to comment requirements of the APPA, the Court must determine whether entry of the proposed Modified Final Judgment ''is in the public interest.'' 15 U.S.C. 16(e). As noted in our Competitive Impact Statement, in conducting this inquiry, ''the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' [10] Rather,

> absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. *Mid-America Dairymen, Inc.*, 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977). And ''a proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' (citations omittted).'' [11]

B. The Public Comments on the Proposed Final Judgment Were Unpersuasive

''[T]his is not a case wherein objectors speak with one voice,'' *United States* v. *Natl. Broadcasting Co.*, 449 F. Supp. 1127, 1144 (C.D. Cal. 1978) (distinguishing *United States* v. *Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975), where the court confronted ''unified opposition'' to a proposed consent decree). Rather, in this case, the 13 public comments submitted on the proposed Final Judgment expressed a wide variety of views, which the United States carefully considered and addressed, but which ultimately failed to persuade the United States to withdraw its consent to entry of the proposed Judgment. (See Certificate of Compliance, Ex. 3–15.)

In its responses to the public comments, the United States carefully explained why requiring the defendants to make extensive divestitures (*id.*, Ex. 7–9, 12–15) or imposing more onerous restrictions on the defendants' business operations post-merger (*id.*, Ex. 1, 10) were unwarranted under the circumstances.[12] In our view, the proposed Final Judgment, without these additional requirements, falls well ''within the range of acceptability'' and the broad ''reaches of the public

[6] After the defendants USA Waste Services, Waste Management and Dome Merger Subsidiary merged, they named the new firm ''Waste Management, Inc.''

[7] The complaint also alleged the merger would create competitive problems in collection and disposal markets in Pennsylvania and Florida, and those states were co-plaintiffs in that lawsuit.

[8] The defendants later opted to divest the Vacarro Transfer Station.

[9] In accordance with the APPA, the United States published notice of the Waste/Eastern Judgment in the New York Times and the Washington Post, newspapers of general circulation in New York, NY and Washington, DC. The United States also published a copy of the complaint, proposed judgment and competitive impact statement in the **Federal Register** on February 26, 1999 (64 Fed. Reg. 9527), and published its responses to the public comments on the Waste/Eastern decree on June 11, 1999 (64 FR 31638).

[10] 119 Cong. Rec. 24598 (1973). See *United States* v. *Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975). A ''public interest'' determination can be made properly on the basis of the government's competitive impact statement and response to comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. 93–1463, 93rd Cong. 2d Sess. 8–9, reprinted in (1974) U.S. Code Cong. & Ad. News 6535, 6538.

[11] *United States* v. *American Tel. and Tel. Co.*, 552 F. Supp. 131, 150 (D.D.C. 1982), aff'd sub nom. *Maryland* v. *United States*, 460 U.S. 1001 (1983), quoting *United States* v. *Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975); *United States* v. *Alcan Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985).

[12] The only comments related to the contingent divestiture of the Scott Avenue transfer Station were from individuals who favored converting the proposed site for the Nekboh transfer Station into an open space or a public park (see Certificate of Compliance, Ex. 4–6), comments which do not implicate the proposed modification.

interest.'' *United States* v. *AT&T*, 552 F. Supp. at 150.

C. Removing the Contingent Divestiture of the Scott Avenue Transfer Station From the Proposed Judgment Would Be in the Public Interest

This case, however, is somewhat atypical because the Modified Final Judgment that the parties now urge the Court to enter differs somewhat from the Final Judgment that they originally proposed.[13] The United States strongly believes that the difference—removal of the Scott Avenue Transfer Station from the modified decree—is a minor change that would make the Modified Final Judgment more effective and procompetitive than the earlier decree the parties proposed.

First, the defendants' divestiture of the Scott Avenue Transfer Station is not necessary to ensure that the Nekboh Transfer Station is permitted. As noted above, the defendants subsequently sold the permit application for the Nekboh site to Republic, now the nation's third largest waste collection and disposal firm. With over $2 billion in annual revenues, Republic certainly possesses the management skill, financial wherewithal and economic incentive to pursue on its own a permit for the proposed Nekboh Transfer Station. In addition, the proposed Modified Final Judgment requires the defendants to cooperate and enjoins them from interfering in any way with Republic's efforts to obtain a permit for the Nekboh site. Modified Final Judgment, §§ IV(H) and VIII (B) and (C), Ex. A at 20, 28. Thus, forcing a divestiture of the Scott Avenue Transfer Station would not advance the timing on the permitting and opening of the Nekboh site.

Moreover, a divestiture of the defendants' Scott Avenue Transfer Station would not promote competition in the disposal of New York City's private commercial waste because as a consequence of a long-term municipal contract, virtually all of that transfer station's capacity is committed to processing the city's residential waste.

In short, the compromise the parties reached in the Waste/Eastern case—returning the Scott Avenue Transfer Station for three transfer stations that would resolve the competitive problems created by the defendants' series of acquisitions of rivals in the New York City market for disposal of commercial waste—not only avoided an expensive and resource-intensive trial on the merits in that case, but also obtained immediate relief, not merely a contingent remedy, that would be more effective than that contained in the proposed Final Judgment in this case. In these circumstances, the United States strongly believes that entry of the proposed Modified Final Judgment in this case is squarely in the public interest.

IV. Conclusion

For the foregoing reasons, and for the reasons set forth in the United States' Certificate of Compliance with Provisions of the Antitrust Procedures and Penalties Act, the United States respectfully requests that this Court enter the proposed Modified Final Judgment.

Dated: September 13, 1999.

Respectfully submitted,

Anthony E. Harris, Illinois Bar No. 1133713,
U.S. Department of Justice, Antitrust Division, Litigation II, 1401 H Street, NW, Suite 3000, Washington, DC 20530, (202) 307–6583.

Modified Final Judgment

Whereas, plaintiffs, the United States of America, the State of Ohio, the State of Arizona, the State of California, the State of Colorado, the State of Florida, the Commonwealth of Kentucky, the State of Maryland, the State of Michigan, the State of New York, the Commonwealth of Pennsylvania, the State of Texas, the State of Washington, and the State of Wisconsin, and defendants USA Waste Services, Inc. (''USA Waste'') and Waste Management, Inc. (''WMI''), by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting any evidence against or an admission by any party with respect to any issue of law or fact herein;

And whereas, defendants have agreed to be bound by the provisions of this Final Judgment pending its approval by the Court;

And whereas, the essence of this Final Judgment is the prompt and certain divestiture of the Relevant Disposal Assets and Relevant Hauling Assets to assure that competition is not substantially lessened;

And whereas, plaintiffs require defendants to make certain divestitures for the purpose of establishing one or more viable competitors in the waste disposal business, the commercial waste hauling business, or both in the specified areas;

And whereas, defendants have represented to the plaintiffs that the divestitures ordered herein can and will be made and that defendants will later raise no claims of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

Now, therefore, before the taking of any testimony, and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby *Ordered, adjudged, and decreed* as follows:

I

Jurisdiction

This Court has jurisdiction over each of the parties hereto and over the subject matter of this action. The Complaint states a claim upon which relief may be granted against defendants, as hereinafter defined, under Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

II

Definitions

As used in this Final Judgment:

A. *USA Waste* means defendant USA Waste Services, Inc., a Delaware corporation with its headquarters in Houston, Texas, and includes its successors and assigns, and its subsidiaries (including Dome Merger

[13] There is no requirement that the government must republish the settlement or resolicit public comment simply because it proposes that the Court enter a modified version of the final judgment originally proposed. The reported cases interpreting the APPA strongly suggest that republication is unnecessary. In *United States* v. *Nat'l. Broadcasting Co.*, 449 F. Supp. 1127 (C.D. Cal. 1978), modified, 1993–2 Trade Case. (CCH) ¶ 70,418 (C.D. Cal. 1993), the government amended a proposed consent decree after comments were received, then submitted the amended proposed judgment for approval by the court. The court said that ''the requirements of the APPA concerning publication and consideration of public comments have been satisfied'' (*id.* at 1129), and subsequently approved the decree. *Id.* at 1145. See also *Massachusetts Sch. of Law* v. *United States*, 118 F.3d 776, 778 (D.C. Cir. 1997) (relating the district court's decision to enter a consent judgment after several modifications had been made following the end of the public comment period). In *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 225 (D.D.C. 1982) (''AT&T''), aff'd sub nom. *Maryland* v. *United States*, 460 U.S. 1001 (1983), Judge Greene approved a proposed consent decree after the comment period had expired, also on the condition that the decree be amended to add a new section. In none of the cases did the court require republication of the amended proposed consent decree before entry. Rather, by eventually entering the consent judgments, the court in each case implicitly concluded that the requirements of the APPA were satisfied by the initial publication, comment, and response. See, *e.g.*, Nat'l. Broadcasting Co., 449 F. Supp. at 1129.

In any event, to the extent notice and opportunity to comment is necessary, it was provided when the United States complied with the APPA before entry of the Final Judgment in the Waste/Eastern case. The competitive impact statement filed in that case discussed the substitution of the Gesuale and Vacarro transfer stations for the Scott Avenue Transfer Station. 64 Fed. Reg. 9538. The Judgment in that case was published in The New York Times, prior to its entry, and thus provided ample notice and opportunity to comment to those persons affected most directly by the waste disposal relief in the New York City market. See the Certificate of Compliance in the Waste/Eastern case, 64 FR 31638, 31639 (July 11, 1999).

Subsidiary), divisions, groups, affiliates, directors, officers, managers, agents, and employees.

B. *WMI* means defendant Waste Management, Inc., a Delaware corporation with its headquarters in Oak Brook, Illinois, and includes its successors and assigns, and its subsidiaries, divisions, groups, affiliates, directors, officers, managers, agent, and employees.

C. *Relevant Disposal Assets* means, unless otherwise noted, with respect to each landfill or transfer station listed and described herein, all tangible assets, including all fee and leasehold and renewal rights in the listed landfill or transfer station; the garage and related facilities; offices; landfill- or transfer station-related assets including capital equipment, trucks and other vehicles, scales, power supply equipment, interests, permits, and supplies; and all intangible assets of the listed landfill or transfer station, including landfill- or transfer station-related customer lists, contracts, and accounts, or options to purchase any adjoining property. Relevant Disposal Assets, as used herein, includes each of the following properties:

1. Landfills and Airspace Disposal Rights

a. Akron/Canton, OH

WMI's Countywide R&D Landfill, located at 3619 Gracemont Street, SW, East Sparta, OH 44626, and known as the Countywide Landfill;

b. Columbus, OH

USA Waste's Pine Grove Landfill, located at 5131 Drinkle Road, SW, Amanda, OH 43102;

c. Denver, CO

USA Waste's Front Range Landfill, located at 1830 County Road 5, Erie, CO 80516–8005; and at purchaser's option, a two-year waste supply agreement that would require defendants to dispose of a minimum of 150 tons/day of waste at the Front Range Landfill, at disposal fees to be negotiated between purchaser and defendants;

d. Detroit, MI

USA Waste's Carleton Farms Landfill, located at 28800 Clark Road, New Boston, MI, subject to two conditions, *viz*, USA Waste's obligations to (1) dispose of ash from the Greater Detroit Resource Recovery Center's incinerator at a separate monofill cell on this site pursuant to an existing contract, and (2) dispose of waste from the Greater Detroit Resource Recovery Center's bypass transfer station at this landfill, until defendants transfer such obligation to another landfill, which they shall use their best efforts to accomplish expeditiously;

e. Flint, MI

USA Waste's Brent Run Landfill, located at Vienna Road, Montrose Township, Genesee County, MI;

f. Houston, TX

(1) USA Waste's Brazoria County Landfill, located at 10310 FM–523, Angleton, TX 77515; and

(2) Airspace disposal rights at WMI's Security Landfill, located at 19248 Highway 105E, Cleveland, TX, or WMI's Atascocita Landfill, located at 2020 Atascocita Road, Humble, TX, or both, pursuant to which defendants will sell to one or more purchasers rights to dispose of at least 3.0 million tons of waste, over a ten-year period, under the following minimum terms and conditions:

(a) The purchaser (or all purchasers combined), or their designee(s), may dispose of up to 360,000 tons of waste/year, or a maximum of 1,200 tons of waste/day, at either, or both of, WMI's Security or Atascocita landfills. If more than one person purchases the airspace disposal rights, the minimum annual and daily disposal rates for each purchaser shall be specified in its purchase agreement, and the total of all purchasers' maximum disposal amounts shall be no less than 360,000 tons/year and 1,200 tons/day;

(b) For each purchaser of airspace rights (or their designee), defendants must commit to operate the Atascocita Landfill and Security Landfill gates, scale houses, and disposal areas under terms and conditions no less favorable than those provided to defendants' own vehicles or to the vehicles of any municipality in the metropolitan Houston area, except as to price and credit terms;

(c) At the end of the first five years of the agreement, the purchaser or purchasers will have been considered to have used a minimum of 1.4 million tons of airspace and can have no more than 1.6 million tons left to use under the purchase agreements. If there is more than one purchaser of the airspace, the minimum amounts used during the first five years shall be specified in their purchase agreements, but the total amount shall be no more than 1.4 million tons; and

(d) At the end of the first seven years of the agreement, the purchaser (or purchasers) will have been considered to have used a minimum of 2.0 million tons of airspace and can have no more than 1.0 million tons left to use under the purchase agreements. If there is more than one purchaser of the airspace, the minimum amount used during the first five years shall be specified in their purchase agreements, but the total amount shall be no more than 2.0 million tons;

g. Los Angeles, CA

USA Waste's Chiquita Canyon Landfill, located at 29201 Henry Mayo Drive, Valencia, CA 91355;

h. Louisville, KY

USA Waste's Valley View Landfill, located at 9120 Sulphur Road, Sulphur, KY 40070;

i. Miami, FL

Airspace disposal rights at USA Waste's Okeechobee Landfill, controlled by a subsidiary of USA Waste, and located at 10800 NE 128th Avenue, Okeechobee, FL 34972, pursuant to which defendants will sell a total of 4.3 million tons of airspace, over a 20-year time period, to one or more purchasers, under the following minimum terms and conditions:

(1) The right to dispose of a maximum of 1.8 million tons of South Florida Waste, over a 20-year time period, as follows:

(a) The purchaser (or purchasers) must commit to dispose of no more than 600 tons/day, of South Florida Waste;

(b) The total amount of airspace used in each year may not exceed 150,000 tons; and

(2) Three options for additional airspace at Okeechobee Landfill, exercisable at the sole discretion of the purchaser of the airspace disposal rights, as follows:

(a) *First Option:* The right to dispose of an additional 1.0 million tons of South Florida Waste at the Okeechobee Landfill, for the remaining term of the agreement, as follows:

(i) The amount of airspace used each weekday must be at least 500 tons, but not more than 800 tons (including tonnage disposed of under prior air space commitments); and

(ii) the amount of airspace used in the year the option is exercised, and in each succeeding year over the term of the agreement, may not exceed 225,000 tons (including tonnage disposed of under prior air space commitments);

(b) *Second Option:* Exercisable at any time after the second anniversary of the agreement, and after exercise of the first option, the right to dispose of an additional 1.0 million tons of South Florida Waste at the Okeechobee Landfill, for the remaining term of the agreement, as follows:

(i) The amount of airspace used each weekday must be at least 600 tons, but

not more than 1,000 tons/day (including tonnage disposed of under prior air space commitments); and

(ii) The amount of airspace used in the year Option Two is exercised and in each succeeding year of the life of the rights may not exceed 300,000 tons (including tonnage disposed of under prior air space commitments); and

(c) *Third Option:* Exercisable any time after the fifth anniversary of the agreement, and after exercise of the second option, the right to dispose of an additional 500,000 tons of South Florida Waste, for the remaining term of the agreement, as follows:

(i) The amount of airspace used must be at least 600 tons/weekday, but may not exceed 1,100 tons/weekday (including tonnage disposed of under prior air space commitments);

(ii) The amount of airspace used in the year the third option is exercised, and in each succeeding year of the life of the rights may not exceed 300,000 tons/year (including tonnage disposed of under prior air space commitments); provided, that in any event,

(d) The Okeechobee Landfill Rights shall expire when the purchaser has used the maximum tonnages available under the rights and any exercised options, or twenty years from the date of purchase of the rights, whichever is sooner; and

(e) For each purchaser of airspace rights (or its designee), defendants must commit to operate the Okeechobee Landfill, and its gate, scale house, and disposal area under terms and conditions no less favorable than those provided to defendants' own vehicles or to the vehicles of any municipality in Florida, except as to price and credit terms;

j. Milwaukee, WI

USA Waste's Kestrel Hawk Landfill, located at 1989 Oakes Road, Racine, WI 53406; and WMI's Mallard Ridge Landfill, located at W. 8470 State Road 11, Delavan, WI 53115;

k. New York, NY/Philadelphia, PA

WMI's Modern Landfill & Recycling, located at 4400 Mt. Piscah Road, York, PA 17402, and known as the Modern Landfill;

l. Northeast Michigan

USA Waste's Whitefeather Landfill, located at 2401 Whitefeather Road, Pinconning, MI; and Elk Run Sanitary Landfill, located at 20676 Five Mile Highway, Onaway, MI;

m. Pittsburgh, PA

WMI's Green Ridge Landfill, located at 717 East Huntingdon Landfill Road, Scottdale, PA 15683, and variously known as the Green Ridge Landfill, the Y&S Landfill, or the Greenridge Reclamation Landfill;

n. Portland, OR

USA Waste's North WASCO Landfill, located at 2550 Steele Road, the Dalles, OR 97058; and

2. Transfer Stations, Disposal Rights and Throughput Agreements

a. Akron/Canton, OH

Throughput disposal rights of a maximum of 400 tons/day of waste, for a ten-year time period, at WMI's Akron Central Transfer Station, located at 389 Fountain Street, Akron, OH, under the following terms and conditions:

(1) The purchaser (or its designee) can deliver waste to the Akron Central Transfer Station for processing and, at the purchaser's option, load the processed waste into the purchaser's (or its designee's) vehicles for disposal;

(2) For each purchaser of such disposal rights (or its designee), defendants must commit to operate the listed Akron Central Transfer Station's gate, scale house, and disposal area under terms and conditions no less favorable than those provided to defendants' own vehicles or to the vehicles of any municipality in Ohio, except as to price and credit terms;

b. Baltimore, MD

Disposal rights of at least 600 tons of waste/day, pursuant to which defendants will sell to one or more purchasers rights to dispose, for a five-year time period, under the following terms and conditions:

(1) The purchaser(s) or its designee(s) may dispose of waste at any one or any combination of the following facilities, as specified in its purchase agreement: Southwest Resource Recovery Facility (known as Baltimore RESCO or BRESCO), located at 1801 Annapolis Road, Baltimore, MD 21230; Baltimore County Resource Recovery Facility, located at 10320 York Road, Cockeysville, MD; Western Acceptance Facility, located at 3310 Transway Road, Baltimore, MD; or Annapolis Junction Transfer Station, located at 8077 Brock Bridge Road, Jessup, MD 20794. If more than one person purchases the disposal rights, the minimum daily disposal rates, and the total of all purchasers' maximum disposal amounts at all facilities specified shall be no less than 600 tons/day;

(2) For each purchaser of disposal rights (or its designee), defendants must commit to operate the listed Baltimore, MD area facilities' gates, scale houses, and disposal areas under terms and conditions no less favorable than those provided to defendants' own vehicles or to the vehicles of any municipality in Maryland, except as to price and credit terms;

c. Cleveland, OH

At purchaser's option, either USA Waste's Newburgh Heights Transfer Station, located at 3227 Harvard Road, Newburgh Heights, OH 44105 (and known as the Harvard Road Transfer Station); or all of WMI's right, title and interest in the Strongsville Transfer Station, located at 16099 Foltz Industrial Parkway, Strongsville, OH; provided, however, that the City of Strongsville, owner of the transfer station, approves such sale or assignment. Defendants will exercise their best efforts to secure the assignment to the purchaser of all their rights, title and their interests in the Strongsville Transfer Station, and in the event the purchaser selects Strongsville, defendants will not reacquire any right, title or interest in the Strongsville transfer station. If the contract is not assigned, defendants will enter into a disposal rights agreement with the purchaser (or purchasers), which will provide, in effect, that the purchaser(s) will enjoy all disposal rights and privileges now enjoyed by defendants at the Strongsville Transfer Station, and that defendants will operate the facility's gate, scale house, and disposal areas under terms and conditions no less favorable than those provided to defendant's own vehicles or to the vehicles of any municipality in Ohio, except as to price and credit terms;

d. Columbus, OH

WMI's Reynolds Road Transfer Station, located at 805 Reynolds Avenue, Columbus, OH 43201;

e. Detroit, MI

WMI's Detroit Transfer Station, located at 12002 Mack Avenue, Detroit, MI 48215;

f. Houston, TX

USA Waste's Hardy Road Transfer Station, located at 18784 East Hardy, Houston, TX;

g. Louisville, KY

USA Waste's Poplar Level Road Transfer Station, located at 4446 Poplar Level Road, Louisville, KY;

h. Miami, FL

All USA Waste's right, title, and interest in the Reuters Transfer Station Rights, as conveyed to Chambers Waste Systems of Florida, a subsidiary of USA Waste, pursuant to the Final Judgment in *United States* v. *Reuter Recycling of*

Florida, Inc., 1996–1 Trade Cas. (CCH) ¶ 71,353 (D.D.C. 1996), a copy of which is attached as Exhibit A;

i. New York, NY

(1) WMI's SPM Transfer Station, located at 912 East 132nd Street, Bronx, NY 10452, and all rights and interests, legal or otherwise, that WMI now enjoys, has had or made use of out of the SPM Transfer Station, to deliver waste by truck to rail siding at the Oak Point Rail Yard in the Bronx, NY, and at the Harlem River Yards facility, located at St. Ann's and Lincoln Avenues at 132nd Street, Bronx, NY 10454;

(2) All right, title, and interest in USA Waste's pending application to construct and operate a waste transfer station located at 2 North 5th Street, Brooklyn, NY 11211, and known as the Nekboh Transfer Station; and

(3) USA Waste's All City Transfer Station, located at 246–252 Plymouth Street, Brooklyn, NY 11202;

j. Philadelphia, PA

USA Waste's Girard Point Transfer Station, located at 3600 South 26th Street, Philadelphia, PA 19145; and USA Waste's Quick Way Inc. Municipal Waste Transfer Station, located at SE Corner, Bath and Orthodox Streets, Philadelphia, PA 19137, subject to the conditions that (1) the existing City of Philadelphia waste contract is transferred to a WMI transfer station, which defendants must use their best efforts to accomplish, and (2) until such transfer is effect3ed, USA Waste will be granted throughput capacity at the Quick Way Transfer Station to handle this contract.

D. *Relevant Hauling Assets,* unless otherwise noted, means with respect to each commercial waste collection route or other hauling asset described herein, all tangible assets, including capital equipment, trucks and other vehicles, containers, interests, permits, supplies [except real property and improvements to real property (*i.e.*, buildings)]; and it includes all intangible assets, including hauling-related customer lists, contracts, and accounts.

Relevant Hauling Assets, as used herein, includes the assets in the following locations:

1. Akron, OH

USA Waste's and American Waste Corporation's front-end loader truck (''FEL'') commercial routes that serve the City of Akron and Summit County, Ohio;

2. Allentown, PA

WMI's FEL commercial routes that serve the cities of Allentown and Northampton and Lehigh County, PA;

3. Cleveland, OH

WMI's FEL commercial routes that serve the City of Cleveland and Cuyahoga County, Ohio (not including the northwest quadrant);

4. Columbus, OH

WMI's FEL commercial routes that serve Franklin County, Ohio;

5. Denver, CO

USA Waste's FEL commercial routes that serve the City of Denver, and Denver and Arapahoe County, CO;

6. Detroit, MI

WMI's FEL commercial routes that serve the City of Detroit and Wayne County, MI;

7. Houston, TX

WMI's FEL commercial routes that serve the City of Houston, the Dickinson area, and Harris County, TX;

8. Louisville, KY

USA Waste's FEL commercial routes that serve the City of Louisville and Jefferson County, KY;

9. Pittsburgh, PA

WMI's FEL commercial routes that serve Allegheny County and Westmoreland County, PA, and the garage facility (real estate and improvements) located at the Y&S Landfill;

10. Portland, OR

WMI's FEL commercial routes that serve the City of Portland, OR;

11. Tucson, AZ

USA's Waste's FEL commercial routes that serve the City of Tucson and Pima County, AZ; and

12. Gainesville, FL

WMI's FEL commercial routes that serve Alachua County, FL.

E. *Hauling* means the collection of waste from customers and the shipment of the collected waste to disposal sites. Hauling, as used herein, does not include collection of roll-off containers.

F. *Waste* means municipal solid waste.

G. *Disposal* means the business of disposing of waste into approved disposal sites.

H. *Relevant Area* means the county in which the Relevant Hauling Assets or Relevant Disposal Assets are located and any adjacent city or county, except with respect to the Modern Landfill [*see* Section II(C)(1)(k)], for which the Relevant Area means Philadelphia, PA, and New York, NY.

I. *Relevant State* means the state in which the Relevant Disposal Assets or Relevant Hauling Assets are located, provided however, that state is a party to this Final Judgment. With respect to the Modern Landfill [*see* Section II(C)(1)(k)], the Relevant State means the Commonwealth of Pennsylvania and the State of New York. With respect to section VII, the Relevant State means each state in which the disposal or hauling assets to be acquired are located, provided that state is a party to this Final Judgment.

J. *South Florida Waste* means waste collected, or delivered directly from a transfer station located, in Broward, Dade or Monroe County, FL.

III

Applicability

A. The provisions of this Final Judgment apply to defendants, their successors and assigns, subsidiaries, directors, officers, managers, agents, and employees, and all other persons in active concert of participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

B. Defendants shall require, as a condition of the sale or other disposition of all or substantially all of its assets, or of a lesser business unit that includes defendants' hauling or disposal businesses in any Relevant Area, that the acquiring party or parties agree to be bound by the provisions of this Final Judgment.

IV

Divestitures

A. Defendants are hereby ordered and directed, in accordance with the terms of this Final Judgment, within one hundred and twenty (120) calendar days after the filing of the Complaint in this matter, or five (5) days after notice of the entry of this Final Judgment by the Court, whichever is later, to sell all Relevant Disposal Assets and Relevant Hauling Assets as viable, ongoing businesses to a purchaser or purchasers acceptable to the United States, in its sole discretion, after consultation with the Relevant State.

B. Defendants shall use their best efforts to accomplish the divestitures ordered by this Final Judgment as expediously and timely as possible. The United States, in its sole discretion, after consultation with the Relevant State, may extend the time period for any

divestiture on additional period of time, not to exceed sixty (60) calendar days.

C. In accomplishing the divestitures ordered by this Final Judgment, defendants promptly shall make known, by usual and customary means, the availability of the Relevant Disposal Assets and the Relevant Hauling Assets. Defendants shall inform any person making an inquiry regarding a possible purchase that the sale is being made pursuant to this Final Judgment and provide such person with a copy of this Final Judgment. Defendants shall also offer to furnish to all bona fide prospective purchasers, subject to customary confidentiality assurances, all information regarding the Relevant Disposal Assets and Relevant Hauling Assets customarily provided in a due diligence process except such information subject to attorney-client privilege or attorney work-product privilege. Defendants shall make available such information to the plaintiffs at the same time that such information is made available to any other person.

D. Defendants shall not interfere with any negotiations by any purchaser to employ any USA Waste (or former WMI) employee who works at, or whose primary responsibility concerns, any disposal or hauling business that is part of the Relevant Disposal Assets or Relevant Hauling Assets.

E. Defendants shall permit prospective purchasers of the Relevant Disposal Assets or Relevant Hauling Assets to have access to personnel and to any and all environmental, zoning, and other permit documents and information, and to make inspection of the Relevant Disposal Assets and Relevant Hauling Assets and of any and all financial, operational, or to other documents and information customarily provided as part of a due diligence process.

F. With the exception of the facilities described in Sections II(C)(2) (e), (h) and (i)(2), defendants shall warrant to each purchaser of Relevant Disposal Assets or Relevant Hauling Assets that each asset will be operational of the date sale.

G. Defendants shall not take any action, direct or indirect, that will impede in any way the operation of the Relevant Disposal Assets or Relevant Hauling Assets.

H. Defendants shall warrant to each purchaser of Relevant Disposal Assets or Relevant Hauling Assets that there are no material defects in the environmental, zoning, or other permits pertaining to the operation of each asset, and that defendants will not undertake, directly or indirectly, following the divestiture of each asset, any challenges to the environmental, zoning, or other permits or applications for permits or licenses pertaining to the operation of the asset.

I. Unless the United States, after consultation with the Relevant State, otherwise consents in writing, the divestitures pursuant to Section IV, or by trustee appointed pursuant to Section V of this Judgment, shall include all Relevant Disposal Assets and Relevant Hauling Assets and be accomplished by selling or otherwise conveying each asset to a purchaser in such a way as to satisfy the United States, in its sole discretion, after consultation with the Relevant State, that the Relevant Disposal Assets or Relevant Hauling Assets can and will be used by the purchaser as part of a viable, ongoing business or businesses engaged in waste disposal or hauling. The divestitures, whether pursuant to Section IV or Section V of this Final Judgment, shall be made to a purchaser (or purchasers) for whom it is demonstrated to the United State's sole satisfaction, after consultation with the Relevant State, that: (1) the purchaser(s) has the capability and intent of competing effectively in the waste disposal or hauling business in the Relevant Area; (2) the purchaser(s) has the managerial, operational, and financial capability to compete effectively in the waste disposal or hauling business in the Relevant Area; and (3) none of the terms of any agreement between the purchaser and defendants gives any defendant the ability unreasonably to raise the purchaser's costs, lower the purchaser's efficiency, or otherwise interfere in the ability of the purchaser to compete effectively in the Relevant Area.

J. A purchaser of any Relevant Disposal Asses or Relevant Hauling Assets under this Final Judgment must demonstrate to the satisfaction of the United States, after consultation with the Relevant State, that the purchaser will comply with any and all applicable federal, state and local environmental and licensing laws.

K. Defendants may enter into an agreement, after review and approval of the United States, in its sole discretion, after consultation with the Relevant State, with a purchaser or purchasers of the Chiquita Canyon, Brazoria or Carleton Farms landfills (*See* Sections II (C)(1)(g), and (d)) for disposal of commercially acceptable waste collected or transferred from defendants' own route operations.

V

Appointment of Trustee

A. In the event that defendants have not sold the Relevant Disposal Assets or Relevant Hauling Assets within the time specified in Section IV of this Final Judgment, the Court shall appoint, on application of the United States, a trustee selected by the United States, to effect the divestiture of each Relevant Disposal Asset or Relevant Hauling Asset not sold.

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to sell the Relevant Disposal Assets or Relevant Hauling Assets described in Sections II(C) and (D) of this Final Judgment. The trustee shall have the power and authority to accomplish any and all divestitures at the best price then obtainable upon a reasonable effort by the trustee, subject to the provisions of Sections IV, VI, and IX of this Judgment, and shall have such other powers as the Court shall deem appropriate. Subject to Section V(C) of this Judgment the trustee shall have the power and authority to hire at the cost and expense of defendants any investment bankers, attorneys, or other agents reasonably necessary in the judgment of the trustee to assist in the divestitures, and such professionals and agents shall be accountable solely to the trustee. To assist in the sale of the Brent Run Landfill, described in Section II II(C)(1)(e) of this Judgment, the trustee also shall have the power and authority to commit defendants to supply waste from defendants' routes in the Relevant Area to that landfill for up to a five-year time period at the best disposal price then obtainable upon reasonable effort by the trustee. The trustee shall have the power and authority to accomplish the divestitures at the earliest possible time to a purchaser or purchasers acceptable to the United States, in its sole discretion, after consultation with the Relevant State, and shall have such other powers as this Court shall deem appropriate. Defendants shall not object to a sale by the trustee on any ground other than the trustee's malfeasance. Any such objections by defendants must be conveyed in writing to the United States and the Relevant State and the trustee within ten (10) calendar days after the trustee has provided the notice required under Section VI of this Final Judgment.

C. The trustee shall serve at the cost and expense of defendants, on such terms and conditions as the Court may prescribe, and shall account for all monies derived from the sale of each Relevant Disposal Asset or Relevant Hauling Asset sold by the trustee and all

costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to defendants and the trust shall then be terminated. The compensation of such trustee and of any professionals and agents retained by the trustee shall be reasonable in light of the value of the divested business and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished.

D. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestitures, including best efforts to effect all necessary regulatory approvals. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities of the businesses to be divested, and defendants shall develop financial or other information relevant to the businesses to be divested customarily provided in a due diligence process as the trustee may reasonably request, subject to customary confidentiality assurances. Defendants shall permit bona fide prospective purchasers of each Relevant Disposal Asset or Relevant Hauling Asset to have reasonable access to personnel and to make such inspection of physical facilities and any and all financial, operational or other documents and other information as may be relevant to the divestitures required by this Final Judgment.

E. After its appointment, the trustee shall file monthly reports with the parties and the Court setting forth the trustee's efforts to accomplish the divestitures ordered under this Final Judgment; provided, however, that to the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the court. Such reports shall include the name, address and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the business to be divested, and shall describe in detail each contact with any such person during that period. The trustee shall maintain full records of all efforts made to sell the businesses to be divested.

F. If the trustee has not accomplished such divestitures within six (6) months after its appointment, the trustee thereupon shall file promptly with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestitures, (2) the reasons, in the trustee's judgment, why the required divestitures have not been accomplished, and (3) the trustee's recommendations; provided, however, that to the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the parties, who shall each have the right to be heard and to make additional recommendations consistent with the purpose of the trust. The Court shall enter thereafter such orders as it shall deem appropriate in order to carry out the purpose of the trust which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

VI

Notice of Proposed Divestitures

Within two (2) business days following execution of a definitive agreement, contingent upon compliance with the terms of this Final Judgment, to effect, in whole or in part, any proposed divestiture pursuant to Sections IV or V of this Final judgment, defendants or the trustee, whichever is then responsible for effecting the divestiture, shall notify the United States and the Relevant State of the proposed divestiture. If the trustee is responsible, it shall similarly notify defendants. The notice shall set forth the details of the proposed transaction and list the name, address, and telephone number of each person not previously identified who offered to, or expressed an interest in or a desire to, acquire any ownership interest in the business to be divested that is the subject of the binding contract, together with full details of same. Within fifteen (15) calendar days of receipt by the United States and the Relevant State of such notice, the United States, in its sole discretion, after consultation with the Relevant State, may request from defendants, the proposed purchaser, or any other third party additional information concerning the proposed divestiture and the proposed purchaser. Defendants and the trustee shall furnish any additional information requested from them within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree. Within thirty (30) calendar days after receipt of the notice [or within twenty (20) calendar days after the United States and the Relevant State have been provided the additional information requested from defendants, the proposed purchaser, and any third party, whichever is later], the United States, after consultation with the Relevant State, shall provide written notice to defendants and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice to defendants (and the trustee, if applicable) that it does not object, then the divestiture may be consummated, subject only to defendants' limited right to object to the sale under Section V(B) of this Final Judgment. Upon objection by the United States, a divestiture proposed under Section IV or Section V of this Final Judgment shall not be consummated. Upon objection by defendants under the provision in Section V(B), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VII

Notice of Future Acquisitions

A. Defendants shall provide each Relevant State with 30 days' written notice (which period may be shortened by permission of the Relevant State) before acquiring, directly or indirectly, any interest in any business, assets (other than in the ordinary course of business), capital stock, or voting securities of any person that, at any time during the twelve (12) months immediately preceding such acquisition, was engaged in waste disposal or small containerized solid waste hauling in any area listed in Section VII(B), where that person's annual revenues from waste disposal or small containerized solid waste hauling in the area were in excess of $500,000 annually, or its total revenues were in excess of $1,000,000 annually.

B. The notice provisions set forth in Section VII(A) above apply whenever defendants seek to acquire any interest in any business, assets (other than in the ordinary course of business), capital stock, or voting securities of any person that was engaged in waste disposal or small containerized solid waste hauling in any of the following areas:

Relevant State	Area for which defendants must provide relevant state notice of future acquisitions
Arizona	Pima Co. (hauling and disposal).
California	Los Angeles and Riverside (hauling and disposal); Ventura and Orange Co. (disposal only).
Colorado	Boulder and Denver Co. (hauling and disposal).
Florida	Brevard, Alachua, Marion, Orange, Osceola, Seminole, Lee, Charlotte, Sarastoa, Putnam, Volusia and Flagler Co. (hauling and disposal).
Kentucky	Jefferson and Oldham Co. (hauling and disposal).
Maryland	Baltimore City, Baltimore, Anne Arundel, Harford, Carroll, Howard, Montgomery, and Prince George's Co. (hauling and disposal).
Michigan	Wayne, Macomb, and Oakland Co. (hauling and disposal); Genessee, Shiawassee, Saginaw, Bay, Midland, Wexford, Manistee and Montgomery Co. (disposal only).
New York	New York, Bronx, Kings, Queens, and Richmond Co. (disposal only).
Ohio	Ashtabula, Cuyahoga, Delaware, Fairfield, Franklin, Geauga, Lake, Licking, Lorain, Lucas, Mahoning, Medina, Pickaway, Portage, Stark, Summit, Trumbull, and Wood Co. (hauling and disposal); Carroll, Columbiana, Coshocton, Holmes, Knox, Madison, Tuscarawas, Union and Wayne Co. (disposal only).
Pennsylvania	Allegheny, Westmoreland, Washington, Beaver, Butler, Lehigh, Northampton, Dauphin, Cumberland, and Perry Co. (hauling and disposal).
Texas	Brazoria, Chambers, Ft. Bend, Galveston, Harris, Liberty, Montgomery, Walker and Waller Co. (hauling and disposal).
Washington	Cowlitz and Clark Co. (hauling and disposal).
Wisconsin	Milwaukee, Waukesha, Racine, Washington, Kenosha, Ozaukee, Walworth, Jefferson and Dane Co. (disposal only).

C. For purposes of this Section VII, the term ''small containerized solid waste hauling'' means the provision of solid waste hauling service to commercial customers by providing the customer with a one to ten cubic yard container, which is picked up mechanically using a frontload, rearload or sideload truck, and excludes hand pick-up service, and service using a compacter attached to or part of a container.

VIII

Defendants' Additional Obligations

Defendants are hereby ordered and directed to, in accordance with the terms of this Final Judgment:

A. Offer to extend, for an additional ten-year time period, the Solid Waste Service Agreement, dated August 8, 1996, by and between the Northeast Maryland Waste Disposal Authority and USA Waste's subsidiary, Garnet of Maryland, Inc. (attached hereto as Exhibit B), for the disposal of Anne Arundel County, MD and Howard County, MD waste at the Annapolis Junction Transfer Station;

B. Use their best efforts, prior to its divestiture, to obtain any and all licenses and permits to open and operate USA Waste's Nekboh Transfer Station, described in Section II(C)(2)(i)(2); and for a five-year period following such divestiture, to cooperate and assist the purchaser in obtaining any and all licenses or permits required to operate Nekboh Transfer Station and to refrain from opposing any application by the purchaser to obtain a license or permit to expand the Nekboh Transfer Station;

C. For a one-year period following entry of this Final Judgment, refrain from opposing any application by any person for a permit or license to operate any waste transfer station in any borough of the City of New York, NY;

D. For a five-year period following entry of this Final Judgment, refrain from opposing any application by any person to obtain a license or permit to expand the remaining capacity or the average daily capacity of the Emerald Park Landfill, Glacier Ridge Landfill, or Valley Meadows Landfill, in the Greater Milwaukee, WI area;

E. Refrain from reacquiring any interest in any Relevant Disposal Assets or Relevant Hauling Assets divested pursuant to the terms of this Final Judgment, without prior written notice to, and written consent of, the United States and the Relevant State;

F. Refrain from conditioning the sale of any landfill pursuant to this Final Judgment on any understanding, agreement or commitment, written or understood, that the purchaser (or purchasers) will agree to sell airspace or otherwise permit defendants to dispose of waste in that landfill; provided, however, that USA Waste's Carleton Farms Landfill may be divested subject to USA Waste's obligation to dispose of ash from the Greater Detroit Resource Recovery Center's incinerator at a separate monofill cell on the Carleton Farms Landfill site;

G. Refrain from taking any action to enforce any agreement or understanding that would prohibit any person from competing in Alachua or Marion County, FL; provided, however, that this provision shall not apply to a current or former employee of defendants (other than any employee who may be responsible in any way for route operations subject to divestiture under Sections II(D)(12), IV and V of this Judgment); and

H. Provide access to the gate, scale house and disposal area of the WMI Tucson transfer station, located at 5200 West Ina, Tucson, AZ, under terms and conditions no less favorable than those provided to defendants' own vehicles or to the vehicles of any county or municipality in Arizona.

IX

Affidavits

A. Within twenty (20) calendar days of the filing of the Final Judgment in this matter and every thirty (30) calendar days thereafter until the divesture has been competed whether pursuant to Section IV or Section V of this Final Judgment, defendants shall deliver to plaintiffs an affidavit as to the fact and manner of compliance with Sections IV or V of this Final Judgment. Each such affidavit shall include, *inter alia*, the name, address, and telephone number of each person who, at any time after the period covered by the last such report, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the businesses to be divested, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts that defendants have taken to solicit a buyer for any and all Relevant Disposal Assets and Relevant Hauling Assets and to provide required information to prospective purchasers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any obligation by the

United States, after consultation with the Relevant State, to information provided by defendants, including limitations on information, shall be made within fourteen (14) days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, defendants shall deliver to plaintiffs an affidavit which describes in detail all actions defendants have taken and all steps defendants have implemented on an on-going basis to preserve the Relevant Disposal Assets and Relevant Hauling Assets pursuant to Section X of this Final Judgment and the Hold Separate Stipulation and Order entered by the Court. The affidavit also shall describe, but not be limited to, defendants' efforts to maintain and operate each Relevant Disposal Asset and Relevant Hauling Asset as a viable active competitor; to maintain separate management, staffing, sales, marketing and pricing of each asset; and to maintain each asset in operable condition at current capacity configurations. Defendants shall deliver to plaintiffs an affidavit describing any changes to the efforts and actions outlined in defendants' earlier affidavit(s) filed pursuant to this Section within fifteen (15) calendar days after any such change has been implemented.

C. For a one-year period following the completion of each divestiture, defendants shall preserve all records of any and all efforts made to preserve the Relevant Disposal Assets and Relevant Hauling Assets that were divested and to effect the ordered divestitures.

X

Hold Separate Order

Until the divestitures required by the Final Judgment have been accomplished, defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardized the sale of any Relevant Disposal Asset or Relevant Hauling Asset.

XI

Financing

Defendants are ordered and directed not to finance all or any part of any acquisition by any person made pursuant to Sections IV or V of this Final Judgment.

XII

Compliance Inspection

For purposes of determining or securing compliance with the Final Judgment and subject to any legally recognized privilege, from time to time:

A. Duly authorized representatives of the United States Department of Justice, upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, or upon written request of duly authorized representatives of the Attorney General's Office of any other plaintiff, and on reasonable notice to defendants made to their principal offices, shall be permitted:

1. Access during office hours of defendants to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of defendants, who may have counsel present, relating to the matters contained in this Final Judgment and the Hold Separate Stipulation and Order; and

2. Subject to the reasonable convenience of defendants and without restraint or interference from them, to interview, either informally or on the record, their officers, employees, and agents, who may have counsel present, regarding any such matters.

B. Upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, or upon the written request of the Attorney General's Office of any other plaintiff, defendants shall submit such written reports, under oath if request, with respect to any matter contained in the Final Judgment and the Hold Separate Stipulation and Order.

C. No information or documents obtained by the means provided in Sections in Sections VII or X or this Final Judgment shall be divulged by a representative of the plaintiffs to any person other than a duly authorized representative of the Executive Branch of the United States, or the Attorney General's Office of any other plaintiff, except in the course of legal proceedings to which the United States or any other plaintiff is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by defendants to plaintiffs, defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and defendants mark each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure,'' then ten (10) calendar days notice shall be given by plaintiffs to defendants prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which defendants are not a party.

XIII

Retention of Jurisdiction

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violations hereof.

XIV

Termination

Unless this Court grants an extension, this Final Judgment will expire upon the tenth anniversary of the date of its entry.

XV

Public Interest

Entry of this Final Judgment is in the public interest.

Dated _____, 1998.

_____

United States District Judge

United States's Certificate Of Compliance With Provisions of the Antitrust Procedures and Penalties Act

The United States of America hereby certifies that it has complied with the provisions of the Antitrust Procedures and Penalties Act (''APPA''), 15 U.S.C. 16(b)–(h), and states:

1. The Complaint in this case, the proposed Final Judgment (''Judgment''), and the Hold Separate Stipulation and Order (''Hold Separate Order'') were filed on July 16, 1998. The United States's Competitive Impact Statement was filed on July 23, 1998.

2. Pursuant to 15 U.S.C. 16(b), the Judgment, Hold Separate Order, and Competitive Impact Statement were published in the **Federal Register** on September 24, 1998 (63 Fed. Reg. 51125). A copy of that **Federal Register** notice is attached as Exhibit 1.

3. Pursuant to 15 U.S.C. 16(d), the United States furnished copies of the Complaint, Hold Separate Order, proposed Judgment and Competitive Impact Statement to anyone requesting them.

4. Pursuant to 15 U.S.C. 16(c), a summary of the terms of the proposed Judgment and the Competitive Impact Statement were published in The Cleveland Plain Dealer, a newspaper of

general circulation in Cleveland, OH, and in The Washington Post, a newspaper of general circulation in the District of Columbia. Copies of the certificates of publication from The Cleveland Plain Dealer and The Washington Post appear in Exhibit 2.

5. On January 21, 1999, the defendants—USA Waste Services, Inc.; Dome Merger Subsidiary; and Waste Management, Inc.—filed with the Court a joint statement describing their communications with employees of the United States Department of Justice concerning the proposed Judgment, as required by 15 U.S.C. 16(g).

6. During the 60-day comment period after publication of notice in the **Federal Register**, The Cleveland Plain Dealer and The Washington Post, the United States received a total of 13 written comments on the proposed settlement. The comments were from:

(a) Recycle Worlds Consulting Corp., Madison, WI (Ex. 3);
(b) Honorable Joseph R. Lenthol, New York State Assemblyman for the 50th District, Brooklyn, NY (Ex. 4);
(c) Sierra Club of New York City Group, New York, NY (Ex. 5);
(d) Neighbors Against Garbage, Brooklyn, NY (Ex. 6);
(e) Red Hook Civic Association, Brooklyn, NY (Ex. 7);
(f) Rose Institute of State and Local Government, Claremont College, Claremont, CA (Ex. 8);
(g) Gold Fields Mining Corporation, Los Angeles, CA (Ex. 9);
(h) Coastal Waste Management, Sacramento, CA (Ex. 10);
(i) York County Solid Waste and Refuse Authority, York, PA (Ex. 11);
(j) Calvert Trash Systems, Inc., Owings, MD (Ex. 12);
(k) LaPlata Recycling Center and Depository, Bayfield, CO (Ex. 13);
(l) Conrad S. Magnuson, Kingston, NH (Ex. 14); and
(m) Three Rivers Disposal Company, Bozeman, MT (Ex. 15).

7. The United States evaluated and responded to each of the comments it received. The comments did not convince the United States that it should withdraw its consent to the proposed settlement. However, for the reasons set forth in its Memorandum in Support of Entry of the Modified Final Judgment, the United States was persuaded to move for a minor modification of the proposed Judgment, which would eliminate the defendants' obligation to divest the Scott Avenue Transfer Station in Brooklyn, NY, and substitute a divestiture of one of two smaller transfer stations, Vaccarro or Gesuale, also in New York City.

Copies of the comments and the United States's responses appear in Exhibits 3–15; they are summarized below.

A. General Comment on the Divestiture Relief in the Proposed Judgment

Recycle Worlds, a private waste industry consultant, urged the United States not to approve any asset divestiture under the proposed Judgment to one of the major integrated waste collection and disposal firms, such as Republic Services, Inc.; Allied Waste Industries, Inc.; or Browning-Ferris Industries, Inc. (Ex. 3). In Recycle Worlds's view, these firms may be more inclined to cooperate with the defendants in raising prices in some markets in order to avoid potential price wars with the defendants elsewhere.

In response, we noted that the United States could not categorically conclude that selling the consent decree assets to a large national waste collection and disposal firm, such as Republic, would be less competitive than a sale to municipal agency or small independent firm, or that large waste companies are more prone to collude, when given the opportunity, than small independent firms. Also, large waste collection and disposal companies may enjoy some competitive advantages, such as better access to capital and more extensive experience, that would make them in some respects more formidable competitors than small independent firms.

In a series of transactions beginning in September 1998 and ending in early 1999, the United States approved Republic as a purchaser of all of the waste collection and disposal assets ordered divested under the Judgment, except the Baltimore area disposal assets, which the United States approved for sale to BFI in October 1999.

B. Comments on the New York City Divestiture Relief

The United States received four comments on provisions of the proposed Final Judgment that relate to the divestiture relief in the New York City area. Three commentators—New York State Assemblyman Joseph Lenthol (Ex. 4), the Sierra Club of New York City Group (Ex. 5), and Neighbors Against Garbage (Ex. 6)—expressed considerable concern that by ordering the defendants to divest the application for a permit to construct and open the proposed Nekboh Transfer Station in Brooklyn, NY, the Final Judgment would ensure that the new owner would continue the attempt to open a transfer station on that site, despite strong community opposition. The commentators suggested that the United States's move to amend the proposed Judgment in such a way as to end the effort to develop the Nekboh site as a waste transfer station (*e.g.*, requiring the defendants to sell the Nekboh site to a government agency for development as a public park).

In response, we pointed out that the aesthetic and environmental concerns that have fueled community opposition to the proposed Nekboh Transfer Station are unrelated to the competitive concerns that precipitated the governments' antitrust suit. Issues concerning whether a waste transfer station should be constructed on the Nekboh site ought to be presented to, and resolved by, the state and local regulatory officials responsible for issuing the site's operating permit.

A fourth commentator Red Hook Civic Association (Ex. 7), wanted to know why the United States did not seek divestiture of defendant USA Waste's massive proposed Erie Basin Transfer Station, also in Brooklyn, NY. We noted that Erie Basin, if it is constructed, would primarily handle the city's residential waste, a market unrelated to the disposal of commercial waste market in which the United States alleged that the defendants' merger would substantially eliminate competition.

C. Comments on the California Divestiture Relief

The United States received three comments on those provisions of the Final Judgment relating to the divestiture relief in the California market. Two commentators—the Rose Institute of State and Local Government, Claremont College, CA (Ex. 8), and Gold Fields Mining Corporation (Ex. 9)—submitted very lengthy papers that questioned our definition of the relevant geographic market for the disposal of commercial waste from the City of Los Angeles. As these commentators see it, the geographic market should be expanded to include public and private landfills located up to 170 miles east of Los Angeles. This expanded market would include a massive new landfill, Mesquite Regional, partly-owned by the defendants. And they would order the defendants to divest that landfill in order to alleviate the competitive concerns that they believe the combination would raise in the expanded geographic market.

The United States noted, in its response, that it made good economic sense to exclude the remote Mesquite Regional Landfill from the competitive analysis since it is relatively

inaccessible to commercial waste haulers from the Los Angeles area. Given this landfill's 170 mile distance from Los Angeles, it would be very expensive for haulers to ship and dispose of commercial waste collected in Los Angeles at Mesquite Regional. Private landfills located much closer to Los Angeles could profitably raise disposal prices without fear of losing significant revenues to this distant landfill. Since Mesquite Regional is not in the relevant market, the defendants should not be required to divest it in order to obtain effective relief.

A third commentator, Coastal Waste Management (Ex. 10), questioned the United States' decision not to allege in its Complaint or seek relief in the proposed judgment relating to commercial waste hauling in the Sacramento, CA market. We noted, in response, that based on the evidence available to us at the time, injunctive relief was not warranted in the Sacramento hauling market. Coastal, however, remains free to pursue such a remedy by filing a private antitrust action.

D. Comments on the Divestiture Relief in Other Areas

The York County Solid Waste and Refuse Authority of York County, PA, was very concerned that the ordered divestiture of Waste Management's Modern Landfill would adversely affect its contract to deliver waste to the Authority's incinerator and dispose of ash and noncombustible waste from the incinerator (Ex. 11). Since the proposed Judgment orders that the landfill be divested ''subject to'' such existing contractual commitments, the sale should not affect these local disposal agreements.

Finally, four commentators—Calvert Waste Systems (Ex. 12), LaPlata Recycling (Ex. 13), Conrad Magnuson (Ex. 14), and Three Rivers Disposal (Ex. 15)—complained that the United States should have sought injunctive relief with respect to several markets not alleged in the governments' complaint, *viz.*, the eastern shore of Maryland; Bayfield, CO; Kingston, NH; and Bozeman, MT.

In our response, we noted that the United States did not seek divestiture relief as to these markets because it was not convinced, based on information available to it at the time, that the merger would create serious competitive problems warranting the imposition of this remedy. Private parties, such as the commentators, certainly remain free to pursue such relief against the defendants by filing a private antitrust suit.

8. Pursuant to 15 U.S.C. 16 (b)–(h), the United States has arranged to publish in the **Federal Register** by September 27, 1999, a copy of the comments and the United States's responses.

9. With these steps having been taken, the parties have fulfilled their obligations under the APPA. Pursuant to the Hold Separate Order that the Court entered on July 16, 1998, the Court may now enter the proposed Judgment, if it determines that the entry of the Judgment is in the public interest. For the reasons set forth in the Competitive Impact Statement, its responses to the public comments, and in its Memorandum in Support of Entry of the Proposed Modified Final Judgment, the United States—and all of the other parties—strongly believe that the proposed decree, as amended, is in the public interest and that the Court therefore promptly should enter it.

Dated: September 13, 1999.

Respectfully submitted.

Anthony E. Harris, Illinois Bar No. 1133713,

U.S. Department of Justice, Antitrust Division, Litigation II, 1401 H Street, NW, Suite 3000, Washington, DC 20530, (202) 307–6583.

Note: Exhibits 1 and 2 were unable to be published in the **Federal Register**. A copy can be obtained from the U.S. Department of Justice, Documents Office, 325 7th St., Room 215, Washington, DC or (202) 514–2481.

Exhibit 3

U.S. Department of Justice Antitrust Division

August 27, 1999.

Mr. Peter Anderson,

Recycle Worlds Consulting Corp., 4513 Vernon Blvd., Suite 15, Madison, Wisconsin 53705–4964.

Re: Comment on Proposed Final Judgment in *United States, State of Ohio, et al.* v. *USA Waste Services, Inc., Waste Management, Inc., et al.,* Civil No. 98–1616 (N.D. Ohio, filed July 16, 1998)

Dear Mr. Anderson: This letter responds to your written comment on the proposed Final Judgment in the above case. The Complaint in this case charged, among other things, that USA Waste's acquisition of Waste Management would substantially lessen competition in the disposal of municipal solid waste in 16 markets throughout the country. The proposed Judgment, now pending in federal district court in Cleveland, Ohio, would settle the case by, inter alia, requiring that the defendants divest waste disposal facilities that serve each of the disposal markets alleged in the Complaint. In a series of transactions in August and December 1998, and in January and February 1999, the United States approved, under the terms of the Judgment, a sale to Republic Services, Inc. (''Republic'') of all assets that had been ordered divested (except the Baltimore area disposal assets). The United States subsequently approved a sale to Browning Ferris Industries, Inc. (''BFI'') of the Baltimore area disposal assets.

In your letter, you questioned whether Republic or any other major waste collection and disposal firm should be allowed to acquire the assets ordered divested under the proposed decree. As you see it, a sale to a large national or regional firm is undesirable because such firms would cooperate with the defendants and other market participants in raising prices to customers after a divestiture. Competition would be better served if the waste collection and disposal assets under the decree were sold to a municipal agency or a small independent firm, entities which, you contend, would have a greater incentive to vigorously compete against the defendants' waste collection and disposal operations.

The United States, however, does not have any evidence that would lead it categorically to conclude that selling the assets under the Judgment to a large national waste collection and disposal firm, such as Republic, would be a less competitive alternative than a sale to municipal agency or small independent firm, or that large waste companies are more prone to collude, when given the opportunity, than small independent firms. Also, it is possible that large waste collection and disposal companies enjoy some competitive advantages, such as better access to capital and more extensive experience, that would make them in some respects more formidable competitors than small independent firms. Thus, United States did not object to Republic's purchase of most of the waste collection and disposal assets that the defendants divested under the proposed Judgment. And since BFI did not compete in the disposal of waste in the Baltimore market, the United States saw no reason to prevent BFI's acquisition of the transfer station disposal capacity divested by the defendants under the proposed Judgment.

Thank you for bringing your concerns to our attention; we hope this information will help alleviate them. Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(d), a copy of your comments and this response will be published in the **Federal Register** and filed with the Court.

Sincerely yours,

J. Robert Kramer, II,

Chief, Litigation II Section.

Note: Letter dated 11/27/98 from Peter Anderson of Recycle Worlds Consulting with attachments was unable to be published in the **Federal Register**. A copy can be obtained from the U.S. Department of Justice, Documents office, 325 7th St., Room 215, Washington, DC or (202) 514–2481.

Exhibit 4

U.S. Department of Justice Antitrust Division

August 27, 1999.

The Honorable Joseph R. Lenthol, Assemblyman 50th District, Kings County, New York

State of New York Assembly, 619 Lorimer Street, Brooklyn, NY 11211.

Re: Comment on Proposed Final Judgment in *United States*v. *State of Ohio et al.* v. *USA Waste Services, Inc., Waste Management, Inc., et al.,* Civil No. 98–1616 (N.D. Ohio, filed July 16, 1998)

Dear Assemblyman Lenthol: This letter responds to your written comment on the proposed Final Judgment in *United States USA Waste Services, Inc.,* now pending in federal district court in Cleveland, Ohio. The Complaint in that case charged, among other things, that USA Waste's acquisition of Waste Management would substantially lessen competition in the disposal of New York City's commercial waste. The proposed final Judgment would settle the case by, *inter alia,* requiring the defendants to divest (a) the Waste Management's SPM Transfer Station in the Bronx, NY; (b) USA Waste's All City Waste Transfer Station in Brooklyn, NY; and (c) USA Waste's proposed Nekboh Transfer Station in Brooklyn, NY. *See* Judgment, §§ II(C)(2) (i)(1)–(3), IV(A). To ensure USA Waste's continued cooperation with the purchaser in its efforts to permit and construct a transfer station on the Nekboh site, the proposed Judgment further provides that, if the Nekboh Transfer Station is not permitted within one year after entry of the decree, USA Waste must, in addition, divest Waste Management's Scott Avenue Transfer Station, also in Brooklyn, NY. Judgment, §§ II(C)(2)(i)(4) and IV(B).

Your letter raises two issues related to the divestiture of the Nekboh and Scott Avenue transfer stations. First, you point out that the proposed Nekboh facility, though much larger than the Scott Avenue station, is still in the permitting stage and may never obtain a permit to open and operate. For that reason, you urged that we amend the consent decree to require an immediate divestiture of the already-permitted Scott Avenue transfer station. Second, you note that in any event, the proposed Nekboh facility would be adjacent to the Eastern District Terminal, ''a beautiful 20 acre parcel of waterfront property'' recently placed on an open-spaces list. You suggested that the public interest would be better served if the Decree contained a prohibition on the use of the Nekboh site as a waste transfer station.

A. The Contingent Divestiture of the Scott Avenue Transfer Station

After considering your comments, and arguments advanced by the defendants and others, the United States (and its New York co-plaintiff, the State of New York) concluded that the divestiture provisions in the proposed Judgment concerning the defendants' Scott Avenue Transfer Station should indeed be modified. The United States and the State of New York agreed to join the defendants in moving the Court to enter a modified Final Judgment that would replace the current contingent divestiture of the Scott Avenue Transfer Station with a requirement that the defendants immediately divest either of two smaller transfer stations, Gesuale or Vacarro, both in New York City. That obligation was imposed by a recent consent decree, entered in federal district court in Brooklyn, NY, that settled another merger case involving a proposed acquisition by Waste Management of other transfer stations in the *New York market, United States, States of New York and Pennsylvania, and Commonwealth of Florida* v. *Waste Management, Inc., Eastern Environmental Services, Inc., et al,* Civil No. 98–7168 (E.D.N.Y., entered May 25, 1999) (the ''Waste/Eastern case''). The United States agreed to move to modify the proposed Judgment for basically two reasons.

First, divestiture of the Scott Avenue Transfer Station was primarily an inducement to defendants to ensure that they continue their efforts to get the Nekboh site permitted. However, the Nekboh Transfer Station permit application was divested to a major waste industry firm, Republic, which is fully capable of vigorously pursuing the permitting process. In August 1998, defendants sold the proposed Nekboh Transfer Station (and virtually all of the other assets under the decree) to Republic Services, Inc. With over $2 billion in annual revenues, Republic is the nation's third largest waste collection and disposal firm. Republic has the financial resources and economic incentive to continue pursuing a permit for the proposed Nekboh Transfer Station without defendants' assistance. In addition, permanent injunctions in the proposed Judgment prohibit the defendants from interfering in any way with Republic's efforts to obtain a permit for that site. Thus, the contingent divestiture of Scott Avenue is unnecessary to ensure that the defendants cooperate in the permitting process.

Second, by permitting the defendants to retain the Scott Avenue Transfer Station, in return for divestiture of the smaller Gesuale or Vaccarro sites, the United States and the State of New York were able to obtain a favorable settlement of the subsequent Waste/Eastern merger case. In September 1998, USA Waste agreed to acquire Eastern Environmental Services, Inc. (''Eastern''), another major competitor in the disposal of New York City's commercial waste. In November 1998, the United States, the State of New York and other states filed an antitrust suit that sought to block that acquisition. To resolve the governments' competitive concerns in that litigation, the defendants agreed to divest two large Brooklyn, NY transfer stations acquired from Eastern (Atlantic and PJ's) in return for the governments' agreement to join the defendants in this case in a motion to modify the proposed Final Judgment to substitute an immediate divestiture of the Gesuale or Vaccaro transfer station for a contingent divestiture of the Scott Avenue Transfer Station. (*See* Waste/Eastern Final Judgment, §§ II (D)(2)(a)–(c), IV(A)(2) and (L), filed in federal district court in Brooklyn, NY on December 31, 1998, and entered on May 25, 1999, after the United States had responded to all public comments submitted during the 60-day public comment period.)

In light of the divestiture of the Nekboh proposal to Republic, a well-financed industry giant, the United States does not believe that the contingent divestiture of the Scott Avenue transfer station was necessary to alleviate any competitive concerns arising from USA Waste's acquisition of Waste Management. And by agreeing to join Waste Management in seeking to remove that requirement from the Ohio consent decree, the United States and the State of New York were able to void a trial on the merits of defendants' acquisition of Eastern.

B. Prohibiting the Construction of a Waste Transfer Station on the Nekboh Site

Finally you suggest that we modify the decree to prohibit the construction of a waste transfer station on the Nekboh site. We strongly believe that promptly permitting and operation of the Nekboh transfer station is necessary to provide an important competitive check on USA Waste in the disposal of New York City's commercial waste. Nothing in the proposed decree, however, would preclude New York state and city officials from deciding not to grant a permit to operate a waste transfer facility on the Nekboh site. Whether the transfer station receives an operating permit depends on any number of factors, including a considered assessment of the environmental impact of the facility. Whether a waste transfer facility on the Nekboh site will have detrimental effects is an issue that is best left to the regulatory agency to review and ultimately resolve.

Thank you for bringing your concerns to our attention; we hope this information will help alleviate them. Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, a copy of your comment and this response will be published in the **Federal Register** and filed with the Court.

Sincerely yours,

J. Robert Kramer II,

Chief, Litigation II Section.

The Assembly, State of New York; Albany

August 7, 1998.

Honorable Janet Reno, Attorney General of the United States,

Department of Justice, 950 Pennsylvania Avenue, NW, Room 4400, Washington, DC 20530–0001

Dear Attorney General Reno: I write in regard to the recently announced agreement between the United States Justice Department and the New York State Attorney General's Office, with USA Waste and Waste Management, relative to the proposed merger of these two corporations. Unfortunately, I find this settlement to be problematic. I believe, however, that these problems can be resolved if the following concerns are addressed.

It is my understanding that this agreement would require USA Waste to divest itself of the Nekboh Transfer Station which it is planning to operate at 2 North 5th Street in Brooklyn, and that this divestiture would be conditioned upon USA Waste being granted the necessary operating permits. I cannot understand why, if this agreement truly seeks to protect the public from monopoly power, USA Waste would be required to divest itself of a transfer station it does not yet, and may never have, the authority to operate. Unless the administrative hearing process is a mere formality, USA Waste may never obtain the necessary permits. Should that be the case, the merged company would instead be required to divest itself of USA Waste's present transfer station located at 485 Scott Avenue in Brooklyn. Unfortunately, the Scott Avenue transfer station is a much smaller facility. It only has the capacity to process approximately 1,000 tons per day, while the proposed Nekboh facility has a capacity in

excess of 5,000 tons per day. These are hardly comparable facilities. The only way in which this agreement would truly serve to protect the public from an unfair monopoly would be for it to require the unconditional divestiture of both properties.

In addition, it would be an inexcusable waste of resources to allow USA Waste to proceed with the permitting process (as would be required by the consent agreement) since it would only be forced to divest once it has obtained the necessary permits. In order to save time and money, the process should be stopped now and USA Waste should be required to divest itself of these sites immediately.

Although it may not fall within the purview of this settlement, a provision that would prohibit the future use of the Nekboh property, as well as the adjacent Eastern District Terminal property, as a transfer station should be added to this agreement. The Eastern District Terminal is a beautiful 20-acre parcel of waterfront property which has recently been placed on the Environmental Bond Act Open Spaces List. This parcel is truly a treasure in my community and must be protected at all cost. I urge you to join our effort to save this irreplaceable piece of land.

For the above reasons, I must object to this settlement. I urge you to revisit this agreement and revise its terms to (1) require that USA Waste divest itself unconditionally of both the Nekboh and Scott Avenue properties, and (2) prohibit the future use of the Nekboh/Eastern District Terminal property as a waste transfer station. Thank you for your kind consideration of my comments.

Sincerely,

Joseph R. Lentol,

Assemblyman, 50th A.D.

JRL/jl
cc: Vice President Albert Gore

Exhibit 5

U.S. Department of Justice Antitrust Division

August 27, 1999.

Ms. Rosalind Rowen,
Sierra Club New York City Group, c/o 225 East 6th Street—Suite 3H, New York, New York 10003.

Re: Comment on Proposed Final Judgment in *United States, State of Ohio, et al.* v. *USA Waste Services, Inc., Waste Management, Inc., et al.,* Civil No. 98–1616 (N.D. Ohio, filed July 16, 19998)

Dear Ms. Rowen: Thank you for your letter commenting on the Final Judgment submitted for entry in the above case. The Complaint in this case charged, among other things, that USA Waste's acquisition of Waste Management would substantially lessen competition in the disposal of New York City's commercial waste. The proposed Judgment would settle the competitive concerns with respect to the New York City market by, *inter alia,* requiring the defendants to divest (a) the USA Waste's SPM Transfer Station; (b) USA Waste's All City Transfer Station; and (c) the pending application by USA Waste for a permit to construct and operate the Nekboh Transfer Station, also in Brooklyn, NY. *See* Judgment, §§ II (C)(2) (i)(1)–(3) and IV(A). To ensure the defendants' continued cooperation with the purchaser in its efforts to get the Nekboh site permitted, the proposed Judgment further provides that if the Nekboh Transfer Station does not receive an operating permit within one year after entry of the Judgment, the defendants must divest the Scott Avenue Transfer Station, also in Brooklyn, NY. *See* Judgment, §§ II (C)(2)(i)(4) and IV(B). In a transaction approved by the United States in August 1998, under the terms of the decree, the defendants divested All City Waste Transfer Station and their application for a permit for the proposed Nekboh site to Republic Services, Inc., which previously did not operate any waste disposal sites in the New York City area.

Your comment relates solely to those portions of the Judgment that require USA Waste to divest all title and interest in its application to construct and operate the Nekboh transfer station in Brooklyn, New York. *See* Judgment, §§ II (C)(1)(i)(2) and IV(A) and (B). As you point out the site of the proposed Nekboh facility abuts an area that the state of New York recently identified for potential preservation under its Clean Water/Clean Air Bond Act. Though Governor Pataki vetoed legislation that would have provided funds for purchasing the site for development as a park, he instructed the state Department of Environmental Conservation to conduct an environmental assessment of the Nekboh site before issuing an operating permit for a transfer station on that site.

You requested that we modify the Judgment to permit the Nekboh site to be sold to the state for development as a public park. We strongly believe that prompt divestiture of the Nekboh permit application, and speedy permitting, construction and opening of a transfer situation on the Nekboh site is essential to ensure vigorous competition in the disposal of New York City's commercial waste. Developing this site as a public park would frustrate that goal.

On the other hand, nothing in the proposed Judgment would preclude the appropriate New York permitting authorities from lawfully deciding not to issue a permit to operate a waste transfer facility on the Nekboh site. Whether Republic obtains an operating permit for a transfer station on the Nekboh site would depend on a variety of factors, including an assessment of the environmental impact of a waste transfer station on that site. Your contention that constructing the Nekboh waste transfer station would preclude preservation of the site as a public park should be addressed to the state and local regulatory agencies that review and ultimately resolve such issues in the ordinary course of the permitting process.

Thank you for bringing your concerns to our attention; we hope this information will help alleviate them. Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. section 16(d), a copy of your comment and this response will be published in the **Federal Register** and filed with the Court.

Sincerely yours,

J. Robert Kramer II,

Chief, Litigation II Section.

Note: Letter dated 9/14/98 from Rosalind Rowen of Sierra Club New York City Group was unable to be published in the **Federal Register**. A copy can be obtained from the U.S. Department of Justice, Document Office, 325 7th St., Room 215, Washington, DC 20530 or (202) 514–2481.

Exhibit 6

U.S. Department of Justice Antitrust Division

August 27, 1999.

Douglas H. Ward, Esquire
Ward, Sommers & Moore, L.L.C., Plaza Office Center, 122 South Swan Street, Albany, NY 12210.

Re: Comment on Proposed Final Judgment in *United States, State of Ohio, et al.* v. *USA Waste Services, Inc., Waste Management, Inc., et al.,* Civil No. 98–1616 (N.D. Ohio, filed July 16, 1998)

Dear Mr. Ward: Thank you for your letter commenting on the proposed Final Judgment submitted for entry in the above case. The proposed Judgment requires the defendants to divest their interest in the proposed Nekboh Transfer Station, which, if permitted by local government regulatory officials, would be constructed in Brooklyn, NY. Your client, Neighbors Against Garbage, strongly opposes permitting, construction and operation of a waste transfer station on the Nekboh site. It proposes, instead, that we modify the proposed Final Judgment to provide an incentive for using the Nekboh site not as a waste transfer facility, but as a public park.

We strongly believe that divestiture of the Nekboh permit application to an acceptable purchaser, and prompt permitting, construction and opening of a waste transfer station on the Nekboh site are steps that must be taken in order to provide an important competitive constraint on defendants' disposal operations in the New York City area. There is, however, nothing in the proposed Judgment that precludes the responsible New York state and city agencies from deciding not to issue a permit to operate a waste transfer station on the Nekboh site. In fact, whether these regulatory agencies decide to issue an operating permit for the Nekboh site depends on a variety of factors, including an assessment of the environmental impact of such a waste disposal facility. For that reason, your argument that opening a waste transfer station on the Nekboh site will have devastating environmental effects should be left to the appropriate state and local regulatory agencies to review and ultimately resolve.

Thank you for bringing your concerns to our attention; we hope this information will help alleviate them. Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(d), a copy of your comment and this response will be published in the **Federal Register** and filed with the Court.

Sincerely yours,

J. Robert Kramer II,

Chief, Litigation II Section.

Ward, Sommer & Moore, L.L.C., Counselors at Law

September 14, 1998.

J. Robert Kramer II,

Anti Trust Division, Chief Litigation II Sect., United States Department of Justice, 1401 H Street N.W., Suite 3000, Washington, DC 20530.

Re: *USA Waste et al.* v. *USA Waste Services Inc.,* CV 1:98CV1616

Dear Mr. Kramer: The undersigned represents a group known as Neighbors Against Garbage. In conjunction with numerous individuals and public representatives, we have participated in New York State Administrative proceedings opposing the construction and/or operation of a waste transfer station in Brooklyn New York known as the Nekboh Transfer Station (attached as Exhibit A). We write to oppose approval of the Draft Consent Order which will encourage the construction and operation of this ill-advised and unnecessary waste transfer station.

Under the terms of the Draft Consent Order, (DCO at II(c)(1)(i)(2), IV (A) and (B) and VIII [B] and [C]), it appears that USA Waste *must* obtain a license for, and transfer its ownership in, the Nekboh facility within one year from the entry of Final Judgment, or sell its Brooklyn Transfer Station, located at 485 Scott Ave. While the terms of the agreement are not entirely clear, it appears to provide an incentive for Waste Management to obtain prompt permitting for the proposed Nekboh facility. My client and the parties to this proceeding have steadfastly opposed any use of this site as a waste transfer station. Recently, after considerable public outcry, Governor Pataki and Mayor Guiliani convinced the NYS Department of Environmental Conservation and the NYC Department of Sanitation to ''go back to the drawing boards'' and conduct a thorough environmental review of the proposal. We are hopeful that this is the first step toward rejecting this unnecessary and ill-conceived plan. Unfortunately, the Draft Consent Order, in pressing USA Waste to obtain prompt approval of its application, is contrary to the directive of the Governor and Mayor and the ever growing factual record which demonstrates that the plan is a bad idea that will have devastating, adverse impacts on the environment and the neighborhood.

We suggest that these objectional provisions of the Draft Consent Order should be modified. We agree with the divestitive requirement, however, the Consent Order should allow that the site could (or should) be used for other purposes such as open space or recreation. Indeed, the agreement should provide an incentive for dedicating the site for park type purposes. This approach would conform this Consent Order to the direction of state and local efforts and would not undercut the recent progress toward an acceptable community compatible use for the Nekboh site.

Thank you for your attention to this matter.

Very truly yours,

Douglas H. Ward,

Ward, Sommer & Moore, LLC.

DHW/sak

cc: Cathleen Breen

State of New York—Department of Environmental Conservation

In the Matter of the Application of USA Waste Services of NYC, Inc.

For A Permit to Construct and Operate a Solid Waste Management Facility

DEC Application No. 26101–00013/00008

Petition for Full Party Status of Hon. Howard Golden, Hon. Sheldon Silver, Neighbors Against Garbage (''NAG''), Hon. Nydia Valazquez, Hon. Joseph R. Lentol, Hon. Martin Connor, Hon. Joan Millman, Hon. Felix Ortiz, Hon. Victor L. Robles, Hon. Kenneth Fisher, Hon. Angel Rodriguez, Hon. Stephen Di Brienza, Hon. Kathryn E. Freed, El Puente, de Williamsburg, Inc. (''El Puenta''), Make a Difference Community Action Program (''MADCAP''), Williamsburg Around the Bridge Block Association (''WABBA''), Northside Community Development Council, Inc., The Watchperson Project, The Sierra Club, United Jewish Council of the East Side, Inc., South Manhattan Development Corporation, Citizens Action Network, Katherine and Alex Kudiash, and Phil Smrek.

Attorneys for Petitioners

Frank J. Pannizzo, Esq.,

Counsel to the President of the Borough of Brooklyn, Borough Hall—209 Joralemon Street, Brooklyn, New York 11020, (718) 802–3807.

Ward, Sommer & Moore, Llc,

Plaza Office Center, 122 South Swan Street, Albany, New York 12210, (518) 472–1776.

Brooklyn Legal Services

Foster Maer, Copoation A, 260 Broadway, Brooklyn, NY 11211, (718) 782–6195.

New York Lawyers for the Public Interest

Sam Sue, Edward Copeland, of counsel, 30 West 21st St., 9th Floor, New York, NY 10010, (212) 727–2270.

Finder and Cuomo, Llp

Attorney for Petitioner Citizens Action Network, Matthew A. Cuomo, of counsel, 600 Third Ave., 27th Floor, New York, New York 10016, (212) 599–2244.

Dated: April 23, 1998.

Exhibit 7

U.S. Department of Justice Antitrust Division

August 27, 1999.

Mr. John McGettrick,

Co-Chairman, The Red Hook Civic Association, 178 Coffey Street, Brooklyn, New York 11231.

Re: Comment on Proposed Final Judgment in *United States, State of Ohio, et al.* v. *USA Waste Services, Inc., Waste Management, Inc., et al.,* Civil No. 98–1616 (N.D. Ohio, filed July 16, 1998)

Dear Mr. McGettrick: Thank you for your letter commenting on the Final Judgment submitted for entry in the above case. The Complaint in this case charged, among other things, that USA Waste's acquisition of Waste Management would substantially lessen competition in the disposal of New York City's commercial waste. The proposed Judgment would settle the competitive concerns with respect to the New York City market by, inter alia, requiring the defendants to divest: (a) the USA Waste's SPM Transfer Station; (b) USA Waste's All City Transfer Station; and (c) the pending application by USA Waste for a permit to construct and operate the Nekboh Transfer Station, also in Brooklyn, NY. See Judgment, §§ II (C)(2)(i)(1)–(3) and IV(A). To ensure the defendants' continued cooperation with the purchaser in its efforts to get the Nekboh site permitted, the proposed Judgment further provides that if the Nekboh Transfer Station does not receive an operating permit within one year after entry of the Judgment, the defendants must divest the Scott Avenue Transfer Station, also in Brooklyn, NY. See Judgment, §§ II(C)(2)(i)(4) and IV(B).

In a transaction approved by the United States in August 1998, under the terms of the proposed Judgment, the defendants divested All City Waste Transfer Station and their application for a permit for the proposed Nekboh site to Republic Services, Inc., which previously did not operate any waste disposal sites in the New York City area.

You have pointed out that although the proposed Final Judgment orders the defendants to divest a number of waste transfer stations in Brooklyn and in the Bronx, the Judgment does not order them to divest their interest in the proposed Erie Basin Marine Transfer Terminal, a large waste disposal facility that USA Waste had proposed permitting and constructing in the Red Hook section of Brooklyn, NY. You asked whether the defendants' retention of this disposal facility might nullify the effects of the ordered divestitures, and whether the defendants ought to be forced to withdraw their proposal to permit and construct the Erie Basin facility.

As noted above, the Complaint alleged that defendants' transaction would substantially reduce competition in the disposal of the city's commercial waste. The proposed Erie Basin site, however, was designed primarily for handling the city's residential waste, not its private commercial waste. This waste transfer station (and others proposed by competitors) would replace disposal capacity that would be lost when New York City closes its only municipal landfill, Fresh Kills, in late 2001. Although a portion of the Erie Basin facility, if permitted, might handle some private commercial waste, at the moment, whether Erie Basin will be permitted is somewhat speculative. In any event, we do not see Erie Basin as a significant competitive factor in the disposal of private commercial waste, and hence, there was no reason for us to insist that the defendants divest it to alleviate any competitive concerns regarding competition in the disposal of New York City's private commercial waste.

Thank you for bringing your concerns to our attention; we hope this information will help alleviate them. Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(d), a copy of your comment and this

response will be published in the **Federal Register** and filed with the Court.

Sincerely yours,

J. Robert Kramer II,

Chief, Litigation II Section.

The Red Hook Civic Association

October 23, 1998.

J. Robert Kramer II,

Chief, Litigation II Section, U.S. Department of Justice, 1401 H Street NW, Suite 3000, Washington, D.C. 20530.

Re: Public Comment on *U.S.* v *USA Waste Services, Inc., Civ. No. 1:98 CV 1616 (E.D. Ohio 7/16/98)*

Dear Mr. Kramer: We would like to comment regarding the adequacy of the New York City divestitures required as part of the above captioned Final Judgment (the ''Settlement''). As you know, the settlement requires the divestiture of the SPM Transfer Station at 912 East 132nd Street in the Bronx, the 2 North 5th Street waste transfer station in Brooklyn, the Plymouth Street station in Brooklyn and the Scott Avenue station in Brooklyn (the ''NYC Divestitures'').

Waste Management is currently bidding to construct a huge new marine transfer station. The company has recently submitted a proposal to the New York Department of Sanitation to construct a huge new marine transfer station (''MTS'') in the Erie Basin in Brooklyn that would handle between 5,000 and 10,000 tons per day of solid waste. We understand that Waste Management and USA Waste already collectively control a substantial majority of the waste transfer business in New York City. This MTS project would nullify the competitive effects of the NYC Divestitures. In order to preserve competition we believe that Waste Management should be required to withdraw the MTS proposal as a condition of approval of the merger contemplated by the merger agreement.

Please comment on whether Waste Management has disclosed the Erie Basin MTS proposal to the Department of Justice and why Waste Management should not be required to withdraw the Erie Basin MTS proposal in order to give effect to the NYC Divestitures. Should you have any questions with regard to the foregoing please do not hesitate to call me at (718) 424–4040.

Yours very truly,

John McGettrick,

The Red Hook Civic Association.

cc: Dennis Vacco NYAG

Exhibit 8

U.S. Department of Justice Antitrust Division

August 27, 1999.

Dr. Alan Heslop,

Director, The Rose Institute of State and Local Government, Claremont McKenna College, Adams Hall, 340 E. Ninth Street, Claremont, CA 91711–6420.

Re: Comment on Proposed Final Judgment in *United States, State of Ohio, et al.* v. *USA Waste Services, Inc., Waste Management, Inc., et al.,* Civil No. 98–1616 (N.D. Ohio, filed July 16, 1998)

Dear Dr. Heslop: This letter responds to your written comment on the proposed Final Judgment in the above case, now pending in federal district court in Cleveland, Ohio. The Complaint in that case charged, among other things, that USA Waste's acquisition of Waste Management would substantially lessen competition in the disposal of commercial waste from portions of the City of Los Angeles. The proposed Judgment would settle the case by, *inter alia,* requiring the defendants to divest Chiquita Canyon Landfill, a large waste disposal site located about 40 miles northeast of the City of Los Angeles. In a transaction approved by the United States in August 1998, under the terms of the decree, the defendants divested the landfill to Republic Services, Inc., which prior to the sale, did not operate any landfills in the greater Los Angeles area.

Your letter raises two issues related to the competitive effect of the proposed acquisition in the Los Angeles area. First, you question the governments' allegation that the relevant geographic market for purposes of analyzing the effects of the acquisition is commercial waste from the City of Los Angeles, an area defined in the Complaint as those parts of the city east of the San Diego Freeway, Interstate 405. In your view, the relevant market, at a minimum, should include a five-county area comprising not only the City of Los Angeles, but also Los Angeles, Ventura, Orange, Riverside and San Bernardino counties. You note that if the relevant geographic market is broadly defined to include these areas, then the United States should have taken into account competition from—and sought divestiture of—defendants' newly-permitted Mesquite Regional Landfill, located nearly 170 miles southeast of the city of Los Angeles.

In defining the relevant geographic market for the disposal of Los Angeles' commercial waste, the United States took into account the extent to which each of the private and public landfills in Southern California could compete for the city's waste. In its competitive analysis, the United States excluded some firms from the relevant geographic market because their landfills were legally prohibited from accepting any municipal solid waste from the City of Los Angeles (*e.g.,* most of the Los Angeles County landfills). The United States excluded other facilities (*e.g.,* Mesquite Regional Landfill) because of their distance from, and relative inaccessibility to, the Los Angeles area. As noted above, Mesquite Regional Landfill is located 170 miles from the city. Rail is the only practical way to transport waste from Los Angeles to that landfill. With delivered costs in excess of $45/ton (including transportation and tipping fees costs), the cost of disposing of commercial waste from the City of Los Angeles at Mesquite Regional Landfill would be nearly twice as much as the cost of sending such waste to close-in LA area landfills, which have average tipping fees of about $23/ton. The four firms that own or operate close-in landfills can profitably increase their prices for disposal of Los Angeles's commercial waste by a small but significant amount, without losing significant business to distant landfills such as Mesquite Regional. In these circumstances, it made economic sense to exclude Mesquite Regional and similarly situated landfills from our competitive analysis in determining the significance of the defendants' merger in the disposal of Los Angeles's commercial waste. See U.S. Department of Justice Horizontal Merger Guidelines §§ 1.2–1.3 (1997 ed.)

For similar reasons, it made sense to limit the relevant market to commercial waste that originates in portions of the City of Los Angeles located east of the San Diego Freeway, Interstate 405. Private commercial waste generated in areas of the city west of the freeway can be legally disposed of in several Los Angeles County landfills, and in our view, the availability of the Los Angeles County landfills for the disposal of waste from this section of the city made it unlikely that the merger would substantially reduce competition for such waste.

Finally, you may have overlooked the fact that expanding the relevant geographic market to include the distant Mesquite Regional Landfill would sweep into the market a number of other similarly-situated large landfills that are not owned or otherwise controlled by the four firms that operate close-in Los Angeles landfills. Including these additional firms in the competitive analysis would substantially diminish, perhaps even eliminate, any anticompetitive effect of an acquisition by USA Waste of Waste Management, which would make it difficult to justify requiring that the defendants divest any Los Angeles area landfills.

Thank you for bringing your concerns to our attention; we hope this information will help alleviate them. Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(d), a copy of your comment and this response will be published in the **Federal Register** and filed with the Court.

Sincerely yours,

J. Robert Kramer II,

Chief Litigation II Section.

Claremont McKenna College

November 23, 1998.

J. Robert Kramer II,

Chief, Litigation II Section, Antitrust Division, United States Department of Justice, Suite 3000, 1401 H. Street, NW, Washington, D.C. 20530.

Re: Proposed Final Judgment and Competitive Impact Statement **Federal Register,** Volume 63, Pages 51125 *et seq.*

Dear Mr. Kramer: The Rose Institute of State and Local Government at Claremont McKenna College (the ''Rose Institute'') respectfully submits the following comments concerning the subject **Federal Register** request for public comment. We note that the comments and opinions expressed herein do not necessarily reflect the opinions of the Trustees of Claremont McKenna College or the Governors of the Rose Institute, but are the findings of the scholars and researchers who have worked on the comments.

By way of introduction, the Rose Institute is a non-profit organization founded in 1973 with a goal of building a comprehensive and unmatched resource of information on the almost 20 million people and several hundred local governments in southern California. It is staffed primarily by the faculty and students of Claremont McKenna

College and the Claremont Graduate School, members of the Claremont University System. The institute specializes in public policy analysis and its researchers are trained in a wide range of disciplines, including government, finance, computer science (including GIS) and environmental regulation and law. While the Rose Institute has been involved in a number of matters of national interest, its general policy analyses are focused on matters affecting California and, in particular, the Los Angeles County and Inland Empire areas of southern California, including the Counties of San Bernardino, Riverside, and Imperial.

One of the major public policy issues which has been the focus of long-term and ongoing research within the Rose Institute is that of solid waste management—particularly concerning the issues of non-hazardous solid waste generation, recycling, reuse, and disposal.

Before the economic recession of the early 1990s, the Rose Institute undertook to play an important role in assisting public policy-makers as they reviewed and identified issues related to the development of plans and methodologies necessary to implement a waste-by-mail disposal system for southern California. The effects of the recession and the success of state-mandated waste recycling requirements delayed what had been projected as a critical need for waste-by-rail disposal options. Nevertheless, over the past several months, the Rose Institute has undertaken to review again the viability and necessity of potential waste-by-rail disposal options for southern California. A report, entitled ''Regional Solid Waste Management in Southern California for the New Millennium,'' sets forth our analysis and conclusions concerning this subject matter and is nearing final publication status. We expect formally to release the report in the near future. Nevertheless, because of the significance of this research for the issues raised in the subject **Federal Register** Notice, we have attached a draft copy of the report, noting that it has yet to be finally formatted, bound, etc., before formal release. We respectfully request that it be considered an integral part of the comments that follow.

During our research for the attached report, we necessarily reviewed the effects of the merger of Waste Management, Inc. and USA Waste Services, Inc. While it was not the initial intention of our research effort to address the specifics of that merger in our region, when the subject Proposed Final Judgment and Competitive Impact Statement (''Impact Statement'') appeared in the **Federal Register,** the Rose Institute as a matter of objective analysis, and in light of its research and the realities of waste disposal in our region, concluded that the Department of Justice had seriously mis-identified the relevant market area for southern California—at least with respect to ''disposal assets'' as that term is used in the Impact Statement.

The comments that follow are strictly limited to issues within the southern California geographical area. Furthermore, we express no opinion whether the relevant market area has been properly defined for purposes of ''hauling assets'' as that term is used in the Impact Statement. Based on our primary research related to waste-by-rail, our comments are directed only to ''disposal assets.''

In short, our conclusion is that the Department of Justice has mis-identified the relevant market area for waste disposal assets in Los Angeles and southern California in general and, in doing so, has provided a clear opportunity for the creation of substantial anti-competitive effects within the region related to solid waste disposal. Our detailed comments are attached.

We appreciate the opportunity to submit these comments and would be pleased to discuss them further with officials at the Department of Justice or before the United States District Court for the Northern District of Ohio, Eastern Division.

Sincerely,

Alan Heslop,

Director.

Comments of the Rose Institute of State and Local Government at Claremont McKenna College Regarding the Department of Justice Proposed Final Judgment and Competitive Impact Statement [1] 63 FR 51125 et seq.

Summary of comments and Conclusions

The Rose Institute of State and Local Government (''The Rose Institute'') at Claremont McKenna College respectfully concludes that the Department of Justice (''DOJ'') has not correctly defined the ''relevant geographic market'' for municipal solid waste (''MSW'') disposal in Los Angeles, California.[2] As a result, DOJ's analysis of the competitive impacts of the USA Waste/WMI merger in the Los Angeles area and its recommendations regarding the divestiture of ''Relevant disposal Assets'' [3] set forth in the proposed Final Judgment and Competitive Impact Statement are deficient. Our analysis indicates that the ''relevant geographic market'' should encompass, at a minimum, the entire County of Los Angeles and not merely a portion of the City of Los Angeles. So defined, the proposed Final Judgment and Competitive Impact Statement would necessarily have reached substantially different conclusions as to the need for further divestiture of ''Relevant Disposal Assets'' in the Los Angeles market. These conclusions are based upon the following:

(1) The definition of the Los Angeles market is overly restrictive and narrow in that:

(a) It is consistent with California state law establishing a comprehensive disposal site planning and utilization process that has been implemented by both the City and County of Los Angeles.[4]

(b) It is inconsistent with the City of Los Angeles' own MSW disposal and contracting practices and ignores Los Angeles County's state-approved integrated waste management plan and the disposal realities throughout southern California.

(c) The boundaries chosen appear to be arbitrary, artificial, and without any meaningful or logical relationship to the demographics, economics, or natural geographical features or boundaries of the City of Los Angeles.

(d) It fails to recognize the actual commercial MSW disposal and marketing practices of WMI in the City of Los Angeles market.

(e) It is inconsistent with the definitions of the geographic markets for all other metropolitan areas in the proposed Final Judgment and Competitive Impact Statement, and it appears to bear no relationship to the definition of ''relevant area'' set forth in the Hold Separate Stipulation and Order.

(2) The definition of the geographic market of Los Angeles is inconsistent with the DOJ's prior recent review and action taken regarding similar waste disposal asset transactions between competitors of USA Waste and WMI in the Los Angeles area.

(3) The proposed Final Judgment and Competitive Impact Statement appears to ignore the effects of recent acquisitions of disposal assets in the region by USA Waste prior to its merger with WMI and thereby compounds the potential anti-competitive effects of the subject merger.

(4) By expanding the Los Angeles market to include the entire county, the analysis of the competitive effects of the transaction would necessarily have included additional landfills in southern California, as well as outside of the state, in which USA Waste and WMI own, control, or hold an interest.

For the reasons set forth above, the proposed Final Judgment and

[1] The proposed Final Judgment, Hold Separate Stipulation and Order, and Competitive Impact Statement were prepared in connection with a civil antitrust lawsuit filed by the United States of America and eleven (11) states, including California, in an effort to enjoin the merger of USA Waste Services, Inc. (''USA Waste'') and Waste Management, Inc. (''WMI'') as a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. On July 16, 1998, a Complaint for Injunctive Relief Case No. 1:98 CV 1616 (the ''Complaint'') and the proposed competitive Impact Statement were filed in the United States District Court for the Northern District of Ohio Eastern Division.

[2] The Complaint (page 4) defines ''Los Angeles'' as ''that area of the City of Los Angeles, CA, located east of Interstate 405, the San Diego Freeway.''

[3] The term ''Relevant Disposal Assets'' is defined at 63 FR 51130.

[4] The California Integrated Waste Management Act of 1989 (AB 939), as amended, California Public Resources Code §§ 40000 *et seq.*

Competitive Impact Statement should be amended to reflect the realities of waste disposal in the Los Angeles region consistent with the analysis contained in these comments. Divestiture of additional ''Relevant Disposal Assets'' in the Los Angeles market should be required, including the El Sobrante Landfill in western Riverside County and USA Waste's interest in the Mesquite Regional Landfill waste-by-rail project in Imperial County.

Introduction

Attached to these comments in the December 1998 report of The Rose Institute entitled ''Regional Solid Waste Management in Southern California for the New Millenium'' (''The Rose Report''). We respectfully request that The Rose Report be read in its entirety to provide essential background information for the following specific comments. The report provides an important factual and historical review of waste disposal in southern California—especially in the City and County of Los Angeles, and many of the comments that follow make specific reference to portions of that report.

By way of summary, The Rose Report shows that, for many years, issues relating to waste management—in particular that of disposal—have received regional attention in southern California. Long before the passage of AB 939, which mandates that waste disposal be addressed through joint city and county planning efforts, the Los Angeles area had a regional perspective on waste issues. Examples of the regionalization of waste management include Los Angeles' reliance upon disposal of organic wastes in San Bernardino ''pig farms'' well into the 1950s and the proposed development of large regional waste-to-energy facilities during the 1970s and 1980s. Regionalization is currently reflected in the formalized planning process for, and potential embrace of, regional waste-by-rail projects.

The Rose Report concludes that, despite the successes made in diverting waste from landfills into recyclable markets pursuant to AB 939, with the closure of three (3) large local landfills in the recent past,[5] the need for regional waste disposal capacity is critical—particularly in view of the extended time required to obtain permits and develop new or expanded landfill capacity in the southern California area. More importantly, our conclusions are not unique but reflect the consensus of other observers of the issue in the region.

We believe that, in a very real sense, and in a potentially harmful manner to consumers and the public interest, DOJ has failed to evaluate properly both the near and long term anti-competitive effects of the merger on Los Angeles County, the county with the largest population in the United States. We further believe that the consequence of the DOJ analysis, if left unamended, will be to place in one operator—WMI—overwhelming control of private landfill disposal capacity capable of serving the City and County of Los Angeles and the entire southern California area all the way to the eastern border of the State and south to the border of the United States with Mexico.

Since the late 1980s, the Rose Institute has been a regular ''player'' in the public policy debate over waste management issues for the southern California region. Our programs have been supported and attended by most of the major waste management firms operating in southern California, including WMI, Browning Ferris Industries (''BFI''), Norcal Waste Systems, Mine Reclamation Corporation, and others. We have no ''axe to grind'' with any firm, nor are we obviously ''interested'' from a competitive viewpoint. Rather, effective public policy guides our analyses and interests in this matter and underscore the obligation we feel to file these comments.

Finally, by way of limitation, the comments that follow are limited to issues related to the definitions of ''relevant geographic market'' and ''Relevant Disposal Assets'' as they relate to Los Angeles. The Rose Institute takes no position concerning the ''Relevant Hauling Assets'' as the term is used in the proposed Hold Separate Stipulation and Order that is part of the Final Judgment.

Specific Comments

(1) The Definition of Los Angeles Markets Is Overly Restrictive and Narrow

(a) The Definition of the Los Angeles Market Is Inconsistent With Applicable California State Law

The California Integrated Waste Management Act (commonly referred to as AB 939), establishes legal requirements for all California counties and municipalities to develop and implement a comprehensive integrated waste management program. Failure of timely compliance with the mandates of AB 939 can result in civil penalties of up to ten thousand dollars ($10,000) per day for each day of violation.

Key among the mandated requirements of AB 939 is that each county must prepare a countywide integrated waste management plan. Part of the plan includes a Countywide Siting Element that must provide for at least fifteen (15) years of waste disposal capacity to meet the county's projected needs. The plan must also include Source Reduction and Recycling Elements from each of the cities in the county demonstrating compliance with the statute's waste diversion mandates.[6] Each countywide plan is required to be prepared by a countywide task force made up of representatives of the county and cities within that county. The role of the task force is to identify waste management issues of countywide or regional concern, determine the need for waste facilities that can service more than one jurisdiction within the county, facilitate the development of multi-jurisdictional methods for marketing recyclable materials, and resolve conflicts and inconsistencies between the subject county.[7] The entire plan is then submitted to the California Integrated Waste Management Board in Sacramento for approval. No provision is made within the law for any city, per se (other than the City and County of San Francisco) to prepare or implement its own waste disposal siting mechanism. That mechanism provided for in the Countrywide Siting Element, is, by law, reserved for the county. However, before submitting the Countywide Siting Element to the Integrated Waste Management Board, it must first be approved by a ''majority of the cities within the county, which have a majority of the population of the incorporated areas of the county.''[8]

No new landfill may be permitted and no existing landfill expanded within a region covered by an approved Siting Element without first being identified and included in the approved Siting Element.

In June 1997, the Los Angeles County Solid Waste Management Committee/ Integrated Waste Management Task Force, which included representatives from the City of Los Angeles, completed its draft of the Countywide Siting Element. It was subsequently approved in June 1998 by the California Integrated Waste Management Board. While a more thorough review of a key finding of the

[5] The Lopez Canyon Landfill in the City of Los Angeles, the BKK Landfill in the City of West Covina, and the prohibition of acceptance of MSW at the Azusa landfill in the City of Azusa.

[6] The law requires that each county and each city within each county demonstrate the ability to achieve 25% diversion (recycling) of generated wastes from landfills by the year 1995 and 50% diversion by the year 2000.

[7] California Public Resources Code § 40950.

[8] California Public Resources Code § 41721.

Siting Element is reserved for discussion below, the unavoidable point made here is that DJO's definition of the Los Angeles waste market for purposes of determining ''Relevant Disposal Assets'' is wholly inconsistent with the basic requirements of state law which addresses waste disposal issues and practices on a city or countywide basis. Only the county with the approval of the majority of its cities representing a majority of the population in that county has the authority to complete and promulgate a siting plan. Pursuant to law, Los Angeles County, with Los Angeles City's active involvement and approval, did precisely that. The geographical extent of that effort is substantially broader than the Los Angeles market as defined by DOJ.

(b) The Definition of the Los Angeles Market is Inconsistent With the City Los Angeles' Own Waste Disposal Practices

As reviewed in the Rose Report, the City of Los Angeles has long relied on disposal of its wastes at locations outside of its jurisdictional boundaries. As disclosed in the official records from the waste disposal reporting system maintained by the California Integrated Waste Management Board, the City of Los Angeles currently disposes of approximately twenty percent (20%) of its MSW at landfill facilities outside the City limits. Moreover, official waste disposal reports indicate that the City of Los Angeles regularly disposes of MSW in landfills in Orange, Riverside, and Ventura Counties in addition to landfills in Los Angeles County outside the City limits.[9] Figure 1 sets forth a map of the region indicating the sites where Los Angeles City wastes are currently disposed.

USA Waste and WMI landfills that provide MSW disposal services to the City of Los Angeles include the Azusa Landfill and Lancaster Landfill in Los Angeles County, the Simi Valley Landfill in Ventura County, and the El Sobrante Landfill in Riverside County (formerly owned by Western Waste Industries prior to its 1996 acquisition by USA Waste). While DOJ's analysis properly identifies the Chiquita Canyon Landfill (which is located outside of the Los Angeles market as defined by DOJ) as accepting MSW from the City of Los Angeles, the other USA Waste/WMI controlled disposal facilities are also important components in the Los Angeles solid waste management program.

[9] ''Total Disposal and Export for Jurisdictions Within a County Region'', November 2, 1998, California Integrated Waste Management Board.

In summary, Los Angeles City's own disposal practices, readily determined by review of official public records, are at odds with DOJ's delineation of the geographic market for purposes of identifying ''Relevant Disposal Assets'' to maintain competition in the Los Angeles marketplace.

(c) The Boundaries of the Los Angeles Market Area Are Arbitrary

Since the DOJ analysis apparently did not consider either the requirements of state law or the realities of actual disposal practices for the City of Los Angeles, there may have been some demographic or other factors relied upon by DOJ in defining the Los Angeles market. However, nowhere in the Complaint or the proposed final Judgment or Competitive Impact Statement is there any indication that DOJ relied on demographic or geographical factors in establishing the market. In any event, the Rose Institute is not aware of demographic or geographic features, waste industry practices, or legal constraints that could logically support a determination by DOJ to confine the relevant market to an area covering about one-half of the City of Los Angeles. Specifically, The Rose Institute is quite certain that there are no ''flow control'' legal restrictions in Los Angeles City or county that could have led the DOJ to restrict the market area to only a portion of Los Angeles City. Moreover, southern California is renowned for its ''regionalization'' of important social and policy matters such as air quality control and regulation, mass transportation, water supply and, as clearly documented in The Rose Report, solid waste disposal.

To illustrate further what we believe to be the illogic of the limited definition of the relevant area, we set forth in figure 2 a map of southern California population distribution, prepared employing the Rose Institute's Geographic Informational systems capabilities. The population of the Los Angeles market as defined by DOJ is set out against geographical population distributions in the region on Figure 2. In reviewing the population data, the obvious question is why did DOJ exclude from its market analysis almost eighty-five percent (85%) of the region's entire population—much of which is in jurisdictions that currently accept Los Angeles City's MSW for disposal? Also, why would DOJ's market analysis only consider a fraction of the total actual MSW generated by the City? Clearly, when compared to the geographic market definitions developed for the other metropolitan areas (discussed more fully below) considered in the Final Judgment and Competitive Impact Statement, DOJ's analysis of the Los Angeles market cannot be supported.

(d) The Boundaries of the Los Angeles Market Fail To Recognize the Actual Commercial Waste Disposal and Marketing Practices of WMI

Substantial amounts of MSW for the entire City of Los Angeles are disposed at the Bradley West Landfill, owned and operated by WMI and located within the relevant geographic market. However, the Rose Institute is not aware of any public information (including MSW disposal contracts) that either accounts for the generation of MSW in the area of Los Angeles delineated by DOJ (*i.e.*, east of Interstate 405 in the City of Los Angeles) or distinguishes between MSW generated ''east of the 405'' or ''west of the 405.''

Certainly, given the size and importance of the Los Angeles market, if such information existed it would be commonly known. Moreover, as detailed in The Rose Report, the information would be reflected in the Countywide Siting Element of Los Angeles County (discussed below). The Siting element specifically recognizes the possibility of using a number of USA Waste and WMI's landfills located in California, Arizona, Nevada, and even as far away as Oregon—WMI's Columbia Ridge Landfill. And, as noted above, the Siting element is, by law, the official ''blueprint'' for waste disposal pians for all 88 cities and the unincorporated areas in Los Angeles County, including the City of Los Angeles. Furthermore, even a cursory review of Los Angeles City and County public records would have revealed numerous and ongoing efforts of WMI to market these facilities to the City and County. An example is the 1989–90 proposal by WMI to the Los Angeles county Sanitation Districts to secure a waste commitment to its RailCycle project in San Bernardino County and to utilize rail-based transfer station sites in El Segundo (west of interstate 405) and in the City of Commerce, as discussed in detail in The Rose Report.

(e) The Definition of Los Angeles Market Is Inconsistent With DOJ's Analysis of Other Metropolitan Areas

In each and every other city identified in the Complaint (and unlike the approach taken for Los Angeles), the definition of ''relevant geographic market'' includes not only the entire area and population of the city, but also the surrounding or adjacent county(ies). Thus, for example:

—Baltimore—''means the City and Howard, Baltimore, Carroll, and Anne Arundel Counties.''
—Cleveland—''means the City of Cleveland and Cuyahoga County.''
—Detroit—''means the City of Detroit and Wayne County.''
—Miami—''means the City of Miami and Broward, Dade, and Monroe Counties.''
—New York—''means New York, Bronx, Queens, and Richmond Counties.''
—Pittsburgh—''means the City of Pittsburgh and Allegheny and Westmoreland Counties.''

(Complaint at pages 4 and 5, emphasis supplied.)

The fact of the matter is that Los Angeles is the only municipality in the Complaint that is restricted to a size smaller than its own municipal boundaries and which does not also include the county in which it is, at least in part, situated. The Rose Institute fails entirely to understand what type of criteria and methodology could have been utilized by DOJ for treating Los Angeles so differently from every other metropolitan waste disposal market in the country identified in the Complaint. Further, we note that a number of the other waste markets, as defined, have greater populations than the Los Angeles market, as defined by DOJ, and the market identified for the New York area has a substantially greater population that approximates the population of the entire County of Los Angeles. Based upon 1990 cenus data, the following table sets forth a summary of the populations in these areas (including the listed counties):

Baltimore	1,497,956
Detroit	1,411,209
Miami	3,309,246
New York	7,703,051
Pittsburgh	1,708,696
Portion of Los Angeles City Selected by DOJ	[10] 2,936,500

Given DOJ's characterization of the New York metropolitan area as the relevant market area (an area containing many natural potential barriers to the ''flow'' of MSW to landfills) it would seem that it should have also characterized the Los Angeles metropolitan areas, which contains over nine million people in Los Angeles County alone (current estimate), as the relevant market area. We also note that, in addition to New York, many of the other jurisdictions also contain some natural geographical features such as rivers and major waterways (not present in the Los Angeles area) that might have led an analyst to conclude that natural barriers exist that affect MSW disposal practices in the area. In any event, absent some logical explanation from DOJ for its remarkably different treatment of Los Angeles, one is left only to speculate over how the conclusions were arrived at.

In the context of the dissimilar treatment by DOJ of the Los Angeles market compared to other metroplitan areas, we also note that another key issue arises relating to the absence of any analysis of the growing importance of transfer stations generally in California, and particularly in the Los Angeles area.

Whole DOJ correctly analyses the potential for enlarging the geographical reach for disposal market purposes through the use of transfer stations (Pages 9 and 10 of the Complaint), it does not consider this factor in the Los Angeles market analysis. As outlined in The Rose Report, municipalties in the southern California regio primarily because of the recycling and waste diversion mandates of AB 939, are moving rapidly to the utilization of ''Materials Recovery Facility (''MRF'')/ Transfer Stations.'' Because of the increase in waste processing through MRFs and Transfer Stations (which involves the loading of MSW into larger transfer trucks or containers for shipment by rail), the practice necessarily facilities the ability to dispose of MSW at greater and greater distances from the point of generation. Furthermore, with the closures of Los Angeles City's Lopez Canyon Landfill and the BKK Landfill in West Covina, and the prohibition on acceptance of MSW at the Azusa Landfill (the latter two of which are situated in eastern Los Angeles County), almost 25,000 tons of MSW per day is now necessarily moving to outlying landfills in the region. Such closures and the mandates of California law are resulting in a growing dependence on MRFs/Transfer Stations by local jurisdictions. In fact and by way of example, of the eighty-eight (88) cities in Los Angeles County, thirty-eight (38) have now committed, as an official part of their approved Source Reduction and Recycling Plans to meet state recycling mandates, to a MRF/ Transfer Station strategy.[11]

The resulting reality of this growing dependence on MRFs/Transfer Stations is that MSW may be taken—and today is being taken—greater distances from disposal, thus broadening the relevant geographic market for Los Angeles for the purpose of waste disposal analysis.

As a final point, we would note the inconsistency in DOJ's definition of ''relevant area'' contained in the Hold Separate Stipulation and Order (''Order'')[12] as applied to the Los Angeles area. In the Order, ''relevant areas'':

''* * * means the county in which the * * * Relevant Disposal Assets are located and any adjacent city or county * * *''

The Order goes on to state in the portion on ''Objectives''[13]

''The Final Judgment * * * is meant to ensure defendants' prompt divestiture * ** for the purpose of establishing viable competitors in the waste disposal business * * * in the Relevant Areas * * *''

(emphasis added)

It appears clear that the DOJ used essentially the same standard in defining ''relevant area'' and in delineating the geographic markets for all of the other metropolitan areas. However, with respect to Los Angeles, DOJ used a different and undetermined methodology to define the geographic market. Had DOJ been consistent and taken the same approach it took for the other jurisdictions, the definition of the Los Angeles market would have included Los Angeles County, and the adjacent counties of Ventura, Orange, Riverside, and San Bernardino. Such a definition of Los Angeles would have been precisely what the Rose Institute maintains is consistent with the common understanding of the Los Angeles market area.

(2) The Definition of the Los Angeles Market Is Inconsistent With DOJ's Prior Actions

In 1996, DOJ had occasion to review a transaction between BKK Corporation (a privately-held waste management firm which, as alluded to above, operated a large regional landfill in eastern Los Angeles County) and BFI.[14] The essence of the transaction was the sale of certain assets of BKK in the Los Angeles area to BFI, including BKK's interest in two (2) proposed landfill projects located on sites in Los Angeles and San Bernardino Counties, as well as BKK's waste recycling operations and transfer station in the City of Los Angeles (Wilmington). At the time, BFI was the owner of the Sunshine Canyon Landfill in Granada Hills (in Los Angeles County) and was then seeking

[10] Estimated by use of Geographic Information System capabilities of the Rose Institute.

[11] Countywide Siting Element for Los Angeles County, Los Angeles Country Department of Public Works Environmental Programs Division, June 1997.

[12] 63 Federal Register 51127.

[13] Ibid.

[14] Information concerning this transaction was taken from conversations with involved counsel.

to obtain final permits and approvals to initiate operations. The Sunshine Canyon Landfill, however, was closed to operations at all times relevant to the BKK/BFI transaction.

The original BKK/BFI transaction documents reviewed by DOJ contained a provision that would have pre-conditioned the transaction on the closing of the BKK Landfill in West Covina, even though that landfill was not part of the transaction. Upon review, DOJ objected to the condition and refused to approve the transaction until the condition related to the West Covina landfill had been deleted. The condition was removed and DOJ approval followed. What is interesting about this transaction, and DOJ's approach to it, is that even though BFI did not operate any landfill in the region at the time,[15] but was merely seeking to resume operations at its Sunshine Canyon Landfill, DOJ looked beyond the borders of the City of Los Angeles and, one can reasonably infer, made an implicit—if not explicit—decision that the Los Angeles waste disposal market extended into eastern Los Angeles County.

We think that DOJ was correct in that prior instance. We think its current analysis is clearly inconsistent with its past view of the Los Angeles disposal market and is therefore incorrect.

(3) The Proposed Final Judgment and Competitive Impact Statement Ignore the Effects of Prior Acquisitions by USA Waste in the Region

Over the past two years, USA Waste has made a number of acquisitions of landfill assets in southern California—both outright and by way of merger. For Example, USA Waste acquired the Chiquita Canyon Landfill from the Laidlaw Company; the Azusa Landfill from BFI; and the El Sobrante Landfill and Western Waste Industries' interest in the Mesquite Regional Landfill (a waste-by-rail project in Imperial County) via a merger with Western Waste.

It is important to note that USA Waste and WMI have not been long-time competitors in the region. In fact, USA Waste is a relatively new organization both locally and in the nation generally. However, USA Waste has acquired many firms in the region that were long-time competitors of WMI, such as Western Waste Industries. The potentially significant anti-competitive consequences of USA Waste's recent acquisitions throughout southern California is raised nowhere in the proposed Final Judgment and Competitive Impact Statement. We believe that it should receive serious independent consideration by DOJ. In fact, USA Waste's acquisitions in California during the last three years, might not have secured DOJ approval if they had been effected by WMI acting on its own account.

By ignoring the prior USA Waste acquisitions in its analysis of the current merger, DOJ is sanctioning a situation in which one private landfill operator will have overwhelming control of private waste disposal capacity capable of serving the City and County of Los Angeles and the entire southern California area all the way to the eastern border of the State and extending south to the border of the United States with Mexico! With the merger as approved by DOJ in the Competitive Impact Statement, WMI will own, control, or hold an interest in all but three (3) of the large private landfills and landfill projects serving all of Los Angeles County, the country with the largest population in the United States.[16]

Figure 3 shows the general location of private landfills in southern California and landfills in neighboring states which have been identified by Los Angeles County in the Countrywide Siting Element (discussed above) as potential sites for providing landfill disposal capacity to the area for the next fifteen (15) years. It also lists the current permitted daily tonnage allowed at each facility and the remaining capacity (as indicated in the Siting Element). It reveals the overwhelming number of landfills that are owned and controlled by WMI in the region and that are specifically identified for future potential use by the relevant market of Los Angeles County (and City).

Also important is the information set forth on Figure 4, which displays the relative amounts of MSW currently being disposed in the same southern California region as shown in Figure 3. As Figure 4 makes clear, the amounts of MSW disposed in the region can quite easily be accommodated by WMI facilities in terms of allowable daily capacity for many years to come. While the potential impact of public landfill facilities is not set forth in the Figure, as discussed in The Rose Report, the ability of Los Angeles County to control disposal capacity sufficient for its own needs within its own boundaries is limited. In fact, the County, in its approved Siting Element, specifically relies upon a ''mix'' of public and private disposal options. If it is unable to permit a significant extension of its Puente Hills Landfill in eastern Los Angeles County,[17] its reliance on private disposal options will be dramatically increased. It is precisely for these reasons that the County's own plans look to the utilization of other potential private sites as depicted in the attached maps. Allowed to go unamended, the VMI merger as currently proposed would result in a situation where one private operator—WMI—has essential control over waste disposal capacity for the entire region.

The Rose Institute strongly believes that any analysis of the current merger should also include an analysis of recent acquisitions of disposal assets in southern California by USA Waste, especially the assets acquired in the acquisition of Western Waste Industries.

(4) At a Minimum, the Los Angeles Market Should Have Included all of Los Angeles County. The Proper Market Description Would Have Resulted in Additions to ''Relevant Disposal Assets'' for Los Angeles

For the reasons set forth above, especially those relating to the solid waste management requirements imposed by California law and the realities of current actual waste disposal practices in the City of Los Angeles, we argue that the Los Angeles market should include the entire County of Los Angeles. In turn, the effect of such a definition should substantially change DOJ's view of what are—or are not—''Relevant Disposal Assets'' for the ''true Los Angeles market.'' No secret exists as to what both the City and County view as the specific landfill assets that could be considered for inclusion in the ''Relevant Disposal Assets''; they are enumerated in the Countywide Siting Element.

As discussed extensively in The Rose Report, implementation of a waste-by-rail project for the region is both imminent and necessary for the County

[15] It was the owner/operator of the Azusa Landfill in eastern Los Angeles County, but that landfill was permitted to receive only ''inert'' wastes and was prohibited by court order from receiving any MSW.

[16] The three major private landfills are BFI's Sunshine Canyon Landfill, the Chiquita Canyon Landfill to be purchased by Republic Services, Inc., and the Eagle Mountain Waste-by-Rail project, being developed by Mine Reclamation Corporation in eastern Riverside County. Eagle Mountain has been tied up in environmental litigation for six years. If the litigation is resolved in favor of the project, it may be several more years before all of the necessary operating permits could be obtained. See The Rose Report for a more complete discussion of the waste-by-rail projects.

[17] The County's land use permit for the facility expires in the year 2003. Given the long lead time to permit new or expanded landfills in the region, the County will need to initiate formal environmental review for that effort in the very near future. The Rose Report concludes that this effort, in turn, will likely also include initial implementation of a significant waste-by-rail operation for the region.

of Los Angeles and its 88 cities. Recently, the Los Angeles County Sanitation Districts secured a site for development of a MRF capable of feeding a waste-by-rail system and have held preliminary discussions for the purposes of implementing such a system with officials of the Eagle Mountain, RailCycle, and the Mesquite Regional Landfill projects. In a letter dated September 13, 1996, from Donald Nellor of the Los Angeles Sanitation Districts to David Mares of the Planning Department for Riverside County, Nellor reaffirmed the Sanitation Districts' continuing commitment to developing waste-by-rail:

> There is a clear need for new regional landfills, such as the Eagle Mountain site . . . The Sanitation Districts continue to be committed to implementing a waste-by-rail system as one component of a balanced and multi-faceted approach to effectively manage the Districts' long-term waste disposal needs.

To date, the only waste-by-rail project that has obtained all of its major land use and operational permits is the Mesquite Regional Landfill.

With an expanded view of the market, any consideration of the competitive impacts of the USA Waste/WMI merger on the waste disposal market in the City and County of Los Angeles should also take into account the resulting position of the merged companies throughout all of southern California. As an example, USA Waste's MRF/Transfer Station in Carson. California, just south of the Los Angeles City limits, has been specifically modified to take MSW from the City of Los Angeles to its El Sobrante Landfill in Riverside County, which it does. As noted above, Figure 3 sets forth a map of USA Waste's and WMI's landfills in the region depicting the permitted daily and overall capacities of each facility. That map shows that more than enough capacity exists among these facilities to accommodate all of Los Angeles County's needs for at least the nest 30 years. Furthermore, should the County of Los Angeles decide to dedicate a wastestream for disposal by rail in order to promote the development of remote regional landfills, USA Waste, by virtue of its recent acquisition of Western Waste Industries, has an interest in the Mesquite Regional Landfill, the only currently permitted in-state waste-by-rail project.

Finally, in viewing the realities of the entire region, The Rose Report notes that there is only one jurisdiction outside of Los Angeles County which may offer disposal capacity held and controlled in the public sector—Orange County (see The Rose Report for specific discussion of the history of Orange County's capabilities). Even here, however, WMI maintains a strong position. In 1995, as part of its bankruptcy recovery program, Orange County ''pre-sold'' capacity in their public landfill system. WMI purchased, and still controls, substantial capacity in that system.

(5) Conclusion—WMI Should Be Required To Divest Additional ''Relevant Disposal Assets''

For all of the reasons set forth above and in the supporting analysis contained in The Rose Report, the proposed Final Judgment and Competitive Impact Statement should be revised to reflect Los Angeles Count as the ''relevant geographic market'' for purposes of analyzing the competitive impacts of the USA Waste/WMI merger. The Rose Institute maintains that a revised definition of the Los Angeles market should result in the divestiture of additional landfill disposal operations of the newly-constituted WMI in order to protect the public interest. In addition, we believe that much of the concern over the creation of an anti-competitive environment in waste disposal in southern California could also be lessened by consideration of the divestiture of assets that were acquired recently by USA Waste, before the instant merger—in particular, the El Sobrante Landfill in western Riverside County and the interest of Western Waste, a wholly owned affiliate of USA Waste, in the Mesquite Regional Landfill waste-by-rail project in Imperial County. The remaining company would still have full ownership and developmental rights over the RailCycle waste-by-rail project in San Bernardino, as well as numerous other landfills and landfill capacity in California and in nearby out-of-state locations that will compete in the Los Angeles market.

Finally, we take note of the following. WMI is no ''stranger'' to the Department of Justice, the Attorneys General of numerous states, or the district attorneys of many counties in those states, including the counties in southern California. Its appetite for growth and ability to control aggressively the markets in which it operates are a matter of public record. We submit that that is not a public record which supports granting to the ''new'' WMI an almost exclusive ''franchise'' in waste disposal for southern California for many years to come—a situation that will exist if the instant merger is allowed to be completed without substantial reconsideration of the Los Angeles market. We think the public interest deserves a more relaistic and complete ayalysis for southern California and its millions of residents. We respectfully submit these comments to the public record in this matter.

Exhibit 9

U.S. Department of Justice, Antitrust Division

August 27, 1999.

Joseph Kattan, Esquire
Michael F. Flanagan, Esquire,
Gibson, Dunn & Crutcher, 1050 Connecticut Avenue, NW, Washington, DC 20036–5306.

Re: Comment on Proposed Final Judgment in *United States of Ohio, et al.* v. *USA Waste Services, Inc. Waste Management, Inc., et al.*, Civil No. 98–161 (N.D. Ohio, filed July 16, 1998)

Dear Messrs. Kattan and Flanagan: This letter responds to your letter, submitted on behalf of your client, Gold Fields Mining Corporation (''Gold Fields''), commenting on the proposed Final Judgment in the above case. The Complaint in that case charged, among other things, that USA Waste's acquisition of Waste Management would substantially lessen competition in the disposal of commercial waste from portions of the City of Los Angeles, The proposed Judgment would settle the case by, *inter alia*, requiring the defendants to divest Chiquita Canyon Landfill, a large USA Waste landfill located about 40 miles northeast of the City of Los Angeles. In a transaction approved by the United States in August 1998, under the terms of the decree, the defendants divested that landfill to Republic Services, Inc., which previously did not operate any landfills in the greater Los Angeles area.

Your client, Gold Fields, together with Union Pacific Railroad Company and defendant USA Waste, own Mesquite Regional Landfill. Gold Fields is very concerned that the proposed divestiture of defendants' Chiquita Canyon Landfill does not go far enough to prevent the defendants from exercising market power after the acquisition. Specifically, Gold Fields is concerned that following the merger, the defendants will attempt to reduce the disposal capacity available to the Los Angeles market by using its ownership interest in Mesquite Regional to prevent this large new landfill from aggressively competing for commercial waste from the city.

In our view, the relevant geographic market for analyzing the competitive effects of the USA Waste's acquisition of Waste Management does not include Mesquite Regional Landfill. In defining the relevant geographic market for the disposal of Los Angeles's commercial waste, the United States took into account the extent to which each of the private and public landfills in Southern California could compete for the disposal of commercial waste that originates in the city of Los Angeles. In the course of its competitive analysis, the United States excluded some firms from its relevant geographic market because their landfills were legally prohibited from accepting any

municipal solid waste from the city of Los Angeles (*e.g.*, most of the LA County landfills). The United States excluded other disposal facilities (*e.g.*, Mesquite Regional) because of their distance from, and relative inaccessibility to, the Los Angeles area.

USA Waste's Mesquite Regional Landfill is located 170 miles from the City of Los Angeles. Rail is the only practical way to transport waste from Los Angeles to that landfill. With delivered costs in excess of $45/ton (including transportation and tipping fee costs), it would be nearly twice as expensive to dispose of commercial waste from the City of Los Angeles at Mesquite Regional Landfill as sending such waste to close-in LA area landfills, which have average actual landfill tipping fees of about $23/ton.[1] The four firms that own or operate landfills reasonably close to Los Angeles can profitably increase their tipping fees for disposal of Los Angeles's commercial waste by a small but significant amount without losing significant business to distant landfills such as Mesquite Regional. Thus, is makes sense to exclude Mesquite Regional and similar landfills from the competitive analysis in determining the significance of the defendants' transaction for the disposal of Los Angeles' commercial waste. See U.S. Department of Justice Horizonal Merger Guidelines § § 1.2–1.3 (1997 ed.).

Finally, you implicitly assume that expanding the relevant geographic market to include Mesquite Regional Landfill would make USA Waste's acquisition of Waste Management more, not less, anticompetitive. However, expanding the market to include this distant landfill would sweep into the competitive analysis a number of other large landfills now owned or otherwise controlled by the four firms that own the close-in Los Angeles landfills. Including in the market the disposal capacity of those distant firms would substantially diminish, or even eliminate, the anticompetitive effects of defendants' transaction, and hence, make it questionable whether the defendants should be required to divest any Los Angeles area landfills.

Thank you for bringing your concerns to our attention; we hope this information will help alleviate them. Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(d), a copy of your comment and this response will be published in the **Federal Register** and filed with the Court.

Sincerely yours,

J. Robert Kramer II,

Chief, Litigation II Section.

Gibson, Dunn & Crutcher, LLP

November 23, 1998.

Via Hand Delivery

J. Robert Kramer, II, Esq.,

Chief, Litigation II Section, Antitrust Division, U.S. Department of Justice, 1401 H Street, N.W., Suite 3000, Washington, D.C. 20530.

Re: *United States* v. *USA Waste Services, Inc.*, Civ. No. 1:98 CV 1616

Dear Mr. Kramer: Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h) (the ''Tunney Act''), we submit the comments of Gold Fields Mining Corporation (''Gold Fields'') on the proposed consent decree filed by the Justice Department contemporaneously with the filing of its complaint in the above-referenced lawsuit.

In a complaint filed on July 16, 1998, the Department (and a number of individual states) alleged that the proposed acquisition of Waste Management, Inc. (''WMI''), by USA Waste Services, Inc. (''USA Waste''), would violate Section 7 of the Clayton Act, 15 U.S.C. 18.[1] As required by the Tunney Act, the Department published a proposed Final Judgment and a Competitive Impact Statement (''CIS'') in the **Federal Register** on September 24, 1998. 63 FR 51,126. Under the Tunney Act , the court is required to make a determination, prior to approving the proposed consent judgment, that ''the entry of such judgment is the public interest.'' 15 U.S.C. 16(e); see also *United States* v. *Airline Tariff Publ'g Co.*, 836 F. Supp. 9, 11 (D.D.C. 1993).

Although the Department is to be commended for intervening and requiring divestitures to reduce the impact of this anticompetitive acquisition, the remedy mandated by the consent decree with regard to one of the markets alleged in that complaint, the Los Angeles area, is insufficient to cure the competitive harm brought about by the transaction. The Department's remedy is inadequate because it leaves the merged company with ownership of sufficient local and remote disposal assets to harm competition for waste disposal in the market. If the merged company is able to retain such power and control, it also will be able to thwart or delay the entry of cost-effective disposal alternatives for customers in the Los Angeles market, such as the Mesquite Regional Landfill in Imperial County, California, which is owned by Gold Fields.

The public interest requires that the decree be modified to address the competitive harm more effectively. To protect competition in the Los Angeles market, for the reasons set forth below, we ask that the Department reexamine its definition of the Los Angeles market,[2] which is necessary in order to more accurately assess the full impact of the transaction. We further request that the Department require the divestiture of additional waste disposal assets by the merged entity, in order to further reduce the merger's anticompetitive effect. Specifically, we request that the Department require Waste Management, acting through its wholly owned affiliate Western Waste Industries (''WWI''), to give up any claim it may have to an ownership stake in the Mesquite Regional Landfill.

I. Factual Background

A. The Complaint and Competitive Impact Statement

The complaint in this matter alleged that USA Waste and WMI are two of the most significant competitors in the disposal of municipal solid waste (''MSW'') in a number of markets throughout the country. Because of the significant competitive positions of both companies, the complaint alleged that the acquisition would substantially lessen competition in the disposal of MSW in seventeen geographic markets throughout the United States, including Los Angeles, California. Compl. ¶¶ 45–78. The complaint further alleged the existence of significant barriers to entry in the MSW disposal business in the Los Angeles area and other ''difficult-to-enter'' markets, due to a variety of important factors, including various ''federal, state and local safety, environmental, zoning and permit laws and regulations'' that ''dictate critical aspects'' of the disposal of MSW, and make the process of obtaining a permit to construct or expand a disposal site ''an expensive and time-consuming task.'' *Id.* ¶ 76; see also CIS at 8, 10, 63 FR at 51,156 (1998). The Department alleged that the diminution in competition brought about by the acquisition is likely to result in consumers paying higher prices and receiving fewer or lesser quality services for the disposal of MSW. Compl. ¶ 78. Indeed, the complaint alleged that operators of local disposal facilities ''can—and do—price discriminate, *i.e.*, charge higher prices to customers who have fewer local options for waste disposal.'' CIS at 9, 63 FR at 51,156 (1998).

Together with the complaint, the Department filed a proposed consent decree under which USA Waste was able to complete its acquisition of WMI, but which required the divestiture of certain assets in order to preserve competition in the affected markets. As it relates to the Los Angeles area, the proposed consent decree required the divestiture of USA Waste's Chiquita Canyon Landfill, located at 29201 Henry Mayo Drive in Valencia, California. We understand that an agreement for the divestiture of this facility to Republic Services, Inc., has been effectuated.

Although we believe that the complaint correctly identified a number of significant competitive problems created by the proposed combination of these two large competitors, the remedy set forth in the proposed consent decree with respect to the Los Angeles area is insufficient to protect the public interest in preserving present and future competition for the disposal of MSW generated in the Lost Angeles area. In particular, the definition of the Los Angeles market is inconsistent with applicable state law an contrary to the commercial realities of the Los Angeles marketplace. Consequently, the remedy set forth in the decree fails to protect the long term interests of purchasers of MSW disposal capacity in a competitive market, as the combined entity now has an

[1] In your letter, you point out that the ''posted'' rates at Los Angeles's transfer stations and resource recovery facilities are about $45/ton, which would be comparable to the delivered cost of waste disposal at Mesquite Regional Landfill. Many of Los Angeles's large haulers, however, receive contractual discounts for waste disposal at area landfills, and these discounted disposal rates, or ''tipping'' fees, actually average about $23/ton for commercial waste from the city.

[1] The entity resulting from the combination of USA Waste and WMI is referred to herein as ''Waste Management.''

[2] As defined in the complaint, Los Angeles means ''that area of the City of Los Angeles, CA, located east of Interstate 405, the San Diego Freeway.'' Compl. ¶ 19.

incentive to block or significantly delay the development of the Mesquite Regional Landfill. However, even if the market definition set forth in the complaint is correct, the remedy set forth in the decree still falls short of the minimum needed to protect consumers in the market defined by the complaint.

B. The Mesquite Regional Landfill

From October 1991 through November 30, 1997, Gold Fields, Western Waste Industries (''WWI''), which since 1996 has been a subsidiary of USA Waste,[3] and SP Environmental Systems, Inc., an affiliate of Southern Pacific Transportation Company (now known as Union Systems, Inc., an affiliate of Southern Pacific Transportation Company (now known as Union Pacific Railroad Company (''UP'')), were engaged in a venture to explore the feasibility of permitting, developing, and operating the Mesquite Regional Landfill. The landfill was to be developed as a MSW regional facility located in Imperial County, California, 170 miles southeast of Los Angeles. The parties believed that the enterprise, which could serve as a disposal site for MSW transported by rail from Los Angeles County and other parts of Southern California, would lessen the need for, and reliance upon, urban landfills and provide an environmentally safe means of disposing of waste at a competitive price.

Gold Fields or Arid Operations, Inc. (''AOI''), its wholly-owned subsidiary, served as manager of the venture and has undertaken all permitting and land acquisition activities requested for the development of the Mesquite Regional Landfill. Gold Fields and AOI have been actively marketing the project throughout Los Angeles County, which is expected to be the primary source of MSW for the facility. Actual construction of the Mesquite Regional Landfill will begin once a contract is awarded.[4] It is projected that MSW disposal will begin within one year of the commencement of construction.

The Mesquite Regional Landfill project is the largest permitted waste-by-rail facility in the United States. During the initial year of operation, the facility will receive up to 3,400 tons of MSW per day, an amount that will increase to 20,000 tons per day over the 100-year life of the project.

Although public and private landfill operators frequently encounter strong opposition to the construction of new landfills and the expansion of existing facilities in densely populated areas, the permitting of the Mesquite Regional Landfill has encountered relatively few difficulties. This is attributable in large measure to the fact that the site of the Mesquite Regional Landfill is especially well suited for the development of a landfill. The site covers 4,250 acres in a deserted portion of the southeastern portion of Imperial County, California. For the past 13 years, the site has been used by Gold Fields and its successor for gold mining activities and as a gravel quarry. The geography of the site—with a base of dense conglomerate and basement rock—contains no active faults and provides a low-permeability barrier that will supplement the engineered leachate and landfill gas containment systems.

The average annual temperature is 74°F, with average highs during the summer months of 105°F to 110°F, and the mean annual rainfall is only 4 inches. This arid climate greatly reduces the potential for leachate to be developed in the landfill. Because of the desert conditions, only low density populations of plant and animal species exist in the area. In addition, because the majority of the site already has been disturbed by mining and gravel extraction activities, any additional impact on plant and animal life will be limited. Finally, the site is located in an area where there are no bodies of water or permanent surface flows.

In September 1995, after three years of public review and comment, the Environmental Impact Report/Environmental Impact Statement for the project was finalized, and local land use approvals and a conditional use permit were issued by Imperial County. In November 1995, all of the municipalities in Imperial County reviewed and approved the project, and a Waste Discharge Order was issued by the California Regional Water Quality Control Board in December of that year. The California Integrated Waste Management Board issued a Solid Waste Facilities Permit in March 1997, and earlier this month, the Imperial County Air Pollution Control District issued an Authority to Construct permit, which addressed air quality issues for the project. As a result, the Mesquite Regional Landfill became the only permitted waste-by-rail project in California. Throughout the permitting process, Gold Fields and AOI prevailed on all administrative and judicial appeals filed in state and federal courts by environmental groups opposing the project.

On November 30, 1997, the venture agreement terminated by its terms. Since the termination of the venture, Gold Fields has been engaged in discussion with SPES, UP, and WWI attempting to wind up the venture. Concurrently, at their sole cost and expense, Gold Fields and AOI have continued the permitting and marketing programs for the project. USA Waste, one behalf of WWI, expressed an interest in participating in the project, however, Gold Fields and USA Waste have irreconcilable differences over plans for the development of the Mesquite Regional Landfill which preclude the parties from being able to conclude a new agreement.

On March 10, 1998, USA Waste, the nation's third largest waste collection and disposal firm, agreed to acquire WMI, the largest waste collection and disposal firm in the country. USA waste's incentive to compete the wind up of the prior venture and negotiate a new agreement with Gold Fields for the continued development of the Mesquite Regional Landfill has been significantly reduced following this acquisition. As a result of the acquisition, the merged company now controls at least four (4) additional major proposed and existing remote waste disposal sites that have either been actively pursuing contracts or are capable of providing waste disposal services to Los Angeles County by transporting waste to their landfills via rail—the RailCycle (Bolo Station) landfill project in California,[5] and the Butterfield Station, Copper Mountain, and Franconia landfills in Arizona. Thus, the merged company now has an incentive to impede the wind up of the venture and thereby frustrated development of the Mesquite Regional Landfill, which is intended to provide the assurance of long term MSW disposal capacity for the Los Angeles area.

Prior to the transaction, WWI and subsequently, USA Waste were committed to the development of the Mesquite Regional Landfill, and the site was posied to compete with WMI's facilities. A 1995 memorandum by Richard Widrig, a vice president of WWI, set out the Mesquite Regional Landfill's goal is being ''the lowest cost'' MSW disposal facility. See July 28, 1995 memorandum from Richard Widrig, attached hereto as Exhibit A, at 2.[6] Given its acquisition of competing sites that were owned prior to the merger by WMI, it is likely that the combined entity will seek to suprress development of the Mesquite Regional Landfill site in order to thwart a low-cost competitive alternative to those sites.

II. The Development of the Mesquite Regional Landfill Is Essential for Effective Waste Management in the Los Angeles Area

The Mesquite Regional Landfill project will be an essential component of the solid waste management program for the Los Angeles area. The location is also particularly well-suited for the disposal of MSW from that area. The site is a short rail haul away from Los Angeles, and offers very large disposal capacity without many of the environmental problems that frequently plague the development of new sites. The Mesquite Regional Landfill, as a newly constructed facility, will be fully lined to comply with current environmental regulations. By contrast, much of the current capacity in the Los Angeles area is the result of the expansion of older landfills that have

[3] WWI merged with USA Waste in a transaction that closed on May 7, 1996.

[4] Construction of the facility is the least time-consuming aspect of market entry. Thus, while the permitting process for a new MSW disposal facility can last an entire decade, construction of a facility such as the Mesquite Regional Landfill can be accomplished within one year.

[5] WMI's RailCycle project in San Bernardino, California is still in the permitting phase, although WMI is now the subject of a major criminal investigation arising from a dispute with a local property owner.

[6] Although this memorandum referred to ''many competitors for this waste stream,'' most of the privately-owned competitive sites are now owned by Waste Management. Mr. Widrig's memorandum states that ''[o]ur competition is primarily RailCycle and LaPaz and local landfills.'' Ex. A, at 2 (emphasis in original). RailCycle, with a proposed capacity of 430 million tons, is owned by Waste Management. La Paz, with an estimated capacity of 20 million tons, is jointly owned by BFI and La Paz County. With the exception of the Chiquita Canyon facility, which USA Waste was forced to divest, and BFI's Sunshine Canyon Landfill, both of which are located in northwestern Los Angeles County, Waste Management owns all of the other major private landfills in Los Angeles County.

limited or non-existent liner systems. In addition, remote locations eliminate the traffic congestion and other public health and safety risks associated with operating a landfill in a heavily populated area.

Governmental authorities have recognized the need to utilize remote facilities, such as the Mesquite Regional Landfill, to meet the MSW disposal needs of the Los Angeles area. For example, Steve Maguin, the head of the Solid Waste Management Department with the Los Angeles County Sanitation Districts testified in February 1997 that ''as early as the beginning of the next decade,'' or a little over a year from the filing of this comment, Los Angeles County would have to export MSW to other locations. See Eagle Mountain Public Hearing before Riverside County Planning Commission, dated Feb. 5, 1997, attached hereto as Exhibit B, at 1.

Mr. Maguin's testimony is consistent with many other projects over the past ten years. Indeed, these projections played a substantial role in creating the impetus for the development of the Mesquite Regional Landfill. For example, as April 1988 study by the Southern California Association of Governments, titled ''The Feasibility of Hauling Solid Waste by Railroad From the San Gabriel Valley to Remote Disposal Sites'' (the ''1988 Study''), attached hereto as Exhibit C, forecasted a shortfall in the landfill capacity for Los Angeles County by the end of 1998. 1988 Study, at 1–13. The projected shortfall in disposal capacity was the driving force behind the development of the Mesquite Regional Landfill and which makes development of that facility a matter of significant importance to Los Angeles area customers. Similarly, the study's conclusions were not lost on the Los Angeles County Sanitation Districts, and in May 1991, an Ad Hoc committee was convened to guide the development of a waste-by-rail system to diversify the solid waste options available to the metropolitan area. See ''Final Waste-by-Rail Master Plan,'' County Sanitation Districts of Los Angeles County, January 1997, attached hereto as Exhibit D, at 1.

In a January 1998 status report on Regional Solid Waste Management within Los Angeles County, prepared by the County Sanitation Districts of Los Angeles County, Mr. Charles W. Carry, the Chief Engineer and General Manager noted that ''[d]evelopment of a waste-by-rail infrastructure is important to the Sanitation Districts in the effort to achieve more effective and diverse waste management in the County.'' See ''Status Report on Regional Solid Waste Management Within Los Angeles County,'' County Sanitation Districts of Los Angeles, January 1998, attached hereto as Exhibit E. The report noted that, because of the closure of three major solid waste landfills in 1996, which resulted in a net reduction of about 25% of the County's daily permitted capacity, ''out-of-County disposal capacity will be heavily relied upon to provide future needs.'' *Id,* at 2. Two of the nine major landfills permitted to accept solid waste in Los Angeles County are projected to close within the next two years and, without the development of new in-County capacity, Los Angeles will become dependent on waste export.

III. Remedial Action Is Required To Ensure the Development of a Low-Cost Disposal Alternative for Los Angeles Area Customers

The complaint and accompanying competitive impact statement recognized that the proposed combination of USA Waste and WMI would substantially lessen competition in the disposal of MSW in Los Angeles. The Department also has recognized that, because the process of obtaining the permits necessary to construct or expand a disposal site is both time-consuming and expensive, entry into the market for the disposal of solid waste is difficult. Compl. ¶76; CIS at 9, 63 FR at 51,156 (1998). Indeed, the Department contends that ''[s]ignificant new entry into these markets is unlikely to occur in any reasonable period of time, and is not likely to prevent exercise of market power after the acquisition.'' CIS at 10; 63 FR at 51,156 (1998).

Based on the recent landfill permitting activities of Gold Fields and others in Southern California, seven to ten years is now commonly accepted as the lead time needed to obtain the necessary permits to expand an existing facility or to construct a new facility, with costs associated with the permitting process ranging from $20 to more than $75 million. Virtually every project will encounter public and/or political opposition, legal challenges, and appeals of administrative determinations. Of course, recovering any such investment is conditioned upon successfully obtaining all of the required permits. For example, the developer of the Weldon Canyon proposal in Ventura County spent $14 million over the course of eleven years before the project failed in the face of public opposition. See ''Southern California Landfill Capacity Analysis,'' prepared by JBS Associates, dated January 1997, attached hereto as Exhibit F, at 3.

The Mesquite Regional Landfill offers a low-cost alternative that can now enter the Los Angeles market because it has essentially completed the permitting process. This makes the facility a formidable competitor of Waste Management's disposal sites within and outside the Los Angeles market, furthering the goal of diversifying the waste disposal options for Los Angeles.

The remedy proposed by the Department, the divestiture of the Chiquita Canyon landfill, is inadequate to preserve competition in the rapidly evolving market in Los Angeles because it will not affect the merged entity's ability to impede the development of a promising potential low-cost entrant into the market—the Mesquite Regional Landfill. Unless the merged entity is forced to relinquish any claim to the assets of the Mesquite Regional Landfill, the development of the project is likely to be delayed and consumers in Los Angeles will be deprived of a major competitor whose goal, as expressed by WWI's Widrig in 1995, is to make the Mesquite Regional Landfill the ''lowest cost'' major MSW disposal facility. We therefore respectfully request that the consent decree be modified to contain such a remedy.

The inadequate nature of the existing remedy may have resulted from a failure to appreciate the truly regional nature of waste disposal in the Los Angeles area, and a corresponding failure to identify the appropriate market, thereby eliminating from the Department's analysis the important role of remote sites in providing disposal services for the Los Angeles metropolitan area. That market is today regional in scope, owing to changes in the relative costs of local and remote sites based on a change in the regulatory regime governing waste disposal. Specifically, in 1989, California enacted the California Integrated Waste Management Act (A.B. 939), as amended.[7] A.B. 939 requires each county, as part of its Integrated Waste Management Plan, to prepare a Siting Element demonstrating a minimum of fifteen years of environmentally safe and technically feasible solid waste disposal capacity. In the Countywide Siting Element for the Los Angeles area, published in June 1997 (''County Siting Element''), the Los Angeles County Department of Public Works' Environmental Programs Division stated that:

> It is important to incorporate into the planning process a number of alternatives to ensure that solid waste disposal, an essential public service, continues to be provided to all residents and businesses in Los Angeles County without interruption during the planning period and the long term. One of these alternatives is the development of out-of-County solid waste disposal facilities, together with the infrastructure necessary to provide access to these facilities.

Id. at 9–1, attached hereto as Exhibit G. Thus, solid waste management in Southern California has evolved into a regional system in which local governments are forced to rely on resources outside their boundaries to fulfill the mandates of A.B. 939.

A.B. 939 also imposes stringent diversion and recycling requirements on cities and counties. In order to meet A.B. 939's diversion mandates, MSW is increasingly processed through Materials Recovery Facilities (''MRF'')/transfer stations making railhaul facilities, such as the Mesquite Regional Landfill (which requires transfer stations for loading intermodal containers), viable full-fledged competitors with local firms.

Although the cost of transporting MSW by rail to sites such as Mesquite is somewhat higher than the transportation cost associated with local disposal, the Mesquite site enjoys a number of significant cost advantages that ameliorate and overcome this disadvantage. Labor costs, air emissions reduction credits, and host fees all are expected to be lower at a remote facility. Indeed, at the time of projected operation of the facility, these cost advantages are expected to be decisive. One reason for this is that the diversion and recycling requirements of A.B. 939 has diminished some of the cost advantages associated with local MSW disposal. Because the Act has imposed higher costs on local disposal without affecting the cost of disposing of MSW at sites such as the Mesquite Regional Landfill, it has narrowed and in some cases eliminated altogether the cost advantage associated with local disposal.

Under A.B. 939, 25% of all solid waste generated in California must be diverted from

[7] Cal. Pub. Res. Code §§ 40,000 *et seq.*

landfill disposal by January 1, 1995, and 50% of all solid waste must be diverted by January 1, 2000.[8] Cal. Pub. Res. Code § 41,850. This diversion requirement imposes significant increased treatment costs and has resulted in a substantial and continuing increase in the use of transfer stations and MFRs throughout Los Angeles County and the surrounding area.[9] The services provided by these facilities generally include handling, processing and loading in transfer trucks or intermodal containers; transportation from the facility to the landfill; and all landfill disposal costs.

With these increased handling costs now being imposed on an increasingly large percentage of the waste stream, the geographic area within which waste is transported for disposal has broadened considerably, and the incremental transportation cost of longer hauls to regional facilities has become much less significant as a proportion of the overall cost. Posted tip fees at large volume transfer stations and MRFs in Los Angeles currently average $41 per ton and range up to $56.65 per ton. Consequently, as the cost advantages of local disposal dissipate, regional facilities, which enjoy certain cost advantages of their own, become more competitive. By means of comparison to the transfer station costs cited above, the projected total disposal costs at the Mesquite Regional Landfill are $40–$45 per ton.

Thus, even today, before the depletion of capacity at some of the major disposal facilities in the Los Angeles area, the Mesquite Regional Landfill would be cost competitive with in-county facilities handling waste processed through a MFR or transfer station. The cost equation will continue to tilt over time in favor of the Mesquite Regional Landfill if the facility goes forward.

Over the course of the next few years, the difference in the prince of local and regional disposal will narrow as efforts to meet the 50% diversion rate by the year 2000 will subject a higher percentage of the waste flow to additional costs. As Mr. Maguin, the head of the Los Angeles County Solid Waste Management Department, recently noted, the County's needs for remote disposal could be greater still if the County were unsuccessful in meeting its diversion mandate of 50%. Ex. B, at 2. Although the estimated statewise diversion rate for 1997 was 32%, data compiled by the CIWMB's Solid Waste Information System reports that approximately 25% of the daily waste stream for Los Angeles County flows through transfer/processing facilities in the county. Unless the present diversion rate improves dramatically, the exhaustion of local landfill capacity will be accelerated, and the resulting need to export MSW will be exacerbated in the near future. And, whether or not the diversion rate improves to the mandated 50% level, the cost advantage of local disposal will continue to dissipate.

Requiring Waste Management to relinquish any claim to an interest in the Mesquite Regional Landfill will protect the public interest for the long term and will effectively constrain Waste Management's ability to increase disposal costs and lower the quality of service to the citizens of Los Angeles.

IV. The Harm to Competition Caused by Waste Management's Efforts To Block Development of the Mesquite Regional Landfill Require Modification of the Proposed Remedy

Under the Tunney Act, a district court has both the power and the duty to review antitrust consent decrees and, in an appropriate case, to exercise its powers to require modification of a decree. ''In order to prevent 'judicial rubber stamping,' district courts are required to make an independent evaluation of proposed decrees: 'Before entering any consent judgment * * * the court shall determine that the entry of such judgment is in the public interest.' 15 U.S.C. § 16(e).'' *United States* v. *BNS Inc.,* 858 F. 2d 456, 459 (9th Cir. 1988) (quoting H.R. Rep. No. 1463, 93d Cong., 2d Sess. 6 (1974), reprinted in 1974 U.S.C.C.A.N. 6535, 6536) (internal citation removed). As the Ninth Circuit noted in BNS, although ''Congress may specifically limit available remedies in defining the jurisdiction of a federal court * * * [i]n this case, however, it has not chosen to do so.'' *Id.* at 462.

In making its independent public interest review, the independent analysis mandated by the Tunney Act is quite broad:

> [T]he statute clearly indicates that the court may consider the impact of the consent judgment on the public interest, even though that effect may be on an unrelated sphere of economic activity. For example, the government's complaint might allege a substantial lessening of competition in the marketing of grain in a specified area. It would be permissible for the court to consider the resulting increase in the price of bread in related areas.

Id. at 463. Thus, even though a court may not ''base its public interest determination on antitrust concerns in markets other than those alleged in the government's complaint,'' *id.* at 462–63, the court may consider broader potentially adverse effects of a decree, *id.* at 464.

Here, the proposed remedy is not in the public interest because, despite the divestiture of the Chiquita Canyon facility, Waste Management will dominate the market for MSW disposal in the Los Angeles area as a result of the transaction. There are nine major landfills permitted to accept solid waste in Los Angeles County. Five of the nine, with a combined daily permitted capacity of 22,800 tons, are owned by the county, a city, or other government agency. Two other facilities, with a combined daily permitted capacity of 11,000 tons are owned by Waste Management and the remaining two facilities, with a daily permitted capacity of 11,000 tons are owned by other private companies.

In addition to facilities within the county, the Los Angeles County Department of Public Works Environmental Programs Division recently identified 14 existing and four proposed landfills located outside Los Angeles County (including the Mesquite Regional Landfill) that had the capability of accepting MSW transported by rail and/or truck from Los Angeles County. See County Siting Element, Ex. G, at 9–8. The merged entity owns, controls, or claims an interest in eight out of the 18 facilities outside the county—six existing landfills and two proposed sites, including the Mesquite Regional Landfill. The merged entity's disposal capacity in these 18 existing and proposed sites exceeds 50% of the total of the sites.

As a result of the transaction, the merged entity will control more than half of the capacity that can serve the Los Angeles area in the near term, when in-County capacity is exhausted. Such control will give Waste Management an ability to exercise market power that will not be remedied by the decree. For example, the merged entity is likely to interfere with the rapid development of the low-cost Mesquite Regional Landfill.

Given the diminishing supply of MSW disposal capacity within Los Angeles County, the key to Waste Management ability to exercise market power is whether other firms will be able to meet the requirements of customers in the marketplace. See *United States* v. *E.I. du Pont de Nemours & Co.,* 351 U.S. 377, 391–92 (1956) (defining market power as the ''power to control prices or exclude competition''). This is particularly critical in a market that is characterized by very significant barriers to entry. ''If entry barriers are substantial, a market participant may be able to achieve or maintain market or monopoly power and use that power anticompetitively because its actions can go unchecked by new competitors.'' *Reazin* v. *Blue Cross and Blue Shield of Kansas,* 899 F.2d 951, 974 (10th Cir. 1990). The ability of an incumbent supplier to frustrate the entry by competitors into the market entrenches its dominance by preventing the addition of capacity that would compete with the incumbent's facilities and restrain its ability to charge prices above the competitive level. Here, the transaction creates an incentive for the merged entity to prevent the entry of the low-cost Mesquite facility.

Prior to the transaction, USA Waste had an interest in only three of the 18 sites outside Los Angeles County that may be suitable to serving the County's needs. These are the El Sobrante facility in Riverside County, the Mesquite Regional Landfill in Imperial County, and the Copper Mountain facility in Arizona. The incentives of the merged entity have changed dramatically because of its

[8] The estimated statewide division rate for 1997 was 32%. See Integrated Waste Management Board News Release, titled ''State Recognizes Communities' Recycling Success on 2nd America Recycles Day,'' dated Nov. 15, 1998, attached hereto as Exhibit H. More than 100 million tons of solid waste have been diverted from landfills since 1990. *Id.*

[9] For example, based on data submitted in annual reports filed by local jurisdictions with the California Integrated Waste Management Board (''CIWMB''), 38 of the 45 jurisdictions within Los Angeles County for which data was available opted for a strategy of utilizing MFRs, in addition to transfer stations, to meet the diversion mandates of A.B. 939. Data compiled by the CIWMB's Solid Waste Information System indicates that approximately 10,000 tons of waste per day (approximately 25% of the daily waste stream for the county) flow through transfer/processing facilities in Los Angeles County.

newly-acquired control of more than 50% of the capacity of suitable out-of-county sites. Unless the Mesquite Regional Landfill is allowed to proceed without the interference of the merged entity, consumers in Los Angeles will be deprived of an entrant that will be able to constrain the ability of Waste Management to dominate the market once local capacity is depleted.

The Los Angeles market plainly encompasses out-of-county facilities, including the Mesquite Regional Landfill. As noted earlier, Los Angeles County will soon run out of disposal capacity and will be forced to transfer its MSW to out-of-county facilities. These facilities are already becoming cost-competitive with within-county sites and are likely to become more competitive over time as the diversion requirements of A.B. 939 are implemented. The relevant geographic market is the geographic area in which sellers of the particular product operate and to which purchasers can practicably turn for the product. *Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U.S. 320, 327 (1961); *Standard Oil Co.* v. *United States,* 337 U.S. 293, 299 n.5 (1949). This market necessarily includes the area within which facilities to which customers will turn for MSW disposal are located. See *United States* v. *Philadelphia Nat'l Bank,* 374 U.S. 321, 359 (1963) (geographic market is ''the 'area of effective competition * * * in which the seller operates, and to which the purchaser can practicably turn for supplies' ''). The cost relationship between local and out-of-county locations is such that customers will be forced to use the out-of-county disposal sites within the very near future because of the practical depletion of Los Angeles County facilities. In these circumstances, the area of effective competition includes out-of-county locations that are practical alternatives to within-county disposal, an area in which the merged entity is dominant. In this area, the Mesquite Regional Landfill is likely to be an important low-cost supplier if its entry into the market is not frustrated by the USA Waste-WMI transaction.

Gold Fields requests that the Department require Waste Management to relinquish any claim it may have to the assets of the Mesquite Regional Landfill venture. Remedies requiring the forbearance of legal claims, such as that sought there, have been used by the Department in other consent decrees. In *United States* v. *Thomson Corp.,* 1997–1 Trade Cas. (CCH) ¶ 71,754 (D.D.C. Mar. 7, 1997), the complaint alleged, *inter alia,* that Thomson Corp.'s acquisition of West Publishing Co. would likely lessen competition in the markets for primary and secondary law products because West's assertion that other legal publishers needed a license in order to ''star paginate'' its publications constituted an important barrier to entry. At the time, West was involved in litigation over the validity of its copyright claim. In order to eliminate this barrier to entry, the consent decree required West to grant other legal publishers a license to star paginate its publications on specified terms, effectively forcing West to renounce its claim.

The Department has required a merged entity to relinquish legal claims as a condition of allowing a transaction to go forward in at least one prior case. In the consent decree entered into in connection with the complaint filed in *United States* v. *Borland Int'l, Inc.,* Civ. Action No. C91 3666 (MHP) (N.D. Cal. 1992) the Department challenged the acquisition of Ashton-Tate Corporation by Borland International, Inc. (''Borland''), the complaint alleged that the effect of the acquisition would be to substantially lessen competition in the sale of certain software for IBM and IBM-compatible personal computers. As set forth in the accompanying competitive impact statement, ''the United States sought to assure the continued availability of competitive alternatives by requiring Borland to relinquish certain copyright claims''. The purpose of the remedy was ''to protect against the possible exercise of market power by Borland after the acquisition.'' Thus, the proposed final judgment enjoined Borland from asserting legal claims, and directed Borland to dismiss with prejudice a copyright infringement suit that Ashton-Tate had initiated against another company. See 57 FR 8359 (1992).

The similar remedy sought by Gold Fields here would protect against the possible exercise of market power by Waste Management after the acquisition, as local disposal options in the Los Angeles area are depleted. Such a remedy is necessary to protect the public interest of consumers in the fast-evolving Los Angeles market.

Sincerely,

Joseph Kattan

Michael F. Flanagan

Appendix of Exhibits to Letter Commenting on Proposed Consent Decree in United States v. USA Waste Services, Inc., Civ. No. 1:98 CV 1616

Dated: November 23, 1998.

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July 28, 1995 memorandum from Richard Widrig	A
Eagle Mountain Public Hearing before Riverside County Planning Commission, dated Feb. 5, 1997	B
Southern California Association of Governments study, titled ''The Feasibility of Hauling Solid Waste by Railroad From the San Gabriel Valley to Remote Disposal Sites,'' April 21, 1988	C
''Final Waste-by-Rail Master Plan,'' County Sanitation Districts of Los Angeles County, January 1997	D
''Status Report on Regional Solid Waste Management Within Los Angeles County,'' County Sanitation Districts of Los Angeles, January 1998	E
''Southern California Landfill Capacity Analysis,'' prepared by JBS associates, January 1997	F
Los Angeles County Department of Public Works, Environmental Programs Division, County Siting Element, June 1997	G
Integrated Waste Management Board News Release, titled ''State Recognizes Communities' Recycling Success on 2nd America Recycles Day,'' dated Nov. 15, 1998	H

Note: Exhibits A through H were unable to be published in the **Federal Register**. A copy can be obtained from the U.S. Department of Justice, Documents office, 325 7th St., Room 215, Washington, DC or (202) 514–2481.

Exhibit 10

U.S. Department of Justice Antitrust Division

August 27, 1999.

Kirk S. Rimmer, Esquire,

Offices of Arthur M. Traugh, The Pacific Stables Building, 1126 Second Street, Old Sacramento, California 95814.

Re: Comments on Proposed Final Judgment in *United States, State of Ohio, et al.* v. *USA Waste Services, Inc., Waste Management, Inc., et al.,* Civil No. 98–1616 (N.D. Ohio, filed July 16, 1998)

Dear Mr. Rimmer: This letter responds to your comment on the proposed Final Judgment, submitted on behalf of Coastal Waste Management (''Coastal''), a small waste hauler in Sacramento, CA. The Complaint in this case charged, among other things, that USA Waste's acquisition of Waste Management would substantially lessen competition in the collection or disposal of municipal solid waste in a number of markets throughout the country. In California, the Complaint alleged, the merger would substantially reduce competition in commercial waste disposal in the City of Los Angeles. The proposed Judgment, now pending in federal district court in Cleveland, Ohio, would settle the case with respect to the Los Angeles market by, *inter alia,* requiring that the defendants divest Chiquita Canyon Landfill, a large facility located about 40 miles north of Los Angeles, CA. In a transaction approved by the United States in August 1998, under the terms of the decree, the defendants divested Chiquita Canyon Landfill to Republic Services, Inc., which prior to the sale did not operate any waste disposal facilities in the Los Angeles area.

In your letter, you expressed concern that USA Waste's acquisition of Waste

Management would also substantially reduce competition in the collection of commercial waste in the Sacramento area, with the combined firm controlling 65–80 percent of commercial waste collection after the merger. To eliminate the alleged adverse effects of the merger in this market, you suggest that we revise the proposed Judgment by adding provision that would, among other things, limit the duration of defendant's commercial waste collection contracts to no more than two years, with perhaps a single one-year renewal period.

We believe that the defendants' divestiture of Chiquita Canyon Landfill to an acceptable purchaser, Republic, alleviated by competitive concerns created by the defendant's merger in the Los Angeles, CA market alleged in the Complaint. As to your statement that additional injunctive relief is necessary to eliminate competitive problems the merger would create in the Sacramento area, we note that at the time of the government's Complaint, we had seen no evidence that the defendant's merger would raise competitive problems warranting the imposition of the relief that you propose. Of course, should we find in a subsequent investigation that the defendant's activities have unreasonably restrained competition in Sacramento, CA or any other waste collection or disposal market, the United States will take appropriate legal action, including requesting that a court impose injunctive relief. Depending on the nature of the violation, that relief may perhaps be similar to that which you have outlined in your comment on this decree. In the meantime, if you believe that your operations have been injured as a result of the proposed merger, you are certainly free to institute a private antitrust action for damages or injunctive relief in federal district court.

Thank you for brining your concerns to our attention; we hope this information will help alleviate them. Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(d), a copy of your comment and this response will be published in the **Federal Register** and filed with the Court.

Sincerely yours,

J. Robert Kramer II,

Chief, Litigation II Section.

Arthur M. Traugh

September 22, 1998.

United States Department of Justice,
New Case Unit, Attn: Dania Gorriz, 1401 H Street N.W., #3000, Washington, D.C. 20530.

Dear Ms. Gorriz: I represent Coastal Waste Management, a small waste hauling company headquartered in Sacramento, California. For the reasons stated below, I am writing this letter to urge you to stop the proposed merger of USA Waste and Waste Management Incorporated (''WMI''), or, in the alternative, if the merger is allowed to occur, to impose certain operating restrictions on the merged companies. If the merger is approved without restrictions, the newly formed waste hauling duopoly will be ripe for a continuation of predatory business practices.

Summary of The Waste Hauling Business

By way of introduction to waste hauling industry practices, we submit the following summary.

There are primarily two types of waste hauling:

(1) Small containerized bins range from two to eight cubic yards in size. They are predominately used to service multifamily apartments or industrial, retail and commercial businesses on a weekly or semi-weekly basis, and a customer has typically executed a contract or service agreement for the servicing of these bins. We estimate that if the merger is allowed to occur, USA Waste will control 65–70% of the front-loader small containerized bins in the Sacramento marketplace, including the only available collection route not run by the City or County of Sacramento.

(2) Large drop boxes vary in size from fifteen to forty cubic yards. This service does not typically have a service contract.

Some landfill operations are controlled by a company that is also a waste hauler, thereby creating a vertically integrated monopoly. The purchase of a landfill by a small waste hauler is not economically feasible. The problem of vertically integrated landfill operations and waste hauling will only be exacerbated by the recent passage of California Assembly Bill 939, which requires all California counties to recycle 50% of all accepted waste. A recycling center controlled by a dominant company that is also a waste hauler will enable the waste hauler to set monopolistic pricing against a small independent waste hauler.

Antitrust Problems

Several problems currently exist that reduce competition and thwart the entrance of new waste haulers into the marketplace. These problems will be aggravated by the proposed merger. Notably, the Antitrust Division of the U.S. Department of Justice filed a complaint against WMI based on the Antitrust Procedures and Penalties Act (''APPA''), 5 U.S.C. 16(b)–(h), in United States District Court for the Southern Division of Georgia, Savannah Division (''Justice Complaint against WMI''). A copy of the final judgment in that action is enclosed for your ease of reference.

The prohibited conduct set forth in the enclosed judgment has allegedly occurred, and is continuing to occur, in the Sacramento marketplace. The trio of predominant waste haulers in Sacramento—BFI, WMI and USA Waste (collectively the ''Sacramento Controlling Companies'')—that control more than eighty percent of the front load marketplace have contracts which mirror the contracts subject to the judgment in the Justice complaint against WMI. For example, but without limitation, the prolix fine print contracts of the Sacramento Controlling Companies have automatic three-year ''rollover'' provisions, no requirement of notice of the expiration of the contract prior to the automatic three-year renewal, and a provision for unilateral price increases. The use of the three-year automatic rollover provision in the contracts of the Sacramento Controlling Companies has made it nearly impossible for new waste hauling companies to enter the marketplace, since virtually every customer is locked into a contract with the Sacramento Controlling Companies. We can provide written verification that the following tactics have allegedly been employed by Sacramento Controlling Companies when other companies have attempted to enter into service contracts with customers who had a presently existing rollover contract with the Sacramento Controlling Companies:

(1) Allegedly slandering the new hauler as to capacity, service, quality of equipment and adequacy of insurance; (2) Keeping service in place by the predominant hauler after notice was given by the customer to remove the bins; [1] (3) Sending invoices to customers after cancellation of service; (4) Sending accounts to collection agencies and threatening legal recourse and liquidated damages under the rollover contracts, thereby chilling the resolve of customers to use new waste haulers; (5) Repeatedly calling and harassing customers who terminated their contracts, even though the customers continually requested that they cease calling; and (6) Reducing their services to below cost after a new waste hauler has submitted an offer for services.

When a customer requests a change in service, he or she is sent a seemingly benign letter or revised agreement which contains the same egregious terms stated above. Customers have repeatedly informed my client that they were not aware they were signing contracts which bound them to automatic three-year rollovers and unilateral price increases.

Suggestions for Enforcement Policies

We suggest the following policies be imposed on the proposed merged companies:

1. The same injunction and restraints that are set forth commencing at page four of the enclosed judgment in the Justice Complaint against WMI.

2. That enforceability of any contract that is beyond a two-year period and that previously contained a three-year rollover period be eliminated.

3. That options for three-year contracts be eliminated unless a separate document in highlighted bold print plainly states the three-year term, and the customer separately initials the yearly term.

4. That rollover contracts beyond one year be eliminated. The contracts should become month-to-month after the expiration of the written term.

5. That a selloff of routes in the front loader business be required to reduce the concentration to below fifty percent in the Sacramento marketplace.

6. That ownership of landfills by waste haulers be prohibited in the marketplace where there is greater than fifty percent domination and no municipal alternative dump location.

My client indicates that there are several other independent waster hauling companies in Sacramento who share my client's concerns as set forth in this letter, and I can

[1] This occurs even when the rollover contracts have been cancelled according to the terms of the contract.

supply you with those names if you so desire. We are attempting to determine through your office the effect of the previous consent decrees.

We appreciate your attention to this matter. If you have any questions please do not hesitate to contact the undersigned.

Kirk S. Rimmer,

Attorney for Coastal Waste and Recycling.

Note: Attachment to the letter from Arthur M. Traugh of the Pacific Stables Building was unable to be published in the **Federal Register.** A copy can be obtained from the U.S. Department of Justice, Documents Office, 325 7th St., Room 215, Washington, DC or (202) 514–2481.

U.S. Department of Justice Antitrust Division

August 27, 1999.

Mr. William A. Ehrman,

Executive Director, York County Solid Waste and, Refuse Authority, 2700 Blackridge Road, York, PA 17402.

Re: Comment on Proposed Final Judgment in *United States, State of Ohio, et al.* v. *USA Waste Services, Inc., Waste Management, Inc., et al.,* Civil No. 98–1616 (N.D. Ohio, filed July 16, 1998)

Dear Mr. Ehrman: This letter responds to your letter, submitted on behalf of the York County Solid Waste and Refuse Authority (''Solid Waste Authority''), commenting on the proposed Final Judgment pending in federal district court in Cleveland, Ohio. The Complaint in the case charged, among other things, that USA Waste's acquisition of Waste Management would substantially lessen competition in the disposal of municipal solid waste from the New York, NY and Philadelphia, PA areas. The proposed Judgment would settle the case with respect to these markets by, *inter alia,* requiring that the defendants divest Waste Management's Modern Landfill, a large facility located in York County, Pennsylvania. See Judgment, §§ II(C)(1)(k) and IV(A). In a transaction approved by the United States in August 1998, under the terms of the decree, the defendants divested Modern Landfill to Republic Services, Inc., which prior to the sale did not operate any waste disposal facilities in the Philadelphia or New York areas.

In your letter, you expressed concern that the defendants' divestiture of Modern Landfill may interfere with defendant Waste Management's contractual commitment to deliver waste to the Solid Waste Authority's incinerator and dispose of noncombustible material and ash from the incinerator. You also question whether the defendants' divestiture of this landfill would promote competition in the Philadelphia market.

The proposed Judgment does not in any way affect the defendants' commitment to deliver waste to the Solid Waste Authority. Nor does it affect in any way their commitment to dispose of material at Modern Landfill. Under the terms of the proposed Judgment, Waste Management must divest Modern Landfill subject to any contractual commitments it has with the Solid Waste Authority to accept noncombustible material or ash for disposal. See Judgment, §§ II(C) and (C)(1)(k), and IV(A) (defining landfill-related contracts and accounts as among the intangible assets that must be divested along with Modern Landfill).

As to your concern that divesting Modern Landfill is unnecessary to alleviate any competitive problems created by the proposed merger, it suffices to say that Modern would be one of only a handful of landfills capable of accepting municipal solid waste from the Philadelphia or New York City area that is not currently owned or controlled by the defendants. Divesting Modern Landfill to a capable new competitor such as Republic will surely enhance competition for the disposal of waste from both of these major metropolitan areas.

Thank you for bringing your concerns to our attention; we hoe this information will help alleviate them. Pursuant to the Antitrust Procedure and Penalties Act, 15 U.S.C. 16(b), a copy of your comment and this response will be published in the **Federal Register** and filed with the Court.

Sincerely yours,

J. Robert Kramer II,

Chief, Litigation II Section.

York County Solid Waste and Refuse Authority

July 24, 1998.

J. Robert Kramer II, Esq.,

Chief, Litigation II Section, Antitrust Division, U.S. Department of Justice, 140 H Street, NW, Suite 3000, Washington, D.C. 20008.

Re: USA Waste Acquisition of Waste Management Inc.

Dear Mr. Kramer: On behalf of the York County Solid Waste and Refuse Authority (''Authority''), the following is submitted in response to the solicitation for written comments concerning the proposed acquisition of Waste Management Inc. by USA Waste Services Inc., as reflected in the press release issued by the Pennsylvania Office of Attorney General on July 16, 1998. As set forth in said release, Waste Management's Modern Landfill, located in York County, Pennsylvania, is to be sold pursuant to a proposed settlement presented to the U.S. District Court for the Northern District of Ohio in conjunction with a lawsuit filed by the Department of Justice and various state attorneys general in connection with the proposed acquisition.

The Authority is a public entity, created under Commonwealth law, which is responsible for the management of municipal solid waste generated within the County pursuant to the County-wide Solid Waste Management Plan, adopted in accordance with Commonwealth law. In such capacity, the Authority has issued bonds for the construction of solid waste management facilities, and has entered into long-term management and disposal services agreements in furtherance of its responsibilities under the Plan. Among those agreements, the Authority is party to an agreement executed by Waste Management of Pennsylvania Inc. and Modern Trash Removal of York, Inc. This agreement was originally executed in 1990, and subsequently amended in 1995, and provides for the delivery of waste to the Authority's Resource Recovery Center and for the disposal of noncombustible material and ash residue material at the Modern Landfill until the year 2010 and through mutual agreement, until 2020. The disposal services contemplated by the agreement are essential to the implementation of the Plan, which provides for long-term assurance of solid waste management for the citizens of York County.

The Authority is, by submittal of these written comments, requesting that the following major concerns be taken into account by the Department of Justice and the District Court when considering the proposed settlement as described in the public release discussed above:

1. The Authority is concerned that divestiture of Modern Landfill under the terms of the proposed settlement could adversely impact the ability of Waste Management and Modern Trash Removal of York to continue waste deliveries to the Resource Recovery Center and disposal services at the Modern Landfill under the Authority's existing agreement with those companies;

2. The Authority questions whether divestiture of the Modern Landfill would enhance competition in the Philadelphia area, which is more than ninety miles to the east of the Modern Landfill.

Thanking you in advance for your careful consideration of the comments raised herein, I remain.

Very truly yours,

William A. Ehrman,

Executive Director.

WAE/mc

cc: The Honorable Michael Fisher, Attorney General, Waste Management of PA, Inc., Modern Trash Removal of York, Inc.

Exhibit 12

U.S. Department of Justice Antitrust Division

August 27, 1999.

Mr. Gregory G. Strott,

President, Calvert Trash Systems, Inc., P.O. Box 9, Owings, Maryland 20736–0009.

Re: Comment on Proposed Final Judgment in *United States, State of Ohio, et al.* v. *USA Waste Services, Inc., Waste Management, Inc., et al.,* Civil No. 98–1616 (N.D. Ohio, filed July 16, 1998)

Dear Mr. Strott: This letter responds to your two letters commenting on the proposed Final Judgment, currently pending in federal district court in Cleveland, Ohio. The Complaint in this case charged, among other things, that USA Waste's acquisition of Waste Management would substantially lessen competition in the disposal of commercial waste from the Baltimore, Maryland area. The proposed Judgment would settle the case by, *inter alia,* requiring that the defendants divest disposal capacity at three Baltimore area transfer stations owned by USA Waste and Waste Management. In a transaction approved by the United States in early January 1999, under the terms of the decree, the defendants divested that disposal capacity to Browning-Ferris Industries, Inc. (''BFT''), which previously did not own or

operate any waste transfer stations in the greater Baltimore area.

In your letters, you expressed concern that the proposed Judgment did not eliminate the effects of USA Waste's acquisition of Waste Management in several markets that were not alleged in the governments' Complaint. Specifically, you charged that the defendants should be: (a) enjoined from entering into any small container commercial waste hauling agreements that exceed a year with Baltimore area customers; (b) required to divest their small container commercial waste hauling operations in southern Maryland; (c) enjoined from raising their waste disposal prices, presumably at any of their Maryland facilities; and finally, (d) required to provide their competitors access to a transfer station on the Eastern Shore of Maryland on the same terms on conditions as the defendants enjoy at that facility.

The United States strongly believes that the ordered divestiture of Baltimore area disposal capacity and other injunctive relief contained in the proposed Judgment [see §§ II(C)(2)(b) IV(A), VII(A)] will alleviate the competitive concerns alleged in the Complaint by introducing a major new competitor into the waste disposal market, capable of providing a competitive alternative to the defendants' own Baltimore area waste disposal facilities.

As to your statement that additional injunctive relief is necessary to eliminate competitive problems the merger would create in Baltimore, and the southern and Eastern Shore areas of Maryland, we note that at the time of the governments' Complaint, we had seen no evidence that the defendants' merger would raise competitive problems warranting the imposition of the relief that you propose. Of course, should we find in a subsequent investigation that the defendants' activities have unreasonably restrained competition in these or any other waste collection or disposal markets, the United States will take appropriate legal action, including requesting that a court impose injunctive relief. Depending on the nature of the violation, that relief may perhaps be similar to that you outlined in your comments on this proposed Judgment. In the meantime, if you believe that your operations have been injured as a result of the proposed merger, you are certainly free to institute a private antitrust action for damages or injunctive relief in federal district court.

Thank you for bringing your concerns to our attention; we hope this information will help alleviate them. Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(d), a copy of your comment and this response will be published in the **Federal Register** and filed with the Court.

Sincerely yours,

J. Robert Kramer II,

Chief, Litigation II Section.

Calvert Trash—Systems Inc.

July 28, 1998.

John R. Tennis,

Assistant Attorney General, State of Maryland, Office of the Attorney General, Antitrust Division, 200 Saint Paul Place, Baltimore, Maryland 21202–2021.

Re: USA Waste Acquisition of Waste Management

Dear Mr. Tennis: After reading the Final Judgement etc. I find several things missing:

1. One Year Service Agreements—Why would you include this provision in BFI/Attwoods merger but not in USA/Waste Management?

2. Southern Maryland Divestiture—With the merger USA/Waste Management controls approximately 85% of the customer base. Why is this not part of the Final Judgement?

3. Eastern Shore of Maryland—Waste Management has a possible preferred deal with Maryland Environment Service for a transfer facility at the Tri-County Landfill in Easton. All haulers in this area should have the same ''preferred Deal''.

Please provide answers to my questions, better yet change the Final Judgement to include One Year Contracts, Southern Maryland Divestiture and equal disposal rates on Maryland Eastern Shore.

I eagerly await your reply.

Sincerely yours, Calvert Trash Systems, Inc.

Gregory G. Strott,

President.

GGS/jw

cc: Anthony E. Harris Esquire, U.S. Department of Justice, Antitrust Division, Litigation II Section, Suite 3000, Washington, DC 20005

Calvert Trash Systems

September 15, 1998.

Robert Kramer II,

Chief, Litigation II Section, Antitrust Division, United States Dept. of Justice, 1401 4th Street, N.W., Washington, D.C. 20530.

Dear Mr. Kramer: The USA/Waste Management merger reminds me of a song. Is That All There Is?

Is that all the Justice Department is going to do? The department has really dropped the ball on this deal. My company is facing disposal fee increase of 14% at Waste Management controlled facility effective October 1, 1998. Waste Management is also increasing the rates to their customers by 8%.

Please review your decision and include:

1. One year service agreements.

2. A limit on disposal fee increases.

3. Greater than 50% market share—divest asset. (Southern Maryland, Eastern Shore Maryland)

Please review and comment.

Sincerely,

P.S. I am waiting for a reply to the first letter I sent to you. (Copy enclosed.)

Gregory C. Strott,

President, Calvert Trash Systems, Inc.

GGS:jw

cc: John Tennis, Assistant Attorney General, State of Maryland, Office of Attorney General, Antitrust Division, 200 St. Paul Place, Baltimore, Maryland 21202–2021

Anthony E. Harris, Esquire, U.S. Department of Justice, Antitrust Division, Litigation II Section, Suite 3000, Washington, DC 20005

Exhibit 13

U.S. Department of Justice Antitrust Division

August 27, 1999.

Mr. Darry A. Ferguson,

Director, La Plata Recycling Center and Depository, 357 North Mountain View Drive, P.O. Box 1430, Bayfield, Colorado 81122.

Re: Comment on Proposed Final Judgment in *United States, State of Ohio, et al.* v. *USA Waste Services, Inc., Waste Management, Inc., et al.,* Civil No. 98–1616 (N.D. Ohio, Filed July 16, 1998).

Dear Mr. Ferguson: This letter responds to your letter commenting on the proposed Final Judgment currently pending in federal district court in Cleveland, Ohio. The Compliant in the case charged, among other things, that USA Waste's acquisition of Waste Management would substantially lessen competition in the collection or disposal of municipal solid waste in many markets throughout the country. The Complaint alleges that in Colorado, the proposed merger would substantially lessen competition in collection and disposal of commercial waste in the Denver area. The proposed Judgment would settle the case by, *inter alia,* requiring that the defendants divest commercial waste collection operations and landfill disposal operations in the Denver area. *See* Judgment, §§ II (C)(1)(c) and (D)(5), and IV(A). In a transaction approved by the United States in August 1998, under the terms of the decree, the defendants divested the Denver area collection and disposal assets to Republic Services, Inc., which prior to the sale did not operate any waste collection or disposal facilities in that market.

In your letter, you expressed concern that the United States have alleged a competitive problem in, and obtained relief that would alleviate the competitive effects of, the combination of the defendant's commercial and residential waste collection operations in the Bayfield, CO area, a small region of Colorado approximately 150 miles southwest of the Denver metropolitan area.

The United States strongly believes that the ordered divestiture of defendants' Denver area collection and disposal operations will alleviate the competitive concerns alleged in the government's Complaint by introducing a new competitor, Republic, that should provide a significant competitive alternative to defendants' waste collection and disposal services in the Denver market.

As to your statement that additional injunctive relief is necessary to eliminate competitive problems the merger would create in the Bayfield, CO area, we note that at the time of the governments' Complaint, we had seen no evidence that the defendants' merger would create competitive problems warranting the imposition of the relief that you propose. Of course, should we find in a subsequent investigation that the defendants' activities have unreasonably restrained competition in the Bayfield, CO market or any other waste collection or disposal market, the United States will take appropriate legal action, including requesting that a court impose injunctive relief. Depending on the nature of the violation, that relief may perhaps be similar to that which

you have outlined in your comment on this decree. In the meantime, if you believe that your operations have been injured as a result of the proposed merger, you are certainly free to institute a private antitrust action for damages or injunctive relief in federal district court.

Thank you for bringing you concerns to our attention; we hope this information will help alleviate them. Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(d), a copy of your comment and this response will be published in the **Federal Register** and filed with the Court.

Sincerely yours.

J. Robert Kramer II,

Chief, Litigation II Section.

Plata Recycling Center and Depository

June 26, 1998.

Mr. Fred H. Parmenter, Esq.,
U.S. Department of Justice, Anti-Trust Division, City Center Building, 1401 H. St, NW., Washington, DC 20530.

Re: Retail Waste Monopoly, Waste Management & USA Waste Services, Inc Merger, La Plata, Montezuma, and Archuleta, Counties, Colorado

Dear Mr. Parmenter: We are writing you this letter to acquaint you with the local effect of the pending merger between Waste Management and USA Waste Services, Inc., the $20 billion merger between the number 1 and number 4 waste companies in the U.S. Locally these companies compete under the names of Waste Management and Baker Sanitation. Prior to this merger the two companies have competed against each other in the commercial and residential waste collection markets in our local region.

The LaPlata Recycling Center and Depository is a privately-owned landfill, recently permitted and constructed under the Subtitle D requirements of the Resource Conservation Recovery Act. It was opened in July, 1997 and provided the opportunity for retail waste collection competition to southwest Colorado. Since opening, our biggest customer has been Baker Sanitation, a subsidiary of USA Waste Services, Inc. It should be noted that Waste Management has not used our landfill even though their landfill is located some 40 miles further south in New Mexico. As a competitor landfill to Waste Management, Waste Management has elected to burden the consumer with higher prices rather that use our disposal facility, which meets the same regulatory stringency as their landfill located some 40 miles away. Some of these higher prices were mitigated by the competition created by Baker Sanitation, using our landfill as a disposal site.

Over the last year, the results of their competition can be seen across the area by a lowering of consumer costs from 20% to 40% for each category of customer. Examples of the lowering of prices from competition between the two companies are as follows:

- Fort Lewis College had their annual waste cost for 1998 reduced by some 42% (from $68,000 to $39,500) when USA Waste competitive bidding brought an alternative to the college for Waste Management.
- The town of Bayfield, Colorado had the residential collection cost for 1998 and future years reduced from $11.80 per month to $8.90 per month (25% reduction in price) when competitive bidders to Waste Management came to the area.
- The average rural residential consumer had their price brought down 18%, from $19.25 per month to an average of $16.00 per month, when the two companies bid for the business.

Now that these two industry giants are merging, the citizens of the southwest Colorado counties will have no competitive alternatives and they will again face unregulated price gouging from the combined entity.

With this letter we are seeking your intervention to have one of the companies divest their retail operations in the above counties to maintain the competitive nature of waste collection. As you know, the merger is proposed to be closed in the next few weeks, so your attention in the near-term would be greatly appreciated.

Additionally, I will be most happy to visit with you or your staff concerning this very important issue and the details of our local needs. I hope your schedule will permit your attention to this matter, for it is the average resident and each commercial business who will suffer from the price abuse from the monopoly created by this merger.

Thank you for the opportunity to discuss this matter with you.

Sincerely,

Darry A. Ferguson,

Director.

Exhibit 14

U.S. Department of Justice Antitrust Division

August 27, 1999.

Mr. Conrad S. Magnuson,
261 Route 125, Kingston, NH 03848.

Re: Comment on Proposed Final Judgment in *United States, State of Ohio, et al.,* v. *USA Waste Services, Inc., Waste Management, Inc., et al.,* Civil No. 98–1616 (N.D. Ohio filed July 16, 1998)

Dear Mr. Magnuson: Thank you for your letter commenting on the proposed Final Judgment submitted for entry in the above case. Your letter indicates that you are a caretaker for a city landfill in Kingston, NH, and that Waste Management, Inc. recently acquired two local haulers, SDW and Astro, who account for much of the volume of waste delivered to the city landfill. Waste Management, however, has assured you that its acquisitions will not affect the amount of waste it delivers to the Kingston landfill since the company's own landfill in Rochester, NH, is full. (You have promised to let us know whether Waste Management later reneges on this commitment.)

In deciding whether entry of the proposed Final Judgment would be in the public interest, the Court's principal task is to determine whether the relief contained in the proposed decree adequately addresses the competitive concerns alleged in the governments' Complaint. By this standard, we find it very difficult to see how your private contractual dispute with the defendants bears on the competitive merits of the proposed Judgment. The governments' Complaint does not allege that the proposed merger would create any competitive problems in the Manchester, NH area, nor does the proposed Judgment contain any relief concerning the Manchester area. If you believe that the merger would create significant competitive problems in that area, then you are free to file a private action against the proposed merger.

Thank you for bringing your concerns to our attention. Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(d), a copy of your comment and this response will be published in the **Federal Register** and filed with the decree court.

Sincerely yours,

J. Robert Kramer II,

Chief, Litigation II Section.

Note: Letter dated October 14, 1998 from Conrad L. Magnusson was not able to be published in the **Federal Register**. A copy can be obtained from the U.S. Department of Justice, Documents office, 325 7th St., Room 215, Washington, DC or (202) 514–2481.

Exhibit 15

U.S. Department of Justice, Antitrust Division

August 27, 1999.

Daniel J. Roth, Esquire,
Kommers & Roth,
Bridger Professional Center,
517 South 22nd Avenue, Suite 5,
Bozeman, Montana 50718–6842.

Re: Comment on Proposed Final Judgment in *United States, State of Ohio, et al.* v. *USA Waste Services, Inc., Waste Management, Inc., et al.,* Civil No. 98–1616 (N.D. Ohio, filed July 16, 1998)

Dear Mr. Roth: Thank you for your letter commenting on the proposed Final Judgment submitted for entry in the above case. Your submission largely consists of copies of a complaint and other pleadings filed by your client, Three Rivers Disposal Co., in a lawsuit against defendants USA Waste Services, Inc. and Waste Management, Inc. in Montana state court. In that suit, Three Rivers contends that USA Waste's acquisition of Waste Management would violate Waste Management's agreement not to compete with Three Rivers in hauling waste in the Bozeman, Montana area.

In deciding whether entry of the Final Judgment would be in the public interest, the Court's principal task is to determine whether the relief contained in the proposed decree adequately addresses the competitive problems that the United States has alleged in its Complaint. By this standard, it is difficult to see how Three Rivers Disposal's private contractual dispute bears on the competitive merits of the proposed Final Judgment in this case. The Complaint in the case does not allege that the defendants' proposed merger would create a competitive problem in the Bozeman area, and for that reason, the proposed Judgment contains no relief relating to the Bozeman market. Of course, if you believe that the merger would create significant competitive problems in that area, then you are free to file a private action against the defendants' proposed merger, as it appears you have, in fact, done.

Thank you for bringing your concerns to our attention. Pursuant to the Antitrust

Procedures and Penalties Act, 15 U.S.C. 16(d), a copy of your comment and this response will be published in the **Federal Register** and filed with the decree court.

Sincerely yours,

J. Robert Kramer II,

Chief, Litigation II Section.

Kommers & Roth

September 9, 1998.

Anthony E. Harris,
U.S. Department of Justice,
Antitrust Division—Litigation II Section,
Suite 3000,
Washington, DC 20005.

Re: *Three Rivers Disposal, Inc.* v. *Waste Management, Inc., et al.* Eighteenth Judicial District Court—Gallatin County, Montana Cause No: DV 98–266

Dear Mr. Harris: Enclosed for your information, and as a comment to the proposed acquisition of Waste Management, Inc. by USA Waste Services, Inc., referencing that proposed Consent Decree entered in the United States District Court, Northern District of Ohio, Eastern Division, captioned *United States of America, et al* v. *USA Waste Services, Inc.;* Dome Merger Subsidiary; and Waste Management, Inc., Cause No: 1:98CV–1616, please find the following pleadings filed in the Montana Eighteenth Judicial District Court, Gallatin County, Cause No: DV 98–266:

1. Summons;
2. Verified complaint;
3. Motion For Preliminary Injunction;
4. Brief In Support Of Motion For Preliminary Injunction;
5. Order To Show Cause.

This matter is scheduled for hearing on October 2, 1998, before the Honorable Mike Salvagni, State of Montana, Eighteenth Judicial District Court Judge, upon plaintiffs application to enjoin the waste hauling activities of USA Waste Services, Inc., d/b/a Customized Services of Bozeman, Montana and Waste Management, all of which are alleged to be in violation of a non-competition agreement contained within that certain asset purchase agreement attached to plaintiffs' Verified Complaint.

Should you wish to discuss any of this, please do not hesitate to contact the undersigned.

Sincerely yours,

Daniel J. Roth.

DJR/rss
Enclosures
cc: Jerrold E. Arbini

Montana Eighteenth Judicial District Court, Gallatin County

[Cause No. DV 98–266]

Three Rivers Disposal, Inc., a Montana corporation and Jerrold E. Arbini, Individually, Plaintiffs, v. Waste Management Partners, Inc., a Delaware corporation, Waste Management Partners of Bozeman, Ltd., an Illinois Limited partnership, a/k/a JVCo., Waste Management of Colorado Inc., a Colorado corporation; U.S.A. Waste Services, Inc., d/b/a Customized Services of Bozeman, Montana, Harry Ellis, and WMX Technologies, Inc., a/k/a Waste Management, Inc., Defendants.

Order To Show Cause

Pursuant to Motion for Preliminary Injunction of Plaintiffs and good cause appearing, it is hereby ordered:

That the parties shall appear before this Court on the 2nd day of October 1998, at 9:30*a.m. at which time Defendants must show cause, if any they have, why the injunctive relief sought by Plaintiffs should not be granted.

Dated this 4th day of September, 1998.

Hon. Mike Salvagni,

District Judge.

*Case #2 on the Court's calendar.

Lorraine Van Ausdol,

Clerk of District Court in and for Gallatin County, State of Montana.

By:

Kim Bladeau,

Deputy.

James M. Kommers
Daniel J. Roth
Ralph W. Steele,
Kommers & Roth, Bridger Professional Center, 517 So. 22nd Avenue, Suite 5, Bozeman, MT 59718, (406) 587–7717

Attorneys for Plaintiffs

Montana Eighteenth Judicial District Court, Gallatin County

[Cause No: DV98–266]

Three Rivers Disposal, Inc., a Montana corporation and Jerrold E. Arbini, Individually, Plaintiffs, v. Waste Management Partners, Inc., a Delaware corporation, Waste Management Partners of Bozeman, Ltd., an Illinois Limited Partnership, a/k/a JVCo., Waste Management of Colorado, Inc., a Colorado corporation; U.S.A. Waste Services, Inc., d/b/a Customized Services of Bozeman, Montana, Harry Ellis, and WMX Technologies, Inc., a/k/a Waste Management, Inc., Defendants.

Summons

The State of Montana Sends Greetings to the Above-Named Defendant:

U.S.A. Waste Services, Inc., d/b/a Customized Services of Bozeman, Montana

You are hereby summoned to answer the Complaint in this action, which is filed in the office of the Clerk of Court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the Plaintiffs' attorney within twenty days after the service of this Summons, exclusive of the day of service; in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the Complaint.

Witness my hand and the seal of said Court this 24th day of August 1998.

Lorraine Van Ausdol,

Clerk of Court.

By: Mary Ann Hostetler,

Deputy Clerk.

James M. Kommers
Daniel J. Roth
Ralph W. Steele,
Kommers & Roth, Bridger Professional Center, 517 So. 22nd Avenue, Suite 5, Bozeman, MT 59718, (406) 587–7717

Attorneys for Plaintiffs

Montana Eighteenth Judicial District Court, Gallatin County

[Cause No. DV98–266]

Three Rivers Disposal, Inc., a Montana corporation and Jerrold E. Arbini, Individually, Plaintiffs, v. Waste Management Partners, Inc., a Delaware corporation, Waste, Management Partners of Bozeman, Ltd., an Illinois Limited Partnership, a/k/a JVCo., Waste Management of Colorado, Inc., a Colorado corporation; U.S.A. Waste Services, Inc., d/b/a Customized Services of Bozeman, Montana, Harry Ellis, and WMX Technologies, Inc. a/k/a Waste Management, Inc., Defendants.

The State of Montana Sends Greetings to the Above-Named Defendant:

WMX Technologies, Inc., a/k/a Waste Management, Inc.

You are hereby summoned to answer the Complaint in this action, which is filed in the office of the Clerk of Court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the Plaintiffs' attorney within twenty days after the service of this Summons, exclusive of the day of service; in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the Complaint.

WITNESS my hand and the seal of said Court this 24th day of August, 1998.

Lorraine Van Ausdol,

Clerk of Court.

By:

Mary Ann Hostetler,

Deputy Clerk.

James M. Kommers
Daniel J. Roth
Ralph W. Steele,
Kommers & Roth, Bridger Professional Center, 517 South 22nd Avenue, Suite 5, Bozeman, MT 59718, (406) 587–7717

Attorneys for Plaintiffs

Montana Eighteenth Judicial District Court, Gallatin County

[Cause No. DV98–266]

Three Rivers Disposal, Inc., a Montana corporation and Jerrold E. Arbini, individually, Plaintiffs, v. Waste Management Partners, Inc., a Delaware corporation, Waste Management Partners of Bozeman, Ltd., an Illinois Limited Partnership, a/k/a JVCo., Waste Management

of Colorado, Inc., a Colorado corporation; U.S.A. Waste Service, Inc., d/b/a Customized Services of Bozeman, Montana, Harry Ellis, and WMX Technologies, Inc., a/k/a Waste Management, Inc., Defendants.

Verified Complaint

The Plaintiffs, hereinafter for convenience may be collectively referred to as ''Three Rivers'', for their claim against the Defendants, states:

1. Three Rivers Disposal, Inc., is a Montana corporation with its principal place of business in Bozeman, Montana. Jerrold E. Arbini is a sole shareholder of Three Rivers Disposal, Inc. and is a resident of Bozeman, Gallatin County, Montana. Three Rivers Disposal is a common carrier holding a certificate from the Montana Public Service Commission to provide waste collection within Montana.

Count I of this action is brought to enforce the terms of a written contract between Three Rivers and the Defendants, that contains a covenant not to compete in Section 6.7 which is to be performed in Gallatin, Madison and other counties within Montana. This is the operating area within which Three Rivers obtains almost all of its revenues.

Count II of this action claims damages by Three Rivers against defendants for violation of the Montana Unfair Trade Practices and Consumer Protection Act of 1973, which may for convenience be referred to as ''UTPA''.

Count III of this action alleges actions by defendants constituting international interference with contractual relations.

Count I

2. On or about March 1, 1996, Waste Management of Colorado, Inc., a Colorado corporation; Waste Management Partners, Inc., a Delaware corporation; Waste Management Partners of Bozeman, Ltd., an Illinois Limited Partnership therein referred to as ''JVCo.'', or as sellers, and Three Rivers Disposal, Inc., a Montana corporation and Jerrold E. Arbini, purchasers, entered into a buy-back transaction in the form of an Asset Purchase Agreement through which Three Rivers re-acquired from the sellers all their right, title, and interest in its refuse collection business as well as equipment and other assets. The sellers themselves, as well as acting on behalf of WMX Technologies, Inc., a/k/a Waste Management, Inc., covenanted they would not have any interest, direct or indirect, in any business in competition with Three Rivers Disposal, Inc. WMX Technologies, Inc., a/k/a Waste Management, Inc., is a necessary party to this action because of the contractual obligations imposed by its agents or representatives. Additionally, Waste Management, Inc. owns or controls all of the other defendant corporations which were signatories to the Asset Purchase Agreement. Even though Waste Management, Inc. was not a signatory to the Asset Purchase Agreement, because of its corporate relationship to the sellers, it is bound by the provisions of the restrictive covenant.

3. Waste Management of Colorado, Inc., Waste Management Partners, Inc., and Waste Management Partners of Bozeman, Ltd., contracted as parties to the agreement, neither they nor WMX Technologies, Inc., or any successors in interest would engage in any business, directly or indirectly, in competition with Three Rivers in Gallatin County, Madison County, Park County, Broadwater County and Sweetgrass County, Montana.

The Asset Purchase Agreement dated March 1, 1996, is attached hereto as Exhibit ''A'' and incorporated herein by reference.

4. The covenant not to compete specially provides in part:

> In the event of a breach of any covenant contained in this Section 6.7, Three Rivers shall be entitled to an injunction restraining such breach in addition to any other remedies provided by law or equity.

Prior to July 16, 1998, U.S.A. Waste Services, Inc. acquired Customized Services, a business already in direct competition with Three Rivers.

5. On or about July 16, 1998, U.S.A. Waste Services, Inc., acquired WMX Technologies, Inc., a/k/a Waste Management, Inc. as well as all of the sellers' interest in the March 1, 1996 Asset Purchase Agreement, these sellers being Waste Management Partners, Inc., a Delaware corporation, Waste Management Partners of Bozeman, Ltd., an Illinois Limited Partnership, a/k/a JV Co., Waste Management of Colorado, Inc., a Colorado corporation, and are now bound by its terms.

6. Defendants, as successors in interest, are now in violation of the terms of the Asset Purchase Agreement because Customized Services is in direct competition with Plaintiffs within almost the entire operating area served by the Plaintiffs' refuse collection business. U.S.A. Waste Services, Inc. and Defendants operate their business in competition with Plaintiffs pursuant to a certificate issued by the Montana Public Service Commission which overlaps and duplicates almost all of the operating rights set forth in the Plaintiffs' certificate of public convenience and necessity.

7. Three Rivers tendered written demand to Defendants to cease and desist any and all competition in violation of Section 6.7 of the Asset Purchase Agreement by letter dated July 28, 1998.

8. The full nature and extent of Plaintiffs' damages associated with the Defendants' breach of the contract cannot be ascertained. Pecuniary compensation would not afford adequate relief because the Defendants have and will continue to be capable of accessing confidential and proprietary information such as pricing policies, customer lists and even the rates charged by Three Rivers, all to the detriment of Three Rivers. Three Rivers, because of the breach of this restrictive covenant, will lose their customer base which cannot be restored, rendering Three Rivers unable to service their debts to Defendants which results in a double punishment to Three Rivers and provides a double benefit to Defendants. Plaintiffs have incurred court costs and attorney fees and other damages for which they are entitled to indemnification from defendants pursuant to Section 6.2 of the Agreement well as specific Performance in the form of injunctive relief pursuant to Section 6.2 of the Agreement as well as Section 6.7 of the Agreement.

9. Plaintiffs are entitled to an order of specific performance of the covenant not to compete since both parties anticipated this being the only equitable remedy when they agreed to injunctive relief in Section 6.7 in the Asset Purchase Agreement.

Count II

10. Plaintiffs reallege and incorporate by reference all preceding paragraphs herein.

11. Defendants have violated the Unfair Trade Practices and Consumer Protection Act, MCA § 30–14–101, *et seq*. Defendants have and are now engaged in a wilful, deliberate and intentional course of conduct which constitutes unfair and discriminatory practices by which fair and honest competition is destroyed or prevented.

12. The anti-competitive, unfair and discriminatory practices by defendants include engaging in:

(a) Unfair competition in sales (MCA § 30–14–207), including but not limited to, submitting and performing exceedingly low bids for refuse collection services at price levels which are far lower than any reasonable, competitive price, with the intent to destroy competition by plaintiffs, a regular established dealer of the same article of commerce.

(b) Anti-competitive conduct by wrongfully soliciting and taking over plaintiff's existing customers.

(c) Price discrimination in violation of § 30–14–901, making it unlawful for any business to discriminate, directly or indirectly, the price charged to different purchasers of commodities of like grade and quality with the affect of substantially lessening, injuring, destroying or preventing competition with another business.

(d) Purposely and intentionally, with the intent of destroying or eliminating competition, undercutting pricing and services charged for refuse collection to purchasers of commodities of like grade and quality.

13. Some or all of the defendants have engaged in unfair competition in sales and price discrimination alleged herein because defendants have possession of and access to confidential and proprietary information about Three Rivers' collection operation including Three Rivers' customer base, customer list, rates and pricing policies.

14. As a result of defendants' violations of the UTPA plaintiffs, in addition to injunctive relief, are entitled to three (3) times the amount of actual sustained plus attorney fees and costs provided in MCA § 30–14–906.

Count III

15. Plaintiffs reallege and incorporate by reference all preceding allegations contained herein.

16. Defendants and their agents have engaged in a systematic, intentional course of conduct which has included making false, misleading and defamatory statements concerning Three River's business practices and policies to existing customers of Three Rivers in order to illegally eliminate competition in the relevant service area in which only the defendants and Three Rivers can service under their certificates.

17. As a direct and proximate result of defendants' actions, defendants have caused substantial economic impairment and damage to Three River in an amount to be determined at trial.

Wherefore, for its claims against Defendants, Plaintiffs demand judgment as follows:

A. For injunctive relief and specific performance, on an expedited hearing basis, by preliminary and permanent injunction of this court to prohibit the Defendants or any of their associated or affiliated corporations, partnerships, businesses or sole proprietorships from operating directly or indirectly in violation of the covenant not to compete within the entire area set forth in Section 6.7 of the Agreement;

B. For all monetary damages arising from Section 6.7 of the Asset Purchase Agreement in an amount to be determined;

C. For all monetary damages arising from Section 6.2 for indemnification for all damages for which Defendants agreed to be responsible;

D. For all monetary damages arising from the Montana Unfair Trade Practices and Consumer Protection Act including three (3) times actual damages plus attorney fees and costs of suit;

E. For all monetary damages arising from defendants interference with contractual relations in an amount to be determined;

F. For plaintiffs' costs and reasonable attorney fees associated with prosecuting this action;

G. For such other remedies provided by law or equity contemplated by the contract terms which may be identified during the course of this action; and,

H. For such other and further relief deemed just and proper by the Court.

Dated this 24th day of August, 1998.

Kommers & Roth, 517 S. 22nd Ave., Suite 5, Bozeman, MT 59718–6842, (406) 587–7717

By:

James M. Kommers

Daniel J. Roth

Ralph W. Steele,

Demand for Jury Trial

Plaintiffs demand that all issues of fact be tried by a jury of twelve.

Kommers & Roth, 517 S. 22nd Ave., Suite 5, Bozeman, MT 59718–6842, (406) 587–7717

By:

James M. Kommers

Daniel J. Roth

Ralph W. Steele

Verification

State of Montana, County of Gallatin

Jerrold E. Arbini, being first duly sworn upon oath, deposes and says as follows:

1. That he is the individual Plaintiff and sole shareholder of Three Rivers Disposal, Inc. herein; and

2. That he has read the foregoing Complaint, and the information contained therein is true and accurate to the best of his knowledge and belief.

Jerrold E. Arbini

Subscribed and Sworn to before me this 24th day of August, 1998.

Daniel J. Roth,

Notary Public, State of Montana, Residing at: Bozeman. May commission expires: 2/27/99.

Asset Purchase Agreement

This Asset Purchase Agreement (the ''Agreement'') is made this first day of March, 1996, by and among the following persons and entities.

(a) WASTE MANAGEMENT OF COLORADO, INC., a Colorado corporation, referred to as ''WMI Colorado'', herein;

(b) WASTE MANAGEMENT PARTNERS, INC., a Delaware corporation referred to as ''Partners'' herein; and together with WMI Colorado, the ''Sellers'';

(c) WASTE MANAGEMENT PARTNERS OF BOZEMAN, LTD., an Illinois limited partnership referred to as ''JVCo.'' herein;

(d) THREE RIVERS DISPOSAL, INC., a Montana corporation referred to as ''Three Rivers'' herein. Three Rivers is the successor to Three Rivers Disposal, a Montana general partnership;

(e) JERROLD E. ARBINI, the sole shareholder of Three Rivers, who is referred to as the ''Owner'' herein.

Recitals

A. On April 5, 1984, Waste Management Inc. (''Partners''), Waste Management Partners of Bozeman, Ltd. (''JVCo.''), Three Rivers Disposal (''Company'' or ''Operator'') and Jerrold Arbini (along with individuals Gross and Nicoletti who no longer have any interest in any asset dealt with herein) entered into an agreement represented by the following documents: (i) Limited Partnership Agreement dated April 5, 1984, between Three Rivers Disposal and Sellers (the ''Partnership Agreement''); (ii) Account Purchase Agreement dated April 5, 1984, by and among Partners, JVCo., Three Rivers Disposal, Owner and Richard A. Gross and John Nicoletti; (ii) Operating Agreement dated April 5, 1984, by and among Partners, JVCo., Owner and Richard A. Gross and John Nicoletti (and amendment thereto); (iv) Services Agreement dated April 5, 1984, between Partners and Three Rivers Disposal; (v) Cross-Purchase Agreement dated April 5, 1984, and among Three Rivers, Partners, JVCo., Owners and Richard A. Gross and John Nicoletti; (vi) an Acquisition Participation Agreement No. 1; and (vii) a Lease Agreement (by which the company leased its permits to JVCo.). These agreements, excluding the Partnership Agreement, are hereinafter collectively referred to as the ''Other Agreements''.

B. Partners desire to sell, transfer and assign to Three Rivers and Three Rivers desires to purchase from Partners all of its right, title and interest in JVCo. WMI Colorado desires to sell, transfer and assign to Three Rivers and Three Rivers desires to purchase from WMI Colorado certain equipment. The parties also desire to restructure certain obligations among themselves and to settle conflicting claims between themselves.

Agreements

In consideration of the premises and the mutual representations, warranties and covenants and subject to the conditions herein contained, the parties agree as follows:

1. Purchase and Sale: Closing

Section 1.1 A Summary of Payments: The following is a summary of the payments agreed to be made for the consideration stated, all as more particularly described in this Part 1.

$1,156,000.00—JVCo. Consideration (See Section 1.2)
$151,344.00—Equipment purchased (See Section 1.3)
$254,153.68—Back lease payments (See Section 1.4)
$75,000.00—Equipment credit (See Section 1.5)
$1,486,497.68—Total consideration from Three Rivers to Sellers

Section 1.2 JVCo. Interest: Partners agrees to and hereby does sell, transfer, assign and deliver to Three Rivers at the Closing (as hereinafter defined) free and clear of all liens, claims and encumbrances, except for the security interest granted to WMI Colorado pursuant to Section 6.3 hereof, all of its right, title and interest in and to JVCo., such general partner interest and limited partner interest being hereinafter collectively referred to as the ''JVCo. Interest'', and including without limitation the following: its share of the capital, profits, losses and distributions of JVCo., its interest in the accounts receivable of JVCo. and any interest in JVCo. litigation and/or causes of action which are accrued or unaccrued, filed or as yet unfiled. Pending litigation includes but is not limited to litigation against Montana Bank of Bozeman/ Norwest Bank. Partners shall execute and deliver at Closing a Transfer and Assignment in the form set out on Exhibit 1.2 hereto. Three Rivers shall pay to Partners the sum of $1,156,000.00 in consideration of said transfer.

Section 1.3 Equipment: WMI Colorado agrees and hereby does (effective at Closing) sell, transfer, assign and deliver to Three Rivers free and clear of all liens, claims and encumbrances, except for the security interest granted to WMI Colorado pursuant to Section 6.3 hereof, the trucks and containers referred to as the ''Equipment'' and described as follows:

1987 White with Heil SL
2960—96 gallon carts
80 300/400 gallon carts
208—64 gallon carts

Three Rivers shall pay as set out herein a purchase price of $151,344.00 subject to the credit described at section 1.5 herein. WMI Colorado shall execute and deliver at Closing an Assignment and Bill of Sale in the form set out in EXHIBIT 1.3 attached hereto. Sellers shall obtain and deliver to Three Rivers at closing a document which extends to Three Rivers the warranty provided by the original manufacturer of the carts to its first purchaser.

Section 1.4 Accrued and Unpaid Lease Payments: As of October 31, 1995, Three Rivers owes to WMI Colorado the sum of $254,153.68, representing accrued but unpaid payments for the equipment presently rented to Three Rivers by WMI Colorado. Three Rivers agrees to repay such amount at the Time of Closing by delivery of a guaranteed promissory note in the aggregate principal amount of $254,153.68 payable in thirty-six (36) consecutive monthly installments of principal together with interest computed at an annual rate equal to 6%. WMI Colorado hereby waives any other rental payments due through February of 1996. Three Rivers shall pay lease payments under the Lease Agreement in a timely fashion from and after March 1, 1996, and from March 1, 1996, the 13.6% of gross paid to Sellers under the original agreement is suspended.

Section 1.5 Credit of $75,000: As partial consideration for the agreement to lease set out in Section 1.8, WMI Colorado agrees to accept and Three Rivers shall transfer to WMI Colorado at Closing the following equipment:

3 Front End Loader Trucks
60 Front End Loader Containers 6 cy and 8 cy

The three FEL Trucks are identified as follows:

#	Vin	Year	Model	Body	Size (yd)	License
1. 211	3770	1989	Peterbuilt	Amrep	42	3U63109
2. 76	6096	1983	White	Amrep	32	648QXJ
3. 77	8812	1979	International	Dempster	28	1N29020

This equipment shall be free and clear of all liens, claims and encumbrances and shall have an agreed value of $75,000, which sum is a credit as indicated in Section 1.1.

$220,000.00—Cash Payment [See 1.6(a)]
$11,000.00—Cash Payment [See 1.6(b)]
$936,000.00—Promissory Note [See 1.6(c)]
$65,344.00—Promissory Note [See 1.6(d)]
$254,153.68—Promissory Note [See 1.6(e)]
$1,486,497.68—Total Consideration

(a) At Closing Three Rivers shall pay to Partners the sum of $220,000 as partial payment of the JVCo. consideration described in Section 1.2.

(b) At Closing Three Rivers shall pay to WMI Colorado the sum of $11,000 partial payment of the Section 1.3 equipment purchase.

(c) At Closing Three Rivers shall deliver to Partners a guaranteed note in the face amount of $936,000 which note is the balance of the JVCo. consideration described in Section 1.1 and 1.2. The terms of this note shall be as follows: (a) Interest shall be 6% per annum; (b) Payments shall commence on the first day of the month next following Closing; (c) Payments shall be in an amount which will retire principal and interest over ten years in 120 equal, monthly payments; (d) Payment shall be due on the first of each and every month over the ten-year period; The form of the note shall be as in EXHIBIT 1.6(c) attached hereto.

(d) At Closing Three Rivers shall deliver to WMI Colorado a guaranteed note in the face amount of $65,344.00 which note is the balance of the Section 1.3 equipment purchase consideration ($151,344 less the $11,000 in cash, less the $75,000 credit). The form and terms of this note shall be as set out on EXHIBIT 1.6(d) which is attached hereto.

(e) At Closing Three Rivers shall deliver to WMI Colorado a guaranteed note in the face amount of $254,153.68 which note reflects the accrued payment consideration described in Section 1.4. The format and terms of this note shall be as set forth in EXHIBIT 1.6(e) attached hereto.

Section 1.7 Returned Vehicles: Three Rivers has returned two 1993 White FEL vehicles and a 1992 Ford Service Truck which were subject to an oral agreement that is now terminated.

Section 1.8 Lease of Vehicles to Three Rivers: At Closing Three Rivers shall execute a separate lease agreement with respect to two 1993 White side

load vehicles, which lease shall be effective from and after March 2, 1996. Said lease shall remain in effect for the shorter of the following periods: (a) Until June 30, 1996, or (b) until replacement vehicles (Witkie, automated side loader trucks) purchased by Three Rivers are delivered. Upon termination of the written lease by the occurrence of one of the stated conditions, Three Rivers shall return the leased vehicles to WMI Colorado. The monthly rental payment for said vehicles shall be $3,949 which sum shall be paid as a monthly lease payment from Three Rivers to WMI Colorado until return of the vehicles. Where inconsistent, the lease shall control over the terms of this paragraph.

Section 1.9 This Section Is Deleted.

Section 1.10 Time of Closing: The Closing of the sale of the JVCo. Interest (the ''Closing'') shall take place on the date all of the conditions precedent contemplated by Section 1.11 have been satisfied or waived and the contents of the escrow contemplated thereby have been released (the ''Time of Closing''); provided that, if the Closing shall not have taken place on or before May 30, 1996, any party to this Agreement shall have the right to terminate this Agreement upon 10 days written notice to the other parties.

Section 1.11 Escrow: Closing Procedure:

(a) This Agreement shall be executed and delivered on or before March 1, 1996. Within seven days of such execution and delivery, the parties shall execute and deliver to counsel for the Sellers the following documents, to be held in escrow pending their release as contemplated by paragraph *(b)* below:

(i) The Sellers shall execute and deliver to counsel such bills of sale and other instruments in such form as is reasonably satisfactory to Three Rivers and as shall be sufficient to vest in Three Rivers good and marketable title to the JVCo. Interest and the Equipment, free and clear of all liens, claims and encumbrances, except as contemplated by Section 6.3 hereof;

(ii) Three Rivers shall deliver to Sellers' counsel $220,000 in cash [see 1.6(a)], the guaranteed promissory note [see 1.6(c)] in the aggregate principal amount of $936,000, an Amendment to the Partnership Agreement (prepared by Sellers), and such other documents and agreements as Sellers may reasonably request; and

(iii) Three Rivers shall deliver to Sellers' counsel such bills of sale, titles and other instruments as are sufficient to vest in WMI Colorado good and marketable title, free and clear of all liens, claims and encumbrances, to the Equipment contemplated by Section 1.5, $11,000 in cash as contemplated by Section 1.6(b) and the guaranteed promissory notes contemplated by Sections 1.6(d) and 1.6(e) in the amounts of $65,344 and $254,153.68, respectively.

(b) On the date that the State of Montana approves the transfer to Three Rivers of the permits presently held by JVCo. or issues new permits in Three Rivers' name sufficient to permit Three Rivers to service JVCo.'s customers, counsel for Sellers shall deliver to Sellers and Three Rivers all of the materials held in escrow by such counsel. It is the intent of the parties that the permits transferred to Three Rivers shall not be subject to more onerous conditions than attain to the current permits, and such permits shall be in form and substance reasonably acceptable to Three Rivers. If the closing shall not have occurred on or before May 30, 1996, and any party hereto shall have terminated this Agreement, counsel for Sellers shall return the cash, promissory notes and other documents to the parties that delivered such cash, promissory notes and other agreements to such counsel and the parties shall have no further rights under this Agreement.

Section 1.12 Rights in Underlying Partners Agreements:

The parties hereby agree and acknowledge that Sellers have no rights of purchase or repurchase under the Partnership Agreement and/or under the Other Agreements as the same are referenced in the Recitals hereto and that Sellers shall cooperate with Three Rivers to obtain all interest (ownership, leasehold or other interest) in permits, licenses or other rights issued by the State of Montana or any political subdivision thereof to JVCo. and which permits, licenses or rights relate to the business of JVCo.

Section 1.13 Permit Transfer Contingency:

The parties acknowledge that the transfer of the JVCo. interest to Three Rivers as set out herein is without substantial value to Three Rivers unless the permits presently held by JVCo. are successfully transferred to Three Rivers. Immediately upon closing or before, JVCo. shall apply for approval of said transfer, and the parties shall do all acts required to successfully transfer said permits. If, for any reason, the permits are not transferred to Three Rivers on or before May 30, 1996, then this agreement is null and void. Any consideration exchanged shall in such event be forthwith returned by transferee to the transferor. The escrow shall in such event immediately return all cash and documents to the party who deposited same to escrow.

2. Representations and Warranties of the Sellers

Sellers make the following representations, warranties and covenants:

Section 2.1 Organization, Power and Authority: Partners is a corporation duly organized and validly existing under the laws of the State of Delaware and has full corporate power and authority to enter into this Agreement and to sell, convey, assign, transfer and deliver the JVCo. Interest to Three Rivers. WMI Colorado is a corporation duly organized and validly existing under the laws of the State of Colorado and has full corporate power and authority to enter into this Agreement and to sell, convey, assign, transfer and deliver the Equipment to Three Rivers.

Section 2.2 Title: Partners has good and marketable title to the JVCo. interest, free and clear of all liens, claims or other encumbrances of any kind or character. WMI Colorado has good and marketable title to the Equipment, free and clear of all liens, claims or other encumbrances of any kind of character.

Section 2.3 Due Authorization: Binding Obligation: The execution, delivery and performance of this Agreement and the consummation of the transactions contemplated hereby have been duly authorized by all necessary corporate action of each Seller. This Agreement has been duly executed and delivered by each Seller and is a valid and binding obligation of each Seller, enforceable in accordance with its terms.

Section 2.4 Obligations as General Partner: Partners has not, during the existence of JVCo., incurred any material obligation on behalf of JVCo. of which Three Rivers was not made aware.

3. Representations and Warranties of Three Rivers

Three Rivers makes the following representation and warranties:

Section 3.1 Organization, Power and Authority: Three Rivers is a corporation duly organized and validly existing under the laws of the State of Montana and has full corporate power and authority to enter into this Agreement and perform its obligations hereunder. Three Rivers is the successor to Three Rivers Disposal, a Montana general partnership, and has all rights and obligations of such partnership under the Partnership Agreement and the Other Agreements.

Section 3.2 Title: Three Rivers has or by Closing will have good and marketable title to the equipment listed on Section 1.5, free and clear of all liens, claims or other encumbrances of any kind or character.

Section 3.3 Due Authorization/ Binding Obligation: The execution, delivery and performance of this Agreement and the consummation of the transactions contemplated hereby have been duly authorized by all necessary corporate action of Three Rivers. This Agreement has been duly executed and delivered by Three Rivers and is a valid and binding obligation of Three Rivers, enforceable in accordance with its terms.

Section 3.4 Obligations as Limited Partner: Sellers have not, during the existence of JVCo., incurred any material obligation on behalf of JVCo. of which Three Rivers was not made aware.

4. Conditions to the Obligations of Three Rivers

The obligation of Three Rivers to purchase the JVCo. interest and the Equipment and to consummate the transactions contemplated hereby shall be subject tot he fulfillment at or prior to the Time of Closing of each of the following conditions:

Section 4.1 Certified Resolutions: Each Seller shall have delivered to Three Rivers copies of resolutions adopted by the board of directors of the Sellers authorizing the transactions contemplated by this Agreement, certified in each case as of the Time of Closing by the Secretary or Assistant Secretary of the Sellers.

Section 4.2 Releae: WASTE MANAGEMENT OF COLORADO, INC., a Colorado corporation, and WASTE MANAGEMENT PARTNERS, INC., a Delaware corporation shall have executed and delivered to Owner and to Three Rivers a General Release in the form set out at Section 5.2

5. Conditions to Obligations of the Sellers

The obligations of the Sellers to sell the JVCo. Interest and the Equipment and to consummate the transactions contemplated hereby shall be subject to the fulfillment at or prior to the Time of Closing of each of the following conditions:

Section 5.1 Certified Resolutions: Three Rivers shall have delivered to the Sellers copies of resolutions adopted by the board of directors of Three Rivers authorizing the transactions contemplated by this Agreement, certified in each case as of the Time of Closing by the Secretary or Assistant Secretary of Three Rivers.

Section 5.2 Release: Three Rivers, Owner and JVCo. shall have executed and delivered each to the Sellers a General Release in the form set out below:

General Release

In consideration of the execution of that certain Asset Purchase Agreement, executed and delivered to each releasee herein, and for other good and valuable consideration Sellers release Buyers and Buyers release Sellers as set out herein.

For the purpose of this release, ''Sellers'' is defined as the following entities: Waste Management of Colorado, Inc., a Colorado corporation, and Waste Management Partners, Inc., a Delaware corporation.

For the purpose of this release, ''Buyer'' is defined as the following persons and entities: Jerrold Arbini; Three Rivers Disposal, a Montana corporation and successor to Three Rivers Disposal, a Montana general partnership; and Waste Management of Bozeman, an Illinois limited partnership (referred to as JVCo.).

A release by or in favor of a party herein is a release by or in favor of that party and by or in favor of that party's predecessors or affiliates, corporations or entities, and its successors, assigns, heirs, personal representatives, executors, administrators, attorneys, employees, agents, servants, and shareholders.

Seller by execution of this Release does release, remise, and forever discharge Buyer from all actions, causes of action, suits, debt, controversies, bonds, bills, covenants, agreements, damages, judgment, claims and demands whatsoever, as such may relate to the relationship of Seller and Buyer prior to the date hereof or to any of the assets sold or conveyed pursuant to the Asset Purchase Agreement, or to any rights or obligations under the Partnership Agreement or any of the Other Agreements (as those terms are defined in the Asset Purchase Agreement), which Seller now has, ever had or hereafter may have against the Buyer; provided, however, that this General Release shall not release any party from its obligations under or contemplated by the Asset Purchase Agreement or from documents required by said agreement and exchanged at Closing of said purchase, including but not limited to Section 1.9 and Section 6.1(c).

Buyer by execution of this Release does release, remise, and forever discharge Seller from all actions, causes of action, suits, debt, controversies, bonds, bills, covenants, agreements, damages, judgments, claims and demands whatsoever, as such may relate to the relationship of Seller and Buyer prior to the date hereof or to any of the assets sold or conveyed pursuant to the Asset Purchase Agreement, or to any rights or obligations under the Partnership Agreement or any of the Other Agreements (as those terms are defined in the Asset Purchase Agreement), which Buyer now has, ever had or hereafter may have against the Seller; provided, however, that this General Release shall not release any party from its obligations under or contemplated by the Asset Purchase Agreement or from documents required by said agreement and exchanged at Closing of said purchase, including but not limited to Section 1.9 and Section 6.1(c).

The parties exclude from this release the following: any liability and/or damages which arise out of or which are alleged to arise out of the transportation and deposit of refuse to landfills within the areas serviced by Three Rivers Disposal, Inc., during the course of the underlying agreements. Should any such claim arise, liability and apportionment thereof (if any) shall be determined by state and federal law pertaining to liability arising from the transportation of refuse and by the underlying documents referenced in the Recitals hereto.

In executing this General Release, each Releasor acknowledges that he/she/they have relief on their own judgment and that of their counsel and have in no way relied on or been induced by any representation, statement, act of omission to act by any Releasee.

Each Releasor acknowledges he has read and understand that this is a General Release and intend to be legally bound by it.

Witness the execution hereof this General Release as of the _____ day of _____, 1996.

(Signature Blocks to be inserted for each party indicating name of party, execution ''by'', and the name and title of the person signing)

6. Additional Agreement of the Parties

Section 6.1 Amendment of Partnership Agreement:

(a) Partners and Three Rivers shall execute and deliver the Amendment to the Partnership Agreement in the form attached hereto as EXHIBIT 6.1, removing Partners as general and a limited partner and admitting Three Rivers as general and a limited partner. Promptly after the Time of Closing, Partners and Three Rivers shall cause the Certificate of Amendment to the Certificate of Limited Partnership to be filed with the Secretary of State of the State of Illinois. Effective as of March 1, 1996, the rights of Partners to share in the revenues of JVCo. with respect to solid waste collection, transportation and disposal services rendered to the Customer Accounts of JVCo. (the ''Customer Accounts'') shall terminate.

(b) Effective as of the Time of Closing, the Other Agreements and the relationship of the parties thereunder (except as specifically set forth in this Agreement) are hereby terminated.

(c) The parties agree that nothing in this Agreement shall affect or impair the rights or obligations of any party to the Operating Agreement which were intended by the parties thereto to survive the termination of such agreement, specifically the rights and obligations arising under Sections 6.1 and 6.2 of the Operating Agreement.

Section 6.2 Indemnification:

(a) Three Rivers and Owner, jointly and severally, agree that they will defend, indemnify and hold Sellers and their affiliates harmless from and against any and all indemnifiable damages of the Sellers. For this purpose, ''indemnifiable damages'' of the Sellers means the aggregate of all expenses, losses, costs, deficiencies, liabilities and damages (including attorneys' fees and court costs) incurred or suffered by the Sellers or any of their directors, agents, employees or affiliates or their affiliates' directors, agents or employees, as a result of or in connection with: (i) any inaccurate representation or warranty made by Three Rivers or Owner in or pursuant to this Agreement, (ii) any default in the performance of any of the covenants or agreements made by Three Rivers or Owner in or pursuant to this Agreement, or (iii) any occurrence, act or omission of Three Rivers or any shareholder, director, officer, employee, consultant or agent of Three Rivers or the Owner relating to the provision of services to the Customer Accounts which occurred prior to or after the Time of Closing, and causes damage to the Sellers or its affiliates.

(b) Sellers agree that they will defend, indemnify and hold Three Rivers, Owner, and their affiliates harmless from and against any and all indemnifiable damages of Three Rivers or Owner. For this purpose, ''indemnifiable damages'' of Three Rivers and Owner means the aggregate of all expenses, losses, costs, deficiencies, liabilities and damages (including attorneys' fees and court costs) incurred or suffered by Three Rivers, Owner, or any of their directors, agents, employees or affiliates or their affiliates' directors, agents or employees, as a result of or in connection with: (i) any inaccurate representation or warranty made by the Sellers in or pursuant to this Agreement, or (ii) any default in the performance of any of the covenants or agreements made by the Sellers in or pursuant to this Agreement.

Section 6.3 Security Interest: Three Rivers hereby grants to Sellers a security interest in the Customer Accounts and the Equipment. Three Rivers agrees to deliver to Sellers a security agreement (in the form attached as EXHIBIT 6.3) to secure Three Rivers obligations under the three guaranteed promissory notes delivered pursuant to Section 1.6(c), 1.6(d) and 1.6(e) hereof. Three Rivers shall further execute and deliver any documents reasonably requested by Sellers to create and/or to perfect said security interest.

Section 6.4 Execution of Further Documents: From and after the Time of Closing, upon the reasonable request of Three Rivers, the Sellers shall execute, acknowledge and deliver all such further documents as may be required to convey and transfer to and vest in Three Rivers the right, title and interest in the JVCo. Interest, and as may be appropriate otherwise to carry out the transactions contemplated by this Agreement.

Section 6.5 CIMS Billing System: Sellers will make the CIMS billing system available to Three Rivers at current pricing until Three Rivers is able to replace such billing system, which replacement shall be no later than June 30, 1996. If Three Rivers is unable to replace the system by that time, a reasonable extension of the use of the system shall be granted by Sellers at current pricing. All computer equipment utilized in connection therewith will be returned to Sellers at such time as the replacement system is operational. Billings shall be mailed in a timely fashion as measured by the history of Three Rivers' billing.

Section 6.6 This Section is Deleted.

Section 6.7 Covenant-Not-to-Compete: The Sellers, jointly and severally, agree and warrant as set out below. As further consideration for this agreement Sellers have obtained the signature to this covenant not to compete of Waste Management of Montana, Inc., which corporation, by its signature hereto, warrants that it has received good and sufficient consideration for the execution of this covenant not to compete. For purposes of this Section 6.7 and no other, ''Waste Management'' shall refer to Waste Management of Colorado, Inc., Waste Management of Montana, Inc., and Waste Management Partners, Inc.

Waste Management, as defined above, agree that for a period ending the earlier of (i) ten years from and after the Time of Closing and (ii) two years after any sale of the assets of or Three Rivers' interest in the business of JVCo., Waste Management, neither WMX Technologies, Inc., (which corporation is not a party to this agreement) nor Waste Management as defined in this paragraph will engage in (as an individual or as a stockholder, trustee, partner, financier, agent, employee or representative of any person, firm, corporation or association), or have any interest, direct or indirect, in any business in competition with the business of JVCo. and/or Three Rivers, as that business is constituted at the Time of Closing (whether or not such business is subsequently carried on by Three Rivers or by any successor or subsequent purchaser of such business), in any area within the following Montana counties: Galatin County, Madison County, Park County, Broadwater County, and Sweetgrass County; provided that this Covenant-Not-to-Compete shall not prevent the Sellers from acquiring and holding not to exceed two percent (2%) of the outstanding shares of any corporation engaged in such a competitive business, if such shares are available to the general public on a national securities exchange. In the event of a breach of any covenant contained in this Section 6.7, Three Rivers shall be entitled to an injunction restraining such breach in addition to any other remedies provided by law or equity.

Section 6.8 Right of First Refusal: Three Rivers and Owner hereby grant to the Sellers a right of first refusal on the business or shares of Three Rivers as follows:

(a) If Three rivers or Owner desires within ten years from the date of this agreement to accept an offer to purchase either all or a majority of the outstanding capital stock of Three Rivers or substantially all of the assets of Three Rivers or the Purchased Assets, Sellers shall have a first right of refusal as follows: First, Three Rivers shall deliver to Sellers a copy of the offer to sell to Sellers on the same terms and conditions; Second Sellers shall have thirty days in which to accept said offer upon terms equivalent to those in the said offer; Third, providing only that Sellers have properly exercised their right of first refusal as set out herein, Three Rivers shall sell to Sellers on the terms as defined in this paragraph. Upon any merger of Three Rivers with or into another entity, the surviving entity shall be bound by the provisions hereof. Delivery of an offer to Sellers shall be satisfied by certified mail, return receipt requested, to the address for Sellers set out in section 8.6.

(b) If the Sellers exercise their right of first refusal within thirty days after the delivery of such offer, payment shall be made at the time and in the manner provided for in the offer. If the Sellers do not accept the offer within thirty days after delivery of the offer to the Sellers, the Sellers shall be deemed to have rejected the offer and Three Rivers may then enter into the transaction described in the offer with the person or persons making such offer during the period of one hundred twenty days after the receipt thereof upon the terms and conditions stated therein. If Three Rivers does not enter into the transaction described in the Offer within such one hundred twenty day period, the foregoing right of first refusal shall be reinstated.

7. Miscellaneous Agreements

Section 7.1 The Belgrade Bond: There is presently a performance bond for the Belgrade contract, which bond has been obtained through Waste Management and which was obtained at a discounted price available to and obtained by Waste Management and Sellers. Sellers agree that said bond or renewal thereof shall continue for a period of five years from Closing. Actual cost of the bond shall be paid by Three Rivers.

Section 7.2 Manhattan and Three Forks Performance Bonds: For a period not to exceed five years, Sellers and Waste Management shall cooperate in obtaining a discounted price for performance bonds obtained for the Manhattan and Three Forks contracts and shall do so in the same manner that renewal cooperation is described in Section 7.1.

Section 7.3 National Accounts: Three Rivers has serviced certain national account customers of Sellers and Sellers' affiliates with locations in the Montana counties contemplated by Section 6.7. WMI Colorado agrees to notify such national account customers that Sellers are no longer able to provide service in those counties and to suggest that such national account customers contract directly with Three Rivers. Immediately upon execution of this agreement, Sellers shall make said notification in writing with a copy thereof to Three Rivers.

Section 7.4 Indemnity: Owner and Three Rivers shall indemnify and hold Sellers harmless from all costs and expenses of obtaining bonds under this Part 7.

Owner and Three Rivers shall further indemnify and hold Sellers harmless from all liability, costs and damages which arise out of the existence of said bonds; said duty of indemnity shall include but shall not be limited to providing a defense for Sellers in any litigation on said bonds and paying all of the following: court costs, attorney fees and any damages awarded against Sellers in such litigation.

8. General Provisions

Section 8.1 Survival of Representations and Warranties: All of the representations and warranties of the parties to this Agreement shall survive the consummation of the transactions contemplated hereby.

Section 8.2 Binding Effect: This Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and assigns.

Section 8.3 Entire Agreement: This agreement supersedes any and all other agreements, oral or in writing, between the parties with respect to the subject of this agreement. This agreement contains all of the covenants and agreements between the parties with reference to its subject, and each party acknowledges that no representations, inducement, promises or agreements have been made by or on behalf of any party except those covenants and agreements embodied in writing herein. No agreement, statement or promise not contained herein shall be binding or valid.

Section 8.4 Headings: The descriptive headings in this Agreement are inserted for convenience only and do not constitute a part of this Agreement.

Section 8.5 Execution in Counterparts: This Agreement may be executed in any number of counterparts, each of which shall be deemed an original.

Section 8.6 Notices: Any notice, request, information or other document to be given hereunder to any of the parties by any other party shall be in writing and hand delivered, sent by certified mail, postage prepaid, or by overnight courier service as follows:

(a) If to the Sellers, addressed to both:

Waste Management Partners, Inc., 3003 Butterfield Road, Oak Brook, Illinois 60521, Attn: General Counsel

Waste Management of Colorado, 3900 S. Wadsworth Blvd., Suite 800, Lakewood, Colorado 80235, Attn: General Counsel

(b) If to Three Rivers or Owner, addressed to both:

Mr. Jerrold E. Arbini, Three Rivers Disposal, Inc., 8600 Huffine Lane, P.O. Box 3588, Bozeman, MT 59772

Richard Scheuler, Counsel for Three Rivers, 437 Washington Street, P.O. Box 8548, Red Bluff, CA 96080

Any party may change the address to which notices hereunder are to be sent to it by giving written notice of such change of address.

Section 8.7 Severability: If any provision of this Agreement is determined to be illegal or unenforceable, such provision will be deemed amended to the extent necessary to conform to applicable law or, if it cannot be so amended without materially altering the intention of the parties, it will be deemed stricken and the remainder of the Agreement will remain in full force and effect.

Section 8.8 Governing Law: This Agreement shall be governed by and construed in accordance with the laws of the State of Illinois applicable to contracts made and to be performed therein.

In Witness Whereof, the parties hereto have caused this Agreement to be duly executed as of the day and year first above written.

Waste Management Partners, Inc.

By: _____
Name: _____
Title: _____

Waste Management of Montana, Inc.

By: Waste Management of Montana, Inc.
Name: _____
Vice President

Waste Management Partners of Bozeman, Ltd.

By: Waste Management Partners, Inc.
Name: _____
Vice President

Waste Management of Colorado, Inc.

By: _____
Name: _____
Title: _____

Three Rivers Disposal, Inc., of Bozeman, Ltd.

By: Jerrold Arbini
Name: Jerrold Arbini
Title: President
Jerrold- Arbini—Owner

Section 8.8 Governing Law: This Agreement shall be governed by and construed in-accordance with the laws of the State of Illinois applicable to contracts made and to be performed therein.

In Witness Whereof, the parties hereto have caused this Agreement to be duly executed as of the day and year first above written.

Waste Management Partners, Inc.

By:
Name: Robert P. Damico
Title: Authorized Signatory

Waste Management of Montana, Inc.

By: Waste Management of Montana, Inc.
Name: Robert P. Damico, President

Waste Management Partners of Bozeman, Ltd.

By:
Waste Management Partners, Inc. General Partner
Name: Robert P. Damico, Authorized Signatory

Waste Management of Colorado, Inc.

By:
Name: Robert P. Damico
Title: President

Three Rivers Disposal, Inc., of Bozeman, Ltd.

By: Jerrold Arbini
Name: Jerrold Arbini
Title: President
Jerrold Arbini—Owner

James M. Kommers
Daniel J. Roth
Ralph W. Steele
Kommers & Roth, Bridger Professional Center, 517 South 22nd Avenue, Suite 5, Bozeman, MT 59718, (406) 587–7717

Attorneys for Plaintiffs

Montana Eighteenth Judicial District Court, Gallatin County

[Cause No. DV98–266]

Three Rivers Disposal, Inc., a Montana corporation and Jerrold E. Arbini, individually, Plaintiffs, v. Waste Management Partners, Inc., a Delaware corporation, Waste Management Partners of Bozeman, Ltd., an Illinois Limited Partnership, a/k/a JVCo., Waste Management of Colorado, Inc., a Colorado corporation; U.S.A. Waste Services, Inc., d/b/a Customized Services of Bozeman, Montana, Harry Ellis, and WMX Technologies, Inc., a/k/a Waste Management, Inc., Defendants.

Motion for Preliminary Injunction

Plaintiffs, Three Rivers Disposal, Inc. and Jerrold E. Arbini (hereinafter ''Three Rivers''), moved, on an expedited basis, for a preliminary injunction pursuant to MCA §§ 27–19–201(1) and (2). The applicants are entitled to equitable relief they seek to enforce a restrictive covenant not to compete under the terms of the Asset Purchase Agreement dated March 1, 1996. Three Rivers' request for equitable relief is appropriate because the agreed terms of the Asset Purchase Agreement, Section 6.7, specifically permits the applicant to seek specific performance in the form of an injunction restraining breach of the restrictive covenants in the agreement. No other remedy would be adequate at law except the injunctive relief agreed to by the parties and sought by Three Rivers herein.

Direct competition from U.S.A. Waste Services, Inc., a publicly owned corporation listed on the New York Stock Exchange, d/b/a Customized Services, Inc., will and has irreparably damaged Three Rivers through the permanent loss of its customer base within its entire operating area. Sellers and their successors in interest, because of the violation of the agreement, have, and will continue to have, the capacity to access proprietary and confidential information regarding Three River Disposal, Inc.'s customer lists, rates, and pricing policies.

The restrictive covenant was obviously intended to prevent the sellers and any successors in interest from accessing confidential information such as the rates and customers being served by Three Rivers. It is irrefutable that substantial economic impairment will result to Three Rivers because Defendants are systematically sabotaging Three Rivers' customer base and simultaneously Three Rivers must service its debt to Defendants under the Asset Purchase Agreement. The court's failure to grant specific performance in the form of injunctive relief will result in doubly punishing Three Rivers and doubly rewarding the Defendants in their breach of the restrictive covenants.

The Plaintiffs have fully and fairly performed all conditions precedent under their obligation to Defendant, MCA § 27–1–416. There is no other adequate remedy but injunctive relief to stop the substantial economic impairment to Three Rivers' business which has and will continue as a result of Defendants' breach of the restrictive covenant.

The basis for this motion is stated in the Verified Complaint concomitantly filed in support of this request for specific performance, which Plaintiffs incorporate herein by reference.

Venue is proper because the contract as well as the covenant not to complete is to be performed in Gallatin County and other counties in the State of Montana. MCA § 25–2–121(1)(b).

The relief sought by this motion is a preliminary injunction of this court which prohibits Defendants from doing business as Customized Services or under any assumed business name or through any other kind or type of affiliation by which they continue to control or operate as a business in violation of the restrictive covenant. Violation of the covenant not to compete commenced on or about July 16, 1998, and the aforementioned irreparable economic damage will continue until an order of this court prohibits the violation of the restrictive covenant within the area set forth in the covenant. If there was an adequate remedy at law, the parties would never have agreed to injunctive relief in the Asset Purchase Agreement.

Three Rivers must seek injunctive relief to prohibit breach of the restrictive covenant for the reasons set forth in the Verified Complaint and this motion. The Verified Complaint seeks relief for entry of a permanent order enforcing the restrictive covenant within the area set forth in Section 6.7 of the Asset Purchase Agreement.

Pecuniary compensation will not afford adequate relief because continued competition will not only result in the substantial economic impairment to Three Rivers' business but also will significantly affect their ability to service their debt obligation owed to these very Defendants arising out of the Asset Purchase Agreement. Three Rivers has in the past and will presently and in the future be able to service all of the customers of U.S.A. Waste, Inc., d/b/a Customized Services if this court grants the injunctive relief sought by Plaintiffs under authority of MCA §§ 27–19–102 (1) and (2).

Dated this 26th day of August, 1998.

Kommers & Roth, 517 S. 22nd Ave., Suite 5, Bozeman, MT 59718–6842, (406) 587–7717

By: Daniel J. Roth

James M. Kommers

Ralph W. Steele

James M. Kommers
Daniel J. Roth
Ralph W. Steele
Kommers & Roth, Bridger Professional Center, 517 South 22nd Avenue, Suite 5, Bozeman, MT 5718, (406) 587–57717

Attorneys for Plaintiffs

Montana Eighteenth Judicial District Court, Gallatin County

[Cause No. DV98–266]

Three Rivers Disposal, Inc., a Montana corporation and Jerrold E. Arbini, individually, Plaintiffs, v. Waste Management Partners, Inc., a Delaware corporation, Waste Management Partners of Bozeman, Ltd., an Illinois Limited Partnership, a/k/a JVCo., Waste Management of Colorado, Inc., a Colorado corporation; U.S.A. Waste Services, Inc., d/b/a Customized Services of Bozeman, Montana, Harry Ellis, and WMX Technologies, Inc., a/k/a Waste Management, Inc., Defendants.

Brief in Support of Motion for Preliminary Injunction

The Motion for Preliminary Injunction is seeking equitable relief based on a breach of a restrictive covenant which involves the sale of assets of a refuse collection business in southwest Montana, including Gallatin County. The Asset Purchase Agreement of March 1, 1996, contains a covenant not to compete which is in the contract attached to the Complaint at Section 6.7, pages 16 and 17. The covenant not to compete states:

Section 6.7 Covenant-Not-to-Compete: The Sellers, jointly and severally, agree and warrant as set out below. As further consideration for this agreement Sellers have obtained the signature to this covenant not to compete of Waste Management of Montana, Inc., which corporation by its signature hereto, warrants that it has received good and sufficient consideration for the execution of this covenant not to compete. For purposes of this Section 6.7 and no other. 'Waste Management' shall refer to Waste Management of Colorado, Inc., Waste Management of Montana, Inc., and Waste Management Partners, Inc.

Waste Management, as defined above, agree that for a period ending the earlier of (I) ten years from and after the Time of Closing and (ii) two years after any sale of the assets of or Three Rivers' interest in the business JVCo., Waste Management, neither WMX Technologies, Inc. (which corporation is not a party to this agreement) nor Waste Management as defined in this paragraph will engage in (as an individual or as a stockholder, trustee, partner, financier, agent, employee or representative of any person, firm, corporation or association), or have any

interest, direct or indirect, in any business in competition with the business of JVCo. and/or Three Rivers, as that business is constituted at the Time of Closing (whether or not such business is subsequently carried on by Three Rivers or by any successor or subsequent purchaser of such business), in any area within the following Montana counties: Gallatin County, Madison County, Park County, Broadwater County, and Sweetgrass County; provided that this Covenant-Not-to-Compete shall not prevent the Sellers from acquiring and holding not to exceed two percent (2%) of the outstanding shares of any corporation engaged in such a competitive business, if such shares are available to the general public on a national securities exchange. In the event of a breach of any covenant contained in this Section 6.7, Three Rivers shall be entitled to an injunction restraining such breach in addition to any other remedies provided by law or equity.

A preliminary injunction is appropriate under the facts of this case because the terms of the contract satisfies the statutory requirements for specific performance. MCA § 27–19–103(5) prescribes certain injunctive actions involving breach of contract except when ''*the performance of which would not be specifically enforced*.'' [emphasis added] Further, all parties to the agreement anticipated injunctive relief because the contract states:

In the event of a breach of any covenant contained in this Section 6.7, Three Rivers shall be entitled to an injunction restraining such breach in addition to any other remedies provided by law or equity.

This case arises out of a violation of Section 6.7 concerning the restrictive covenant not to compete contained in the Asset Purchase Agreement. The Montana Public Service Commission regulates entry of carriers into the collection of solid waste but its jurisdictional authority does not encompass the rates charged by refuse removal companies. See, *Rozel Corporation* v. *Department of Public Service Regulation, Public Service Commission,* 226 Mont. 237, 735 .2d 282, 285 (1987).

This case involves two refuse collection businesses which hold a common carrier certificate issued by the Montana Public Service Commission. MCA § 27–19–203 permits entry of a restraining order even though a matter be subject to Public Service Commission proceedings.

The Defendants are operating contrary to the restrictive covenants of the Asset Purchase Agreement as a result of the acquisition by U.S.A. Waste Services, Inc. of all of the remaining Defendants on or after July 16, 1998. This acquisition by U.S.A. Waste Services, Inc. resulted in retaining the corporate name of Waste Management, Inc. The acquisition by U.S.A. Waste Services, Inc. of Customized Services, which is and will be in direct competition with Three Rivers, occurred prior to July 16, 1998.

The applicable portions of MCA §§ 27–19–201(1) and (2) empowering the court to enter a preliminary injunction are as follows:

27–19–201. When preliminary injunction may be granted. An injunction order may be granted in the following cases:

(1) When it appears that the applicant is entitled to the relief demanded and the relief of any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;

(2) When it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant;

Plaintiffs are clearly entitled to the relief demanded because the parties agreed in writing, in Section 6.7 of the agreement, to specific performance and injunctive relief. In addition, Defendants have failed to refuse to acknowledge the cease and desist letter served upon them weeks ago. More importantly, the Defendants' have and will continue to have illegal access to confidential and proprietary information about Three Rivers' collection operation. This permits defendants to continue to economically ravage Plaintiffs' disposal business. Defendants continued operation in violation of the restrictive covenant not only substantially diminishes gross revenues, but it is from these very revenues Three Rivers is required to make significant monthly payments to service the substantial debt owed to Defendants as a result of the Buy-Back Agreement. Three Rivers has no adequate remedy at law other than the immediate remedy of injunctive relief.

The injunctive relief sought herein is particularly appropriate under the doctrine of specific performance. Although this relief is not allowed under some circumstances, (see, MCA § 27–19–103), the present case falls squarely under the statutory provision permitting specific performance as a remedy because the parties anticipated and agreed to this remedy as part of the consideration in their agreement. MCA § 27–1–411(4) provides in part:

Specific performance of an obligation may be compelled when:

* * * * *

(4) it has been expressly agreed in writing, between the parties to the contract, that specific performance thereof may be required by either party or that damages shall not be considered adequate relief.

The Montana Supreme Court in *Halcro* v. *Moon,* 226 Mont. 121, 733 P.2d 1305 (1987), held 027–1–411(4) MCA provides that ''specific performance may be compelled when the parties to a contract have expressly agreed in writing that specific performance shall be an available remedy.'' *Id.* 733 P.2d 1307.

Additionally authority for the entry of injunctive relief in this case is found in *Marco and Company LLC.* v. *Deaconess/Billings Clinic Health System,* 55 St. Rep. 91, 1998 WL 67544, _____Mont._____, _____P.2d_____, (February 12, 1998) (opinion not published, copy attached). The supreme court found the district court in error for failure to follow the agreement of the parties providing for injunctive relief. The Montana Supreme Court affirmed and followed *Maxted* v. *Barrett,* 198 Mont. 81, 86,643 P.2d 1161, (1982), in the *Marco* case affirming that the Montana court will enforce specific enforcement of remedies agreed upon by parties in written agreements, including, the remedy of injunction.

This court should therefore enter the injunctive relief requested at the conclusion of the hearing on the Order to Show Cause why the Motion for Preliminary Injunction should not be granted.

The Defendants are entitled to received reasonable notice of the time and place of the making of the application for this order requesting specific performance. MCA § 27–19–301. Plaintiffs request the matter be set before this Court on an expedited basis. In support of its Motion for Preliminary Injunction, the Plaintiffs will offer proof that Defendants are and will be competing in direct violation of the restrictive covenant set forth in Section 6.7 of the Asset Purchase Agreement.

Respectfully submitted this 24th day of August, 1998.

Kommers & Roth, 517 S. 22nd Ave., Suite 5, Bozeman, MT 59718–6842, (406) 587–7717

By:

James M. Kommers

Daniel J. Roth

Ralph W. Steele

Certificate of Service

I, Anthony E. Harris, hereby certify that on August 27, 1999, I caused copies of the foregoing United States's Certificate of Compliance with Provisions of the Antitrust Procedures and Penalties Act to be served on plaintiffs—the states of Ohio, Arizona, California, Colorado, Florida, Maryland, Michigan, New York, Texas, Washington and Wisconsin, and the commonwealths of Kentucky and

Pennsylvania—and defendants USA Waste Services, Inc., Dome Merger Subsidiary, and Waste Management, Inc., by mailing a copy of the pleading first-class, postage prepaid, to a duly authorized legal representative of those parties as follows:

James R. Weiss, Esquire, Preston Gates Ellis & Rouvelas Meeds LLP, 1735 New York Avenue, NW, Washington, DC 20006–8425

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Counsel for Plaintiff State of Washington

Edwin J. Hughes, Assistant Attorney General, Wisconsin Department of Justice, P.O. Box 7857, Madison, WI 53707–7857

Counsel for Plaintiff State of Wisconsin

Anthony E. Harris, Esquire,

Illinois Bar No. 1133713, U.S. Department of Justice, Antitrust Division, 1401 H Street, NW, Suite 3000, Washington, DC 20530, (202) 307–0924.

[FR Doc. 99–24882 Filed 10–1–99; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

Agency Information Collection Activities: Proposed Collection; Comment Request

ACTION: Notice of Information Collection Under Review: Application to Replace Alien Registration Card.

The Department of Justice, Immigration and Naturalization Service (INS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1955. The information collection was previously published in the **Federal Register** on June 23, 1999 at 64 FR 33519, allowing for a 60-day public comment period. No comments were received by the INS on this proposed information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until November 3, 1999. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Stuart Shapiro, Department of Justice Desk Officer, Room 10235, Washington, DC 20530; 202–395–7316.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of currently approved collection.

(2) *Title of the Form/Collection:* Application to Replace Alien Registration Card.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form I–90. Adjudications Division, Immigration and Naturalization Service.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Not-for-profit institutions. The information collected will be used by the INS to determine eligibility for an initial Alien Registration Card, or to replace a previously issued card.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 410,799 responses at 55 minutes (.916) hours per response.

(6) *An estimate of the total public burden (in hours) associated with the*

collection: 376,292 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please contact Richard A. Sloan 202–514–3291, Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, U.S. Department of Justice, Room 5307, 425 I Street, NW., Washington, DC 20536. Additionally, comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time may also be directed to Mr. Richard A. Sloan.

If additional information is required contact: Mr. Robert B. Briggs, Clearance Officer, United States Department of Justice, Information Management and Security Staff, Justice Management Division, Suite 850, Washington Center, 1001 G Street, NW, Washington, DC 20530.

Dated: September 29, 1999.

Richard A. Sloan,

Department Clearance Officer, United States Department of Justice, Immigration and Naturalization Service.

[FR Doc. 99–25697 Filed 10–1–99; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

Agency Information Collection Activities: Comment Request

ACTION: Request OMB emergency approval; Liberian Deferred Enforced Departure (DED) Supplement to Form I–765.

The Department of Justice, Immigration and Naturalization Service (INS) has submitted an emergency information collection request (ICR) utilizing emergency review procedures, to the Office of Management and Budget (OMB) for review and clearance in accordance with section 1320.13(a)(1)(ii) and (a)(2)(iii) of the Paperwork Reduction Act of 1995. The INS has determined that it cannot reasonably comply with the normal clearance procedures under this part because normal clearance procedures are reasonably likely to prevent or disrupt the collection of information. INS is requesting emergency review from OMB of this information collection to ensure compliance with Presidential Directive dated September 27, 1999 to defer for one year the deportation of certain Liberians present in the United States as of September 29, 1999. Therefore, OMB approval has been requested by September 29, 1999.

If granted, the emergency approval is only valid for 180 days. ALL comments and/or questions pertaining to this pending request for emergency approval MUST be directed to OMB, Office of Information and Regulatory Affairs, Attention: Mr. Stuart Shapiro, 202–395–7316, Department of Justice Desk Officer, Washington, DC 20503. Comments regarding the emergency submission of this information collection may also be submitted via facsimile to Mr. Shapiro at 202–395–6974.

During the first 60 days of this same period, a regular review of this information collection is also being undertaken. During the regular review period, the INS requests written comments and suggestions from the public and affected agencies concerning this information collection. Comments are encouraged and will be accepted until December 3, 1999. During the 60-day regular review, ALL comments and suggestions, or questions regarding additional information, to include obtaining a copy of the information collection instrument with instructions, should be directed to Mr. Richard A. Sloan, 202–514–3291, Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, U.S. Department of Justice, Room 5307, 425 I Street, NW., Washington, DC 20536. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information collection:

(1) Type of Information Collection: Reinstatement with change of previously approved collection.

(2) Title of the Form/Collection: Liberian Deferred Enforced Departure (DED) Supplement to Form I–765.

(3) Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form I–765D, Office of Examinations, Immigration and Naturalization Service.

(4) Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Individuals or households. The data collected on this form is used by the INS to determine eligibility for the requested benefit, pursuant to the requirements of the Presidential Order. The data will enable adjudication officers to adjudicate the underlying benefit without the need of requiring individual interviews in local INS offices on the majority of applications

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: 15,000 responses at 60 minutes (1 hour) per response.

(6) An estimate of the total public burden (in hours) associated with the collection: 15,000 annual burden hours.

If additional information is required contact: Mr. Robert B. Briggs, Clearance Officer, United States Department of Justice, Information Management and Security Staff, Justice Management Division, Suite 850, Washington Center, 1001 G Street, NW, Washington, DC 20530.

Dated: September 28, 1999.

Richard A. Sloan,

Department Clearance Officer, Department of Justice, Immigration and Naturalization Service.

[FR Doc. 99–25698 Filed 10–1–99; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF JUSTICE

National Institute of Justice

[OJP(NIJ)–1251]

RIN 1121–ZB85

Announcement of the Availability of the National Institute of Justice Office of Research and Evaluation 2000 Solicitation for Investigator-Initiated Research

AGENCY: Office of Justice Programs, National Institute of Justice (NIJ), Justice.

ACTION: Notice of solicitation.

SUMMARY: Announcement of the availability of the National Institute of

Justice Office of Research and Evaluation 2000 Solicitation for Investigator-Initiated Research.

DATES: Proposals must be received by close of business Tuesday, January 18, 2000.

ADDRESSES: National Institute of Justice, 810 Seventh Street, NW, Washington, DC 20531.

FOR FURTHER INFORMATION CONTACT: For a copy of the solicitation, please call NCJRS 1–800–851–3420. For general information about application procedures for solicitations, please call the U.S. Department of Justice Response Center 1–800–421–6770.

SUPPLEMENTARY INFORMATION:

Authority

This action is authorized under the Omnibus Crime Control and Safe Streets Act of 1968, Sections 201–203, as amended, 42 U.S.C. 3721–23 (1994).

Background

In this solicitation, NIJ invites applicants to submit proposals that will help the Institute address five general themes related to the NIJ mission. This solicitation specifically requests proposals in topical areas that are not covered by other NIJ solicitations. Wherever possible, applicants interested in conducting research on such topics as violence against women or science and technology development should apply to directed solicitations targeting these particular areas of research.

Under this investigator-initiated program, applicants may submit proposals to explore a wide range of research and evaluation topics relevant to criminal justice policy or practice, supporting NIJ's broad portfolio of both basic and applied studies. While the Institute's specific research and development interests are constantly evolving in response to the needs of the field, the following five broad criminal justice areas are current NIJ priorities: rethinking justice and the processes that create just communities; understanding the nexus between crime and its social context; breaking the cycle of crime by testing research-based interventions; creating the tools, evaluating new and transferable techniques and procedures for improving the effectiveness and efficiency of the criminal justice system; and expanding the horizons, moving beyond traditional definitions of crime and criminal relationships.

Interested organizations should call the National Criminal Justice Reference Service (NCJRS) at 1–800–851–3420 to obtain a copy of ''Office of Research and Evaluation 2000 Solicitation for Investigator-Initiated Research'' (refer to document no. SL000385). For World Wide Web access, connect to either NIJ at http://www.ojp.usdoj.gov/nij/funding.htm, or the NCJRS Justice Information Center at http://www.ncjrs.org/fedgrant.htm#nij.

Dated: September 29, 1999.

Jeremy Travis,

Director, National Institute of Justice.

[FR Doc. 99–25702 Filed 10–1–99; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 99–38; Exemption Application No. D–10621, et al.]

Grant of Individual Exemptions; MICO, Inc. (MICO), et al.

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Grant of individual exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Notices were published in the **Federal Register** of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, D.C. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of proposed exemption were issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemptions are administratively feasible;

(b) They are in the interests of the plans and their participants and beneficiaries; and

(c) They are protective of the rights of the participants and beneficiaries of the plans.

MICO, Inc. (MICO) Located in North Mankato, Minnesota

[Prohibited Transaction Exemption 99–38; Exemption Application Number D–10621]

Exemption

The restrictions of sections 406(a), 406(b)(1) and (2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the sale (the Sale) of a certain parcel of unimproved real property (the Property) from the MICO, Inc. Profit Sharing Plan (the Plan) to MICO, a party in interest and disqualified person with respect to the Plan, provided that the following conditions are met:

(a) The terms and conditions of the Sale are at least as favorable to the Plan as those obtainable in an arm's length transaction with an unrelated party;

(b) MICO purchases the Property for $362,000, which represents the Property's current fair market value as determined by a qualified, independent appraiser;

(c) MICO additionally pays to the Plan a premium of $36,200, as determined by a qualified, independent appraiser, due to MICO's ownership of improved real property which is located adjacent to the Property;

(d) The Sale is a one-time transaction for cash; and

(e) The Plan pays no fees or commissions in connection with the Sale.

For a more complete statement of the facts and representations supporting this exemption, refer to the notice of proposed exemption published on May 27, 1999 at 64 FR 28835.

FOR FURTHER INFORMATION CONTACT: Mr. Christopher Motta of the Department, telephone (202) 219–8881 (This is not a toll-free number).

Fleet Bank (RI), National Association (Fleet)

Located in Providence, Rhode Island

[Prohibited Transaction Exemption 99–39;

Exemption Application No. D–10643]

Exemption

Section I—Transactions

A. Effective August 11, 1999, the restrictions of sections 406(a) and 407(a) of the Act and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to the following transactions involving trusts and certificates evidencing interests therein:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the trust, the sponsor or an underwriter and an employee benefit plan subject to the Act or section 4975 of the Code (a plan) when the sponsor, servicer, trustee or insurer of a trust, the underwriter of the certificates representing an interest in the trust, or an obligor is a party in interest with respect to such plan;

(2) The direct or indirect acquisition or disposition of certificates by a plan in the secondary market for such certificates; and

(3) The continued holding of certificates acquired by a plan pursuant to Section I.A.(1) or (2).

Notwithstanding the foregoing, Section I.A. does not provide an exemption from the restrictions of sections 406(a)(1)(E), 406(a)(2) and 407 for the acquisition or holding of a certificate on behalf of an Excluded Plan, as defined in Section III.K. below, by any person who has discretionary authority or renders investment advice with respect to the assets of the Excluded Plan that are invested in certificates.[1]

B. Effective August 11, 1999, the restrictions of sections 406(b)(1) and 406(b)(2) of the Act and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(E) of the Code, shall not apply to:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the trust, the sponsor or an underwriter and a plan when the person who has discretionary authority or renders investment advice with respect to the investment of plan assets in the certificates is (a) an obligor with respect to receivables contained in the trust constituting 0.5 percent or less of the fair market value of the aggregate undivided interest in the trust allocated to the certificates of the relevant series, or (b) an affiliate of a person described in (a); if

(i) The plan is not an Excluded Plan;

(ii) Solely in the case of an acquisition of certificates in connection with the initial issuance of the certificates, at least 50 percent of each class of certificates in which plans have invested is acquired by persons independent of the members of the Restricted Group, as defined in Section III.L., and at least 50 percent of the aggregate undivided interest in the trust allocated to the certificates of a series is acquired by persons independent of the Restricted Group;

(iii) A plan's investment in each class of certificates of a series does not exceed 25 percent of all of the certificates of that class outstanding at the time of the acquisition;

(iv) Immediately after the acquisition of the certificates, no more than 25 percent of the assets of a plan with respect to which the person has discretionary authority or renders investment advice is invested in certificates representing the aggregate undivided interest in a trust allocated to the certificates of a series and containing receivables sold or serviced by the same entity;[2] and

(v) Immediately after the acquisition of the certificates, no more than 25 percent of the assets of a plan with respect to which the person has discretionary authority or renders investment advice is invested in certificates representing an interest in the trust, or trusts containing receivables sold or serviced by the same entity. For purposes of paragraphs B.(1)(iv) and B.(1)(v) only, an entity shall not be considered to service receivables contained in a trust if it is merely a subservicer of that trust;

(2) The direct or indirect acquisition or disposition of certificates by a plan in the secondary market for such certificates, provided that conditions set forth in Section I. B.(1)(i) and (iii) through (v) are met; and

(3) The continued holding of certificates acquired by a plan pursuant to Section I.B.(1) or (2).

C. Effective August 11, 1999, the restrictions of sections 406(a), 406(b) and 407(a) of the Act and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c) of the Code, shall not apply to transactions in connection with the servicing, management and operation of a trust, including reassigning receivables to the sponsor, removing from the trust receivables in accounts previously designated to the trust, changing the underlying terms of accounts designated to the trust, adding new receivables to the trust, designating new accounts to the trust, the retention of a retained interest by the sponsor in the receivables, the exercise of the right to cause the commencement of amortization of the principal amount of the certificates, or the use of any eligible swap transactions, provided that:

(1) Such transactions are carried out in accordance with the terms of a binding pooling and servicing agreement;

(2) The pooling and servicing agreement is provided to, or described in all material respects in the prospectus or private placement memorandum provided to, investing plans before they purchase certificates issued by the trust;[3]

(3) The addition of new receivables or designation of new accounts, or the removal of receivables in previously-designated accounts, meets the terms and conditions for such additions, designations or removals as are described in the prospectus or private placement memorandum for such certificates, which terms and conditions have been approved by Standard & Poor's Ratings Services, Moody's Investors Service, Inc., Duff & Phelps Credit Rating Co., or Fitch IBCA, Inc., or their successors (collectively, the Rating Agencies), and does not result in the certificates receiving a lower credit rating from the Rating Agencies than the then current rating of the certificates; and

(4) The series of which the certificates are a part will be subject to an ''Economic Pay Out Event'' (as defined in Section III.BB.), which is set forth in

[1] Section I.A. provides no relief from sections 406(a)(1)(E), 406(a)(2) and 407 for any person rendering investment advice to an Excluded Plan within the meaning of section 3(21)(A)(ii) and regulation 29 CFR 2510.3–21(c).

[2] For purposes of this exemption, each plan participating in a commingled fund (such as a bank collective trust fund or insurance company pooled separate account) shall be considered to own the same proportionate undivided interest in each asset of the commingled fund as its proportionate interest in the total assets of the commingled fund as calculated on the most recent preceding valuation date of the fund.

[3] In the case of a private placement memorandum, such memorandum must contain substantially the same information that would be disclosed in a prospectus if the offering of the certificates were made in a registered public offering under the Securities Act of 1933. In the Department's view, the private placement memorandum must contain sufficient information to permit plan fiduciaries to make informed investment decisions. For purposes of this exemption, all references to ''prospectus'' include any related supplement thereto, and any documents incorporated by reference therein, pursuant to which certificates are offered to investors.

the pooling and servicing agreement and described in the prospectus or private placement memorandum associated with the series, the occurrence of which will cause any revolving period, scheduled amortization period or scheduled accumulation period applicable to the certificates to end, and principal collections to be applied to monthly payments of principal to, or the accumulation of principal for the benefit of, the certificateholders of such series until the earlier of payment in full of the outstanding principal amount of the certificates of such series or the series termination date specified in the prospectus or private placement memorandum.

Notwithstanding the foregoing, Section I.C. does not provide an exemption from the restrictions of section 406(b) of the Act, or from the taxes imposed under section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(E) or (F) of the Code, for the receipt of a fee by the servicer of the trust, in connection with the servicing of the receivables and the operation of the trust, from a person other than the trustee or sponsor, unless such fee constitutes a ''qualified administrative fee'' as defined in Section III.U. below.

D. Effective August 11, 1999, the restrictions of sections 406(a) and 407(a) of the Act and the taxes imposed by sections 4975(a) and (b) of the Code, by reason of sections 4975(c)(1)(A) through (D) of the Code, shall not apply to any transaction to which those restrictions or taxes would otherwise apply merely because a person is deemed to be a party in interest or disqualified person (including a fiduciary) with respect to a plan by virtue of providing services to the plan (or by virtue of having a relationship to such service provider as described in section 3(14)(F), (G), (H) or (I) of the Act or section 4975(e)(2)(F), (G), (H) or (I) of the Code), solely because of the plan's ownership of certificates.

Section II—General Conditions

A. The relief provided under Section I will be available only if the following conditions are met:

(1) The acquisition of certificates by a plan is on terms (including the certificate price) that are at least as favorable to the plan as such terms would be in an arm's-length transaction with an unrelated party;

(2) The rights and interests evidenced by the certificates are not subordinated to the rights and interests evidenced by other certificates of the same trust;

(3) The certificates acquired by the plan have received a rating at the time of such acquisition that is either: (i) In one of the two highest generic rating categories from any one of the Rating Agencies; or (ii) for certificates with a duration of one year or less, the highest short-term generic rating category from any one of the Rating Agencies; provided that, notwithstanding such ratings, this exemption shall apply to a particular class of certificates only if such class (an Exempt Class) is at the time of such acquisition part of a series in which credit support is provided to the Exempt Class through a senior-subordinated series structure or other form of third-party credit support which, at a minimum, represents five (5) percent of the outstanding principal balance of certificates issued for the Exempt Class, so that an investor in the Exempt Class will not bear the initial risk of loss;

(4) The trustee is not an affiliate of any other member of the Restricted Group. However, the trustee shall not be considered to be an affiliate of a servicer solely because the trustee has succeeded to the rights and responsibilities of the servicer pursuant to the terms of a pooling and servicing agreement providing for such succession upon the occurrence of one or more events of default by the servicer;

(5) The sum of all payments made to and retained by the underwriters in connection with the distribution or placement of certificates represents not more than reasonable compensation for underwriting or placing the certificates; the consideration received by the sponsor as a consequence of the assignment of receivables (or interests therein) to the trust, to the extent allocable to the class of certificates purchased by a plan, represents not more than the fair market value of such receivables (or interests); and the sum of all payments made to and retained by the servicer, to the extent allocable to the class of certificates purchased by a plan, represents not more than reasonable compensation for the servicer's services under the pooling and servicing agreement and reimbursement of the servicer's reasonable expenses in connection therewith;

(6) The plan investing in such certificates is an ''accredited investor'' as defined in Rule 501(a)(1) of Regulation D of the Securities and Exchange Commission (SEC) under the Securities Act of 1933;

(7) The trustee of the trust is a substantial financial institution or trust company experienced in trust activities and is familiar with its duties, responsibilities, and liabilities as a fiduciary under the Act (i.e. ERISA). The trustee, as the legal owner of, or holder of a perfected security interest in, the receivables in the trust, enforces all the rights created in favor of certificateholders of such trust, including plans;

(8) Prior to the issuance by the trust of any new series, confirmation is received from the Rating Agencies that such issuance will not result in the reduction or withdrawal of the then current rating of the certificates held by any plan pursuant to this exemption;

(9) To protect against fraud, chargebacks or other dilution of the receivables in the trust, the pooling and servicing agreement and the Rating Agencies require the sponsor to maintain a seller interest of not less than two (2) percent of the principal balance of the receivables contained in the trust;

(10) Each receivable added to a trust is an eligible receivable, based on criteria of the relevant Rating Agency(ies) and as specified in the pooling and servicing agreement. The pooling and servicing agreement requires that any change in the terms of the cardholder agreements must be made applicable to the comparable segment of accounts owned or serviced by the sponsor which are part of the same program or have the same or substantially similar characteristics;

(11) The pooling and servicing agreement limits the number of the sponsor's newly originated accounts to be designated to the trust, unless the Rating Agencies otherwise consent in writing, to the following: (i) with respect to any consecutive three-month period commencing in January, April, July and October of each calendar year, 15 percent of the number of existing accounts designated to the trust as of the first day of the calendar year during which such monthly period commenced, and (ii) with respect to any calendar year, 20 percent of the number of existing accounts designated to the trust as of the first day of such calendar year;

(12) The pooling and servicing agreement requires the sponsor to deliver an opinion of counsel confirming the validity and perfection of each transfer of receivables in newly originated accounts to the trust for each interim addition;

(13) The pooling and servicing agreement requires the sponsor and the trustee to receive confirmation from a Rating Agency that no Ratings Effect will result from (i) a Required Addition (as defined in Section III.MM.) in excess of the limits in paragraph B.(11) above, or (ii) any Restricted Additions (as defined in Section III.NN.);

(14) If a particular class of certificates held by any plan involves a Ratings

Dependent or Non-Ratings Dependent Swap entered into by the trust, then each particular swap transaction relating to such certificates:

(a) shall be an Eligible Swap;

(b) shall be with an Eligible Swap Counterparty;

(c) in the case of a Ratings Dependent Swap, shall include as an early payout event, as specified in the pooling and servicing agreement, the withdrawal or reduction by any Rating Agency of the swap counterparty's credit rating below a level specified by the Rating Agency where the servicer (as agent for the trustee) has failed, for a specified period after such rating withdrawal or reduction, to meet its obligation under the pooling and servicing agreement to:

(i) obtain a replacement swap agreement with an Eligible Swap Counterparty which is acceptable to the Rating Agency and the terms of which are substantially the same as the current swap agreement (at which time the earlier swap agreement shall terminate); or

(ii) cause the swap counterparty to establish any collateralization or other arrangement satisfactory to the Rating Agency such that the then current rating by the Rating Agency of the particular class of certificates will not be withdrawn or reduced;

(d) in the case of a Non-Ratings Dependent Swap, shall provide that, if the credit rating of the swap counterparty is withdrawn or reduced below the lowest level specified in Section III.II. hereof, the servicer, as agent for the trustee, shall within a specified period after such rating withdrawal or reduction:

(i) obtain a replacement swap agreement with an Eligible Swap Counterparty, the terms of which are substantially the same as the current swap agreement (at which time the earlier swap agreement shall terminate); or

(ii) cause the swap counterparty to post collateral with the trustee of the trust in an amount equal to all payments owed by the counterparty if the swap transaction were terminated; or

(iii) terminate the swap agreement in accordance with its terms; and

(e) shall not require the trust to make any termination payments to the swap counterparty (other than a currently scheduled payment under the swap agreement) except from ''Excess Finance Charge Collections'' (as defined below in Section III.LL.) or other amounts that would otherwise be payable to the servicer or the sponsor;

(15) Any class of certificates, to which one or more swap agreements entered into by the trust applies, may be acquired or held in reliance upon this exemption only by Qualified Plan Investors.

B. Neither any underwriter, sponsor, trustee, servicer, insurer, nor any obligor, unless it or any of its affiliates has discretionary authority or renders investment advice with respect to the plan assets used by a plan to acquire certificates, shall be denied the relief provided under Section I, if the provision in Section II.A.(6) above is not satisfied for the acquisition or holding by a plan of such certificates, provided that:

(1) Such condition is disclosed in the prospectus or private placement memorandum; and

(2) In the case of a private placement of certificates, the trustee obtains a representation from each initial purchaser which is a plan that it is in compliance with such condition, and obtains a covenant from each initial purchaser to the effect that, so long as such initial purchaser (or any transferee of such initial purchaser's certificates) is required to obtain from its transferee a representation regarding compliance with the Securities Act of 1933, any such transferees shall be required to make a written representation regarding compliance with the condition set forth in Section II.A.(6).

Section III—Definitions

For purposes of this exemption:

A. ''Certificate'' means a certificate:

(1) That (i) represents a beneficial ownership interest in the assets of a trust and entitles the holder to payments denominated as principal, interest and/or other payments made as described in the applicable prospectus or private placement memorandum and in accordance with the pooling and servicing agreement in connection with the assets of such trust, to the extent allocable to the series of certificates purchased by a plan, either currently or after a revolving period during which principal payments on assets of the trust are reinvested in new assets, or (ii) is denominated as a debt instrument that represents a regular interest in a financial asset securitization investment trust (FASIT), within the meaning of section 860L(a) of the Code, and is issued by and is an obligation of the trust.

For purposes of this exemption, references to ''certificates representing an interest in a trust'' include certificates denominated as debt which are issued by a trust; and

(2) With respect to which (a) Fleet or any of its affiliates is the sponsor, and (b) Fleet, any of its affiliates, or an ''underwriter'' (as defined in Section III.C.) is the sole underwriter or the manager or co-manager of the underwriting syndicate or a selling or placement agent.

B. ''Trust'' means an investment pool, the corpus of which is held in trust and consists solely of:

(1) Either:

(a) Receivables (as defined in Section III.V.); or

(b) Participations in a pool of receivables (as defined in Section III.V.) where such beneficial ownership interests are not subordinated to any other interest in the same pool of receivables; [4]

(2) Property which has secured any of the assets described in paragraph B.(1) above; [5]

(3) Undistributed cash or permitted investments made therewith maturing no later than the next date on which distributions are to be made to certificateholders, except during a Revolving Period (as defined herein) when permitted investments are made until such cash can be reinvested in additional receivables described in paragraph B.(1)(a) above;

(4) Rights of the trustee under the pooling and servicing agreement, and rights under any cash collateral accounts, insurance policies, third-party guarantees, contracts of suretyship and other credit support arrangements for any certificates, swap transactions, or under any yield supplement agreements,[6] yield maintenance agreements or similar arrangements; and

(5) Rights to receive interchange fees received by the sponsor as partial compensation for the sponsor's taking credit risk, absorbing fraud losses and funding receivables for a limited period prior to initial billing with respect to accounts designated to the trust.

Notwithstanding the foregoing, the term ''trust'' does not include any investment pool unless: (i) the investment pool consists only of receivables of the type which have been included in other investment pools; (ii) certificates evidencing interests in such other investment pools have been rated

[4] The Department notes that no relief would be available under the exemption if the participation interests held by the trust were subordinated to the rights and interests evidenced by other participation interests in the same pool of receivables.

[5] Fleet states that it is possible for credit card receivables to be secured by bank account balances or security interests in merchandise purchased with credit cards. Thus, the exemption should permit foreclosed property to be an eligible trust asset.

[6] In a series involving an accumulation period (as defined in Section III.Z.), a yield supplement agreement may be used by the Trust to make up the difference between (i) the reinvestment yield on permitted investments, and (ii) the interest rate on the certificates of that series.

in one of the two highest generic rating categories by at least one of the Rating Agencies for at least one year prior to the plan's acquisition of certificates pursuant to this exemption; and (iii) certificates evidencing an interest in such other investment pools have been purchased by investors other than plans for at least one year prior to the plan's acquisition of certificates pursuant to this exemption.

C. ''Underwriter'' means an entity which has received from the Department an individual prohibited transaction exemption which provides relief for the operation of asset pool investment trusts that issue asset-backed pass-through securities to plans that is similar in format and substance to this exemption (each, an Underwriter Exemption); [7] any person directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with such entity; and any member of an underwriting syndicate or selling group of which such firm or affiliated person described above is a manager or co-manager with respect to the certificates.

D. ''Sponsor'' means Fleet, or an affiliate of Fleet that organizes a trust by transferring credit card receivables or interests therein to the trust in exchange for certificates.

E. ''Master Servicer'' means Fleet or an affiliate that is a party to the pooling and servicing agreement relating to trust assets and is fully responsible for servicing, directly or through subservicers, the receivables in the trust pursuant to the pooling and servicing agreement.

F. ''Subservicer'' means Fleet or an affiliate of Fleet, or an entity unaffiliated with Fleet which, under the supervision of and on behalf of the master servicer, services receivables contained in the trust, but is not a party to the pooling and servicing agreement.

G. ''Servicer'' means Fleet or an affiliate which services receivables contained in the trust, including the master servicer and any subservicer or their successors pursuant to the pooling and servicing agreement.

H. ''Trustee'' means an entity which is independent of Fleet and its affiliates and is the trustee of the trust. In the case of certificates which are denominated as debt instruments, ''trustee'' also means the trustee of the indenture trust.

I. ''Insurer'' means the insurer or guarantor of, provider of other credit support for, or other contractual counterparty of, a trust. Notwithstanding the foregoing, a swap counterparty is not an insurer, and a person is not an insurer solely because it holds securities representing an interest in a trust which are of a class subordinated to certificates representing an interest in the same trust.

J. ''Obligor'' means any person, other than the insurer, that is obligated to make payments with respect to any receivable included in the trust.

K. ''Excluded Plan'' means any plan with respect to which any member of the Restricted Group is a ''plan sponsor'' within the meaning of section 3(16)(B) of the Act.

L. ''Restricted Group'' with respect to a class of certificates means:

(1) Each underwriter;

(2) Each insurer;

(3) The sponsor;

(4) The trustee;

(5) Each servicer;

(6) Each swap counterparty;

(7) Any obligor with respect to receivables contained in the trust constituting more than 0.5 percent of the fair market value of the aggregate undivided interest in the trust allocated to the certificates of a series, determined on the date of the initial issuance of such series of certificates by the trust; or

(8) Any affiliate of a person described in paragraphs L.(1) through (7) above.

M. ''Affiliate'' of another person includes:

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person;

(2) Any officer, director, partner, employee, relative (as defined in section 3(15) of the Act), a brother, a sister, or a spouse of a brother or sister of such other person; and

(3) Any corporation or partnership of which such other person is an officer, director or partner.

N. ''Control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

O. A person will be ''independent'' of another person only if:

(1) Such person is not an affiliate of that other person; and

(2) The other person, or an affiliate thereof, is not a fiduciary who has investment management authority or renders investment advice with respect to any assets of such person.

P. ''Sale'' includes the entrance into a forward delivery commitment (as defined in Section III.Q. below), provided that:

(1) The terms of the forward delivery commitment (including any fee paid to the investing plan) are no less favorable to the plan than they would be in an arm's length transaction with an unrelated party;

(2) The prospectus or private placement memorandum is provided to an investing plan prior to the time the plan enters into the forward delivery commitment; and

(3) At the time of the delivery, all conditions of this exemption applicable to sales are met.

Q. ''Forward Delivery Commitment'' means a contract for the purchase or sale of one or more certificates to be delivered at an agreed future settlement date. The term includes both mandatory contracts (which contemplate obligatory delivery and acceptance of the certificates) and optional contracts (which give one party the right but not the obligation to deliver certificates to, or demand delivery of certificates from, the other party).

R. ''Reasonable Compensation'' has the same meaning as that term is defined in 29 CFR section 2550.408c–2.

S. ''Pooling and Servicing Agreement'' means the agreement or agreements among a sponsor, a servicer and the trustee establishing a trust and any supplement thereto pertaining to a particular series of certificates. In the case of certificates which are denominated as debt instruments, ''pooling and servicing agreement'' also includes the indenture entered into by the trustee of the trust issuing such certificates and the indenture trustee.

T. ''Series'' means an issuance of a class or various classes of certificates by the trust all on the same date pursuant to the same pooling and servicing agreement, and any supplement thereto and restrictions therein.

U. ''Qualified Administrative Fee'' means a fee which meets the following criteria:

(1) The fee is triggered by an act or failure to act by the obligor other than the normal timely payment of amounts owing with respect to the receivables;

(2) The servicer may not charge the fee absent the act or failure to act referred to in paragraph U.(1) above;

(3) The ability to charge the fee, the circumstances in which the fee may be charged, and an explanation of how the fee is calculated are set forth in the pooling and servicing agreement or described in all material respects in the prospectus or private placement memorandum provided to the plan before it purchases certificates issued by the trust; and

(4) The amount paid to investors in the trust is not reduced by the amount of any such fee waived by the servicer.

[7] For a listing of Underwriter Exemptions, see the description provided in the text of the operative language of Prohibited Transaction Exemption (PTE) 97–34 (62 FR 39021, July 21, 1997).

V. ''Receivables'' means secured or unsecured obligations of credit card holders which have arisen or arise in Accounts designated to a trust. Such obligations represent amounts charged by cardholders for merchandise and services and amounts advanced as cash advances, as well as periodic finance charges, annual membership fees, cash advance fees, late charges on amounts charged for merchandise and services and certain other fees (such as bad check fees, cash advance fees, and other fees specified in the cardholder agreements) designated by card issuers (other than a qualified administrative fee as defined in Section III.U.).

W. ''Accounts'' are revolving credit card accounts serviced by Fleet or an affiliate, which were originated or purchased by Fleet or an affiliate, and are designated to a trust such that receivables arising in such accounts become assets of the trust.

X. ''Revolving Period'' means a period of time, as specified in the pooling and servicing agreement, during which principal collections allocated to a series are reinvested in newly generated receivables arising in the accounts.

Y. ''Amortization Period'' means a period of time specified in the pooling and servicing agreement during which a portion of the principal collections allocated to a series will commence to be paid to the certificateholders of such series in installments.

Z. ''Accumulation Period'' means a period of time specified in the pooling and servicing agreement during which a portion of the principal collections allocated to a series will be deposited in an account to be distributed to certificateholders in a lump sum on the expected maturity date.

AA. ''Pay Out Event'' means any of the events specified in the pooling and servicing agreement or supplement thereto that results (in some instances without further affirmative action by any party) in the early commencement of either an amortization period or an accumulation period, including (1) the failure of the sponsor or the servicer, whichever is subject to the relevant obligation under the pooling and servicing agreement, (i) to make any payment or deposit required under the pooling and servicing agreement within five (5) business days after such payment or deposit was required to be made, or (ii) to observe or perform any of its other covenants or agreements set forth in the pooling and servicing agreement, which failure has a material adverse effect on holders of investor certificates of the relevant series and continues unremedied for 60 days; (2) a breach of any representation or warranty made by the sponsor or the servicer in the pooling and servicing agreement that continues to be incorrect in any material respect for 60 days; (3) the occurrence of certain bankruptcy events relating to the sponsor or the servicer; (4) the failure by the sponsor to convey to the trust additional receivables to maintain the minimum seller interest that is required by the pooling and servicing agreement and the Rating Agencies; (5) the failure to pay in full amounts owing to investors on the expected maturity date; and (6) the Economic Pay Out Event.

BB. An ''Economic Pay Out Event'' occurs automatically when the portfolio yield for any series of certificates, averaged over three consecutive months (or such other period approved by one of the Rating Agencies) is less than the base rate of the series averaged over the same period. Portfolio yield for a series of certificates for any period is equal to the sum of the finance charge collections and other amounts treated as finance charge collections less total defaults for the series divided by the outstanding principal balance of the investor certificates of the series, or such other measure approved by one of the Rating Agencies. The base rate for a series of certificates for any period is the sum of (i) amounts payable to certificateholders of the series with respect to interest, (ii) servicing fees allocable to the series payable to the servicer, and (iii) any credit enhancement fee allocable to the series payable to a third party credit enhancer, divided by the outstanding principal balance of the investor certificates of the series, or such other measure approved by one of the Rating Agencies.

CC. ''CCA'' or ''Cash Collateral Account'' means that certain account established in the name of the trustee that serves as credit enhancement with respect to the investor certificates and holds cash and/or permitted investments (as defined below in Section III.KK.) which conform to applicable provisions of the pooling and servicing agreement.

DD. ''Group'' means a group of any number of series offered by the trust that share finance charge and/or principal collections in the manner described in the applicable prospectus or private placement memorandum.

EE. ''Ratings Effect'' means the reduction or withdrawal by a Rating Agency of its then current rating of the certificates held by any plan pursuant to this exemption.

FF. ''Principal Receivables Discount'' means, with respect to any account designated by the sponsor, the portion of the related principal receivables that represents a discount from the face value thereof and that is treated under the pooling and servicing agreement as finance charge receivables.

GG. ''Ratings Dependent Swap'' means an interest rate swap, or (if purchased by or on behalf of the trust) an interest rate cap contract, that is part of the structure of a series of certificates where the rating assigned by the Rating Agency to any senior class of certificates held by any plan is dependent on the terms and conditions of the swap and the rating of the swap counterparty, and if such certificate rating is not dependent on the existence of the swap and rating of the swap counterparty, such swap or cap shall be referred to as a ''Non-Ratings Dependent Swap''. With respect to a Non-Ratings Dependent Swap, each Rating Agency rating the certificates must confirm, as of the date of issuance of the certificates by the trust, that entering into an Eligible Swap with such counterparty will not affect the rating of the certificates.

HH. ''Eligible Swap'' means a Ratings Dependent or Non-Ratings Dependent Swap:

(1) which is denominated in U.S. Dollars;

(2) pursuant to which the trust pays or receives, on or immediately prior to the respective payment or distribution date for the senior class of certificates, a fixed rate of interest, or a floating rate of interest based on a publicly available index (*e.g.* LIBOR or the U.S. Federal Reserve's Cost of Funds Index (COFI)), with the trust receiving such payments on at least a quarterly basis and obligated to make separate payments no more frequently than the swap counterparty, with all simultaneous payments being netted;

(3) which has a notional amount that does not exceed either (i) the certificate balance of the class of certificates to which the swap relates, or (ii) the portion of the certificate balance of such class represented by receivables;

(4) which is not leveraged (i.e., payments are based on the applicable notional amount, the day count fractions, the fixed or floating rates designated in paragraph HH.(2) above, and the difference between the products thereof, calculated on a one to one ratio and not on a multiplier of such difference);

(5) which has a final termination date that is the earlier of the date on which the trust terminates or the related class of certificates is fully repaid; and

(6) which does not incorporate any provision which could cause a unilateral alteration in any provision described in paragraphs HH.(1) through

(4) above without the consent of the trustee.

II. ''Eligible Swap Counterparty'' means a bank or other financial institution which has a rating, at the date of issuance of the certificates by the trust, which is in one of the three highest long-term credit rating categories, or one of the two highest short-term credit rating categories, utilized by at least one of the Rating Agencies rating the certificates; provided that, if a swap counterparty is relying on its short-term rating to establish eligibility hereunder, such counterparty must either have a long-term rating in one of the three highest long-term rating categories or not have a long-term rating from the applicable Rating Agency, and provided further that if the senior class of certificates with which the swap is associated has a final maturity date of more than one year from the date of issuance of the certificates, and such swap is a Ratings Dependent Swap, the swap counterparty is required by the terms of the swap agreement to establish any collateralization or other arrangement satisfactory to the Rating Agencies in the event of a ratings downgrade of the swap counterparty.

JJ. ''Qualified Plan Investor'' means a plan investor or group of plan investors on whose behalf the decision to purchase certificates is made by an appropriate independent fiduciary that is qualified to analyze and understand the terms and conditions of any swap transaction used by the trust and the effect such swap would have upon the credit ratings of the certificates. For purposes of the exemption, such a fiduciary is either:

(1) A ''qualified professional asset manager'' (QPAM),[8] as defined under Part V(a) of PTE 84–14 (49 FR 9494, 9506, March 13, 1984);

(2) an ''in-house asset manager'' (INHAM),[9] as defined under Part IV(a) of PTE 96–23 (61 FR 15975, 15982, April 10, 1996); or

(3) a plan fiduciary with total assets under management of at least $100 million at the time of the acquisition of such certificates.

KK. ''Permitted Investments'' means investments that either (i) are direct obligations of, or obligations fully guaranteed as to timely payment of principal and interest by, the United States or any agency or instrumentality thereof, provided that such obligation is backed by the full faith and credit of the United States, or (ii) have been rated (or the obligor thereof has been rated) in one of the three highest generic rating categories by a Rating Agency; are described in the pooling and servicing agreement; and are permitted by the relevant Rating Agency(ies).

LL. ''Excess Finance Charge Collections'' means, as of any day funds are distributed from the trust, the amount by which the finance charge collections allocated to certificates of a series exceed the amount necessary to pay certificate interest, servicing fees and expenses, to satisfy cardholder defaults or charge-offs, and to reinstate credit support.

MM. ''Required Additions'' means accounts which are required to be added to the trust when either the seller amount is less than the minimum required seller amount or the principal amount is less than the required principal amount.

NN. ''Restricted Additions'' means accounts which may be added to the trust at the discretion of the sponsor only upon confirmation from a Rating Agency that no Ratings Effect will result from the addition.

The Department notes that this exemption is included within the meaning of the term ''Underwriter Exemption'' as it is defined in Section V(h) of the Grant of the Class Exemption for Certain Transactions Involving Insurance Company General Accounts, which was published in the **Federal Register** on July 12, 1995 (see PTE 95–60, 60 FR 35925).

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the notice of proposed exemption published on August 11, 1999 at 64 FR 43742.

Effective Date: This exemption is effective August 11, 1999.

For Further Information Contact: Mr. Gary H. Lefkowitz of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

[8] PTE 84–14 provides a class exemption for transactions between a party in interest with respect to an employee benefit plan and an investment fund (including either a single customer or pooled separate account) in which the plan has an interest, and which is managed by a QPAM, provided certain conditions are met. QPAMs (*e.g.*, banks, insurance companies, registered investment advisers with total client assets under management in excess of $50 million) are considered to be experienced investment managers for plan investors that are aware of their fiduciary duties under ERISA.

[9] PTE 96–23 permits various transactions involving employee benefit plans whose assets are managed by an INHAM, an entity which is generally a subsidiary of an employer sponsoring the plan which is a registered investment adviser with management and control of total assets attributable to plans maintained by the employer and its affiliates which are in excess of $50 million.

UNOVA, Inc. (UNOVA), Located in Beverly Hills, California

[Prohibited Transaction Exemption No. 99–40; Exemption Application Nos. D–10663 and D–10664]

Exemption

The restrictions of section 406(a), 406(b)(1) and (b)(2), and section 407(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply, as of December 17, 1998, to: (1) the acquisition by the UNOVA, Inc. Pension Plan and the Landis Tool Pension Plan (collectively, the Plans) of certain improved real property (the Property) from an unrelated party for a sales price of $15,250,000 (the Purchase); and (2) the leasing of a portion of the Property (the Lease) by the Plans to UNOVA, a party in interest with respect to the Plans, provided that the following conditions are satisfied:

(a) The Plans paid an amount for the Property which was no more than the fair market value of the Property at the time of the transaction;

(b) The interest in the Property owned by each Plan represented no more than 10% of the value of either Plan's total assets at the time of the Purchase;

(c) The Property, including the amount of space in the Property leased to UNOVA under the Lease (the Leased Space), represents no more than 10% of the value of either Plan's total assets throughout the duration of the Lease;

(d) The terms and conditions of the Lease are at least as favorable to the Plans as those obtainable in an arm's-length transaction with an unrelated party;

(e) The fair market rental value of the Leased Space has been, and every three years during the Lease will continue to be, determined by a qualified, independent appraiser;

(f) The amount of rent paid by UNOVA to the Plans for the Leased Space throughout the duration of the Lease will be no less than the greater of the initial rent paid by UNOVA or the current fair market value of the Leased Space, as determined every three years by a qualified independent appraiser;

(g) The Plans' independent fiduciary has determined that the Purchase and Lease are appropriate for the Plans and in the best interests of the Plans' participants and beneficiaries; and

(h) The Plans' independent fiduciary will monitor the Lease, as well as the conditions of this exemption, and will take whatever actions are necessary to safeguard the interests of the Plans throughout the duration of the Lease.

Effective Date: This exemption is effective as of December 17, 1998.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on May 13, 1999 at 64 FR 25921.

Written Comments

The Department received approximately 69 comment letters from interested persons regarding the notice of proposed exemption (the Notice). The Department also received three comment letters from the applicant (*i.e.*, UNOVA), one letter in response to the 69 comments submitted by interested persons, another letter requesting certain clarifications and modifications to the Notice, and a final letter which provides a further statement regarding an appropriate limitation on the percentage of each Plan's assets that the Property may represent.

With respect to the 69 comments received by the Department from interested persons, approximately 58 of the letters were similar or identical in nature. One such letter had 22 different signatures endorsing the comments made therein. All of these letters expressed general opposition ''* * * to any plan that would allow unova inc. [*sic*] to use any funds that have been accumulated by its employees for retirement, for company related expenditures.'' Some of these letters also expressed concerns regarding ''* * * a potential conflict of interest'' and that ''* * * any money set aside for future retirement should only be used to enhance that retirement fund to the fullest extent possible.'' The remaining comment letters were not similar or identical in nature and raised more specific issues. For example, one comment stated that ''* * * the purchase of land from 'arms length' parties is suspect and not in the best interest of plan participants * * *'' and that ''* * * investment in real property in Los Angles [*sic*] is speculative at best * * *'' Other comments suggested that it would have been more appropriate for UNOVA to buy the Property rather than the Plans. Some of these comments also suggested that the rent being paid by UNOVA for the Leased Space, and UNOVA's reimbursement of leasing expenses to the Plans, is inadequate. Finally, most of these comments raised concerns about the ''* * * security of the retirement funds'' and the need for adequate protections from any investment losses.

In response to these comments, the applicant states that the Investment Committee of the Plans (the Committee) determined in 1998 that real estate should be part of the investments in the Plans' portfolios in order to diversify the assets of the Plans. The applicant notes that asset diversity can reduce risk to an investment portfolio and can contribute to the growth of the Plans' assets. With respect to the Plans' investment in the Property, the applicant represents that the Committee determined that the Property would be an appropriate real estate investment for the Plans in meeting the stated goal of diversifying the Plans' assets into real estate. The applicant states that the Lease adds to the value of the Property because it adds to the income enjoyed by the Plans from the investment. Further, the requested exemption contains safeguards, such as independent fiduciary review of the fair market rental value of the Leased Space every three years, adjustment of the rent to reflect cost of living increases, and continued monitoring of the Lease's terms to ensure that the Lease does not become disadvantageous to the Plans.

The applicant notes that the safeguards agreed to by UNOVA for the Lease are similar to those required in other lease transactions for which the Department has granted an exemption. In this regard, UNOVA hired an independent fiduciary for the Plans to review the terms of proposed transactions and to take whatever actions may be necessary to safeguard the best interests of the Plans and its participants and beneficiaries. In addition, an independent qualified real estate appraiser was hired to review and appraise the Property (the Appraisal) to determine its fair market value prior to its acquisition by the Plans. The appraiser that produced the Appraisal also analyzed the rental rate to be paid by UNOVA for the Leased Space and concluded that an initial rental rate of $25.20 per square foot annually represented the current fair market value of the Leased Space. The Appraisal was also reviewed by certified real estate appraisers (the Reviewers) who were independent of the parties involved in the transactions. The Reviewers determined that the rental rate to be paid by UNOVA for the Leased Space was at the high end of the range of rents being paid for similar properties in the local real estate market.

Therefore, the applicant believes that given the goal of diversification of plan assets and the independent safeguards discussed above, the transactions are in the best interests of the Plans and their participants and beneficiaries.

The Department agrees with the applicant that the conditions of the proposed exemption contain adequate independent safeguards to protect the interests of the Plans. The Department notes further that the total value of the Property allocated to each of the Plans represented less than 5% of each Plan's total assets at the time of the Purchase. Therefore, based on the current facts and representations, the Department is satisfied that the Plans' purchase of the Property and subsequent leasing of part of the Property to UNOVA was consistent with the Plans' investment objectives, and that the terms and conditions of the Lease (as agreed to by the parties and approved by an independent fiduciary) are in the interests of the Plans. Upon consideration of the concerns raised by the comments, the applicant has agreed by letter dated September 21, 1999 to further limit the percentage of each Plan's total assets that the Property will represent throughout the duration of the Lease to no more than 10%. As noted below, the Department has modified conditions (b) and (c) of the exemption accordingly. In addition, the applicant has also represented that no major expenditures or renovations are contemplated for the Property except for certain expenses associated with tenant installation.[10]

The following is a discussion of the applicant's additional comments regarding the Notice. These comments requested that:

(1) relief from the restrictions of section 407(a) of the Act be provided in the exemption;

(2) condition (c), which imposes a limitation on the total Plan assets that can be represented by the Property, be clarified; and

(3) certain clarifications be made to the information contained in Paragraph 3 of the Summary of Facts and Representations in the Notice (the Summary).

With respect to item (1) above, the applicant states that relief from section 407(a) of the Act is necessary because the Property represents a single parcel of ''employer real property'' (as defined in section 407(d)(2) of the Act) and would not be considered ''qualifying employer real property'' within the meaning of section 407(d)(4) of the Act, since such a property would not meet

[10] The Department notes that any expenses for tenant installation, or other expenditures relating to the Property, made by the Plans must be consistent with the fiduciary responsibility provisions contained in Part 4 of Title I of the Act. In this regard, the Department notes that section 404(a) of the Act requires, among other things, that plan fiduciaries act prudently and solely in the interest of the plan and its participants and beneficiaries when making investment decisions for a plan, including any decisions for reasonable expenditures that are necessary to enhance the value of such investments.

the requirement contained therein that such properties be ''geographically dispersed.'' Thus, in order to ensure that adequate relief is provided by the final exemption, the applicant requests that the Department clarify that the exemption provides relief from section 407(a).

The Department agrees with the applicant's analysis and has modified the exemption to provide relief from the restrictions of section 407(a) of the Act.

With respect to item (2) above, the applicant states that condition (c) of the Notice states that:

> The Property, *and* the amount of space in the Property leased to UNOVA under the Lease (the Leased Space), represents no more than 15% of the value of either Plans's total assets throughout the duration of the Lease. [emphasis added]

In this regard, the applicant asks the Department to confirm that this condition does not double count the value of the Property and the value of the Leased Space, but merely looks to the value of the Property (including the value of the Leased Space) when determining whether this condition is met.

The Department acknowledges the applicant's comment and, in order to clarify the meaning of this condition in the final exemption, has deleted the word ''and'' and substituted the word ''including'' in the reference to the Leased Space contained in condition (c). In addition, as noted above, the Department has modified conditions (b) and (c) of the exemption by reducing the percentage limitation required therein from 15% to 10%.

With respect to item (3) above, the applicant notes that the first sentence in Paragraph 3 of the Summary states that:

> After the Purchase, the Plans leased a portion of the Property to UNOVA, *effective as of December 17, 1998* (*i.e.*, the Lease). [emphasis added]

The applicant states that this sentence should state that the Plans leased a portion of the Property to UNOVA, effective as of February 1, 1999.

The Department acknowledges this clarification to the information contained in the Summary.

Accordingly, based on the entire record, the Department has determined to grant the proposed exemption as modified herein.

For Further Information Contact: Christopher J. Motta of the Department, telephone (202) 219–8194. (This is not a toll-free number.)

The Manufacturers Life Insurance Company (Manulife) Located in Toronto, Canada

[Prohibited Transaction Exemption 99–41; Exemption Application No. D–10738]

Exemption

Section I. Covered Transactions

The restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply, to (1) the receipt of common stock (the Common Shares) of Manulife Financial Corporation, a newly-formed company that will be the holding company (the Holding Company) for Manulife; or (2) the receipt of cash or policy credits, by any plan policyholder (the Eligible Policyholder) that is an employee benefit plan (the Plan), other than a policyholder which is a Plan established by Manulife or an affiliate for its own employees, in exchange for such Eligible Policyholder's membership interest in Manulife, in accordance with a plan of reorganization (the Plan of Demutualization) adopted by Manulife and implemented under the insurance laws of Canada and the State of Michigan.

This exemption is subject to the conditions set forth below in Section II.

Section II. General Conditions

(a) The Plan of Demutualization is implemented in accordance with procedural and substantive safeguards that are imposed under the insurance laws of Canada and the State of Michigan and is subject to review and/or approval in Canada by the Office of the Superintendent of Financial Institutions (OSFI) and the Minister of Finance (the Canadian Finance Minister) and, in the State of Michigan, by the Commissioner of Insurance (the Michigan Insurance Commissioner).

(b) OSFI, the Canadian Finance Minister and the Michigan Insurance Commissioner review the terms of the options that are provided to Eligible Policyholders of Manulife as part of their separate reviews of the Plan of Demutualization. In this regard,

(1) OSFI (i) authorizes the release of the Plan of Demutualization and all information to be sent to Eligible Policyholders; (ii) oversees each step of the demutualization process; and (iii) makes a final recommendation to the Canadian Finance Minister on the Plan of Demutualization.

(2) The Canadian Finance Minister may consider such factors as whether (i) the Plan of Demutualization is fair and equitable to Eligible Policyholders; (ii) the Plan of Demutualization is in the best interests of the financial system in Canada; and (iii) sufficient steps had been taken to inform Eligible Policyholders of the Plan of Demutualization and of the special meeting on demutualization.

(3) The Michigan Insurance Commissioner makes a determination that the Plan of Demutualization is (i) fair and equitable to all Eligible Policyholders and (ii) consistent with the requirements of Michigan law.

(4) Both the Canadian Finance Minister and the Michigan Insurance Commissioner concur on the terms of the Plan of Demutualization.

(c) Each Eligible Policyholder has an opportunity to vote to approve the Plan of Demutualization after full written disclosure is given to the Eligible Policyholder by Manulife.

(d) One or more independent fiduciaries of a Plan that is an Eligible Policyholder receives Holding Company Common Shares, cash or policy credits pursuant to the terms of the Plan of Demuutualization and neither Manulife nor any of its affiliates exercises any discretion or provides investment advice with respect to such acquisition.

(e) After each Eligible Policyholder is allocated 186 Common Shares, additional consideration is allocated to Eligible Policyholders who own eligible policies based on an actuarial formula that takes into account the cash value, the death benefit (in the case of life insurance policies and certain annuity policies) and the duration of each such eligible policy. The actuarial formula has been reviewed by the Canadian Finance Minister and the Michigan Insurance Commissioner.

(f) All Eligible Policyholders that are Plans participate in the transactions on the same basis within their class groupings as other Eligible Policyholders that are not Plans.

(g) No Eligible Policyholder pays any brokerage commissions or fees in connection with the receipt of Common Shares.

(h) All of Manulife's policyholder obligations remain in force and are not affected by the Plan of Demutualization.

Section III. Definitions

For purposes of this exemption:

(a) The term ''Manulife'' means The Manufacturers Life Insurance Company and any affiliate of Manulife as defined in paragraph (b) of this Section III.

(b) An ''affiliate'' of Manulife includes—

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with Manulife. (For

purposes of this paragraph, the term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.)

(2) Any officer, director or partner in such person, and (3) Any corporation or partnership of which such person is an officer, director or a 5 percent partner or owner.

(c) The term ''Eligible Policyholder'' means a policyholder who is eligible to vote at the special meeting on demutualization and to receive consideration under Manulife's Plan of Demutualization. More specifically, an Eligible Policyholder is a policyholder of the mutual insurer that had a voting policy on the day Manulife announced its intention to prepare a plan of demutualization (the Eligibility Date) or any policyholder that applied for a voting policy on or prior to that day. Policyholders will also be deemed Eligible Policyholders if they are holders of a voting policy that lapsed before the insurer's Eligibility Date but was reinstated on or before 90 days prior to the special meeting to consider demutualization. These policyholders will be eligible to receive benefits upon demutualization.

(d) The term ''policy credit'' means whichever of the following is applicable: (1) with respect to an individual life or individual deferred annuity policy, and for a group policy (other than a group annuity), where the owner has elected a paid-up addition option, an increase in the paid-up addition value; (2) with respect to all other individual life or individual deferred annuity policies, and for all other group policies (other than group annuities), an increase in the dividend accumulation account; (3) with respect to a settlement annuity, a vested annuity or a group annuity, an increase in the periodic income payment.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption (the Notice) that was published July 22, 1999 at 64 FR 39539.

Written Comments

The Department received two written comments with respect to the Notice. One comment was submitted by a Manulife policyholder. The other comment was submitted by Manulife. Following is a discussion of these comments.

Policyholder's Comment

The commenter expressed concern over the tax implications of the cash distribution that would be made by Manulife to the policyholder's Plan account as a result of the demutualization. The commenter explained that he had not sought the demutualization nor was he taking the distribution in his own name. Rather, he said he would reinvest the cash consideration received with other assets held by his Plan account. The commenter argued that to tax him would be unfair since the money he would be receiving as a result of Manulife's demutualization would not be in his actual possession and the tax would have to be paid to the taxing authorities from his present income. The commenter further explained that while he fully expected to pay taxes on the cash consideration when he took distributions from his Plan account, to tax him prematurely would be unfair and constitute unjust enrichment to the taxing authorities.

In response to the commenter, Manulife indicated that it was unaware of how the commenter acquired erroneous information that the payment of the demutualization benefits to the commenter's Plan account would constitute a taxable event. Manulife explained that under current U.S. tax law, the payment of the demutualization benefits to a qualified plan would not result in current taxation to a Plan participant, such as the commenter, nor of the Plan, itself. To emphasize this point, Manulife indicated that in the Information Circular it mailed to policyholders on or before May 31, 1999, pages 51 and 52 of the document specifically state that the ''[r]eceipt of Common Shares or cash by a pension or profit sharing trust (a plan covered by section 401(a) of the U.S. Tax Code) will be tax-free to the trust (assuming the trust is not otherwise subject to tax).''

Manulife's Comment

In its comment, Manulife recommended modifications or clarifications to the operative language and the Summary of Facts and Representations (the Summary) of the Notice in a number of areas. Manulife explained that its comment was generated primarily because the exemption application reflected a draft version of the Plan of Demutualization rather than the final version that was approved by OSFI and the Michigan Insurance Commissioner.

Discussed below are Manulife's concerns and the Department's responses with respect to these areas of concern. Also included is a discussion of the Department's revisions of certain typographical errors appearing in the Summary and the Notice to Interested Persons.

1. *Canadian Finance Minister Considerations.* On page 39539 of the Notice, Section II(b)(2) describes the various factors the Canadian Finance Minister may take into account in deciding whether to approve a plan of demutualization. Manulife represents that the first subclause of Section II(b)(2) should be revised to read ''The Canadian Finance Minister may consider such factors as whether (i) the Plan of Demutualization is fair and equitable to policyholders.'' As for subclauses (ii) and (iii) of Section II(b)(2), Manulife states that no changes should be made.

The Department concurs with this modification to Section II(b)(2) of the Notice.

2. *Fixed and Variable Allocations of Demutualization Benefits.* On page 39539 of the Notice, Section II(e) states that the fixed allocation of demutualization benefits will equal 184 Common Shares. However, Manulife wishes to clarify that the fixed allocation is actually equal to 186 Common Shares and, in response to this comment, the Department has made the requested change. The Department has also made a corresponding revision on page 39543 of the Notice in the second paragraph of Representation 10 of the Summary.

In addition, Section II(e) of the Notice describes the variable component of the demutualization benefits, in part, as follows: ''additional consideration is allocated to Eligible Policyholders who own participating policies based on actuarial formulas that take into account each participating policy's contribution to the surplus of Manulife * * *'' Manulife represents that while some other insurance companies have calculated the variable component of their demutualization benefit in this manner, Manulife's variable allocation will be calculated on a different basis. In this regard, Manulife explains that under its Plan of Demutualization, the variable allocation to eligible policies that are life insurance policies will be calculated on the basis of the cash value, the death benefit and the duration of each such eligible policy. Manulife further explains that the variable allocation to eligible policies that are annuities will be calculated using the same formula that will be used for life insurance policies, except that the share allocation with respect to the death benefit will generally be zero. According to Manulife, these allocation formulas have been reviewed by the Canadian Finance Minister and the Michigan Insurance Commissioner. In

light of the above, Manulife suggests that Section II(e) be revised to read as follows:

After each Eligible Policyholder is allocated 186 Common Shares, additional consideration is allocated to Eligible Policyholders who own eligible policies based on an actuarial formula that takes into account the cash value, the death benefit (in the case of life insurance policies and certain annuity policies) and the duration of each such eligible policy. The actuarial formula has been reviewed by the Canadian Finance Minister and the Michigan Insurance Commissioner.

The Department acknowledges Manulife's requested change and has modified Section II(e) of the Notice.

3. *Eligible Policyholder Definition.* On page 39539 of the Notice, Section III(c) defines the term ''Eligible Policyholder'' as—

A policyholder who is eligible to vote at annual meetings of the mutual insurer and to receive consideration under Manulife's Plan of Demutualization. More specifically, an Eligible Policyholder is a policyholder of the mutual insurer that had a voting policy before Manulife announced its intention to demutualize or any policyholder that applied for a voting policy prior to that day. Policyholders will also be deemed Eligible Policyholders if they are holders of a voting policy that lapsed before the insurer's announcement date but was reinstated on or before 90 days prior to the special meeting to consider demutualization. These policyholders will be eligible to receive benefits upon demutualization.

To reflect current revisions in its Plan of Demutualization, Manulife requests that the definition of ''Eligible Policyholder'' as set forth in Section III(c) of the Notice be revised to read as follows:

The term ''Eligible Policyholder'' means a policyholder who is eligible to vote at the special meeting on demutualization and to receive consideration under Manulife's Plan of Demutualization. More specifically, an Eligible Policyholder is a policyholder of the mutual insurer that had a voting policy on the day Manulife announced its intention to prepare a plan of demutualization (the Eligibility Date) or any policyholder that applied for a voting policy on or prior to that day. Policyholders will also be deemed Eligible Policyholders if they are holders of a voting policy that lapsed before the insurer's Eligibility Date but was reinstated on or before 90 days prior to the special meeting to consider demutualization. These policyholders will be eligible to receive benefits upon demutualization.

In response to this comment, the Department has made the requested changes to Section III(c) of the Notice.

4. *Policy Credit Definition.* On page 39540 of the Notice Section II(d) contains the following definition of the term ''policy credit'':

The term ''policy credit'' means whichever of the following is applicable: (1) with respect to an individual life insurance policy, an increase in the dividend accumulation amount; (2) with respect to an individual deferred annuity policy where the owner has elected a dividend accumulation option, an increase in the dividend accumulation amount; (3) with respect to all other individual deferred annuity policies, an increase in the dividend addition value; and (4) with respect to a settlement annuity, an increase in the contract reserve which shall provide for an increase in the monthly income payment equal to the ratio of the reserve increase to the then current contract reserve.

To reflect current revisions to its Plan of Demutualization, Manulife suggests that the definition of the term ''policy credit'' be revised to read as follows:

The term ''policy credit'' means whichever of the following is applicable: (1) with respect to an individual life or individual deferred annuity policy, and for a group policy (other than a group annuity), where the owner has elected a paid-up addition option, an increase in the paid-up addition value; (2) with respect to all other individual life or individual deferred annuity policies, and for all other group policies (other than group annuities), an increase in the dividend accumulation account; (3) with respect to a settlement annuity, a vested annuity or a group annuity, an increase in the periodic income payment.

The Department concurs with this clarification and has modified Section III(d) accordingly.

5. *Subsidiary Ownership.* On page 39540 of the Notice, Representation 1 of the Summary states, in pertinent part, that Manulife indirectly owns approximately 85 percent of The Manufacturers Life Insurance Company of North America (Manulife/North America). Manulife wishes to clarify however, that as a result of ManUSA's recent acquisition of the 15 percent minority interest in Manulife/North America, Manulife now indirectly owns 100 percent of that entity.

The Department notes this clarification to the Summary.

6. *Stock Ownership Listings.* On page 39541 of the Notice, Representation 4 of the Summary states that Common Shares of the Holding Company will be listed on the Montreal, Toronto or New York Stock Exchanges. However, for purposes of clarification, Manulife represents that Common Shares will be listed on each of the ''Montreal, Toronto, Hong Kong, Philippines and New York Stock Exchanges.''

The Department acknowledges this clarification.

7. *Holding Company Shares.* On page 39541 of the Notice, Representation 6 of the Summary describes the steps that will occur in connection with Manulife's demutualization. Specifically, the third sentence of Representation 6 states the following: ''Then, all of the Holding Company's Common Shares held by Manulife immediately prior to the effective date will be canceled.'' Manulife requests that this sentence be revised by deleting the reference to the term ''Common Shares'' and replacing it with the term ''shares.'' Therefore, the revised sentence would read as follows: ''Then, all of the Holding Company's shares held by Manulife immediately prior to the effective date will be canceled.'' The Department does not object to this change and has made the requested revision.

8. *Footnote 13.* On page 39542 of the Notice, Footnote 13 of the Summary describes the treatment of the underwriters' discount under Canadian law if Common Shares are sold by non-Canadian policyholders of Manulife in a secondary offering by the Holding Company's underwriters as part of the initial public offering. To clarify the language of the footnote, Manulife suggests that the second and third sentences be deleted and replaced with the following language:

Because the payment of the underwriters' discount is treated as dividend in Canada, a withholding tax of 15 percent of the amount of the dividend will be imposed. Manulife has concluded that there is an applicable withholding tax exemption under the Canada/U.S. tax treaty and, accordingly, it will not withhold any taxes from amounts remitted to the Plans. Manulife has represented that even if its conclusion is incorrect, it will not seek reimbursement from any Plan policyholder under such circumstances.

The Department concurs with these revisions and has made the requested changes.

9. *Footnote 19.* On page 39542 of the Notice, Footnote 19 of the Summary discusses, in pertinent part, special rules applicable to an insurance policy that is issued to a trust established by Manulife. Because the last sentence of the second paragraph of Footnote 19 is in error, Manulife suggests that the sentence be revised to read as follows: ''The trustee of any such trust established by Manulife will not be considered an Eligible Policyholder or owner and will not be eligible to vote or receive consideration.''

The Department acknowledges this revision and has made the requested change.

10. *Eligible Policyholder.* On page 39543 of the Notice, Representation 10 of the Summary describes the criteria for an Eligible Policyholder under Manulife's Plan of Demutualization. To

clarify the second parenthetical in the first paragraph of Representation 10, which relates to certain status and time requirements for the insurance policies, Manulife suggests that the parenthetical be revised to read as follows:

(or applied for on or before that date or which are in lapse status on that date and reinstated at least 90 days prior to the special meeting of the Eligible Policyholders to vote on the Plan of Demutualization).

The Department acknowledges this revision and has modified the parenthetical.

11. *Cash Elections/Non-Trusteed Policies.* On page 39543 of the Summary, the second sentence in the fourth paragraph of Representation 10 states that the cash election that is made by an Eligible Policyholder who is entitled to receive Common Shares may be reduced if the Board of Directors of the Holding Company determines that such reduction is in Manulife's best interests. However, for purposes of clarification, Manulife suggests that this sentence be deleted and the following new sentence be inserted in lieu thereof:

If, in the judgment of the Board of Directors of the Holding Company, it would not be in the best interests of Manulife to conduct a public offering that fully funds cash elections, then the Board of Directors shall determine the number of Common Shares by which the aggregate cash elections shall be reduced, and such reductions shall be pro-rated among all Eligible Policyholders who have made a cash election.

In response to this comment, the Department has made the suggested modification.

In addition, the fifth paragraph of Representation 10 refers to Plans intending to qualify under section 403(a) of the Code as the recipients of policy credits. Manulife requests that the sentence should also make reference to Plans intending to qualify under section 401(a) of the Code. Accordingly, Manulife suggests that the sentence should read as follows:

Other Eligible Policyholders, namely owners of individual retirement annuities, tax sheltered annuities, certain other policies issued directly to Plan participants in qualified pension or profit sharing plans, or group policies issued in connection with Plans intending to qualify under section 401(a) or 403(a) of the Code that are not held in trust, will receive policy credits equal in value to the shares allocated to such Eligible Policyholders.

The Department notes this change and has made the requested revision.

12. *Escrow Arrangement.* On page 39543 of the Notice, Representation 12 of the Summary describes an escrow arrangement that Manulife will implement in the event the exemption is not granted before the effective date of the demutualization. Specifically, the first sentence of Representation 12 provides that the escrow arrangement is subject to terms and conditions approved by the Superintendent of OSFI. Manulife wishes to clarify, however, that such terms and conditions will be subject to approval by the Michigan Insurance Commissioner rather than the Superintendent of OSFI.

In response, the Department notes this clarification and has made the requested change.

Finally, the Department has revised certain typographical errors appearing in the Summary and the Notice to Interested Persons. In this regard, on page 39543 of the Notice, references to the citation ''29 CFR 2510.3–2(c)'' in the fifth paragraph of Representation 10 and in paragraph (d) of Representation 12 should be revised to read ''29 CFR 2510.3–21(c).'' Also, the reference to ''20 CFR 2570.43(b)(2)'' in the Notice to Interested Persons should be revised to read ''29 CFR 2570.43(b)(2).''

For further information regarding the comments or other matters discussed herein, interested persons are encouraged to obtain copies of the exemption application file (Exemption Application No. D–10738) the Department is maintaining in this case. The complete application file, as well as all supplemental submissions received by the Department, are made available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, Room N–5638, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Accordingly, after giving full consideration to the entire record, including the written comments received, the Department has decided to grant the exemption subject to the modifications and clarifications described above.

For Further Information Contact: Ms. Jan D. Broady of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemptions does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in each application are true and complete and accurately describe all material terms of the transaction which is the subject of the exemption. In the case of continuing exemption transactions, if any of the material facts or representations described in the application change after the exemption is granted, the exemption will cease to apply as of the date of such change. In the event of any such change, application for a new exemption may be made to the Department.

Signed at Washington, DC, this 29th day of September, 1999.

Ivan Strasfeld,

Director of Exemption Determinations, Pension and Welfare Benefits Administration, Department of Labor.

[FR Doc. 99–25709 Filed 10–1–99; 8:45 am]

BILLING CODE 4510–29–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[99–128]

Agency Information Collection: Submission for OMB Review, Comment Request

AGENCY: National Aeronautics and Space Administration (NASA).

SUMMARY: The National Aeronautics and Space Administration has submitted to the Office of Management and Budget (OMB) the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Comments on this proposal should be received on or before November 3, 1999.

ADDRESSES: All comments should be addressed to Ms. Michele Hull, National Aeronautics and Space Administration, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Ms. Carmela Simonson, Office of the Chief Information Officer, (202) 358–1223.

Reports: None.

Title: Required Central Contractor Registration.

OMB Number: 2700–.

Type of Review: New.

Need and Uses: NASA is requiring it's vendors to register in DoD's Central contractor Registration Database. This requirement will be applicable for all awards excluding purchases with a Government purchase card.

Affected Public: Business or other for-profit, not-for-profit institutions, Federal Government, State, Local or Tribal Government.

Estimated Number of Respondents: 10,120.

Responses Per Respondent: 1.

Estimated Annual Responses: 10,120.

Estimated Hours Per Request: ½ hr.

Estimated Annual Burden Hours: 5,060.

Frequency of Report: Annually.

David B. Nelson,

Acting Deputy Chief Information Officer, Office of the Administrator.

[FR Doc. 99–25739 Filed 10–1–99; 8:45 am]

BILLING CODE 7510–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 99–125]

NASA Advisory Council, Life and Microgravity Sciences and Applications Advisory Committee, Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Pub. L. 92–463, as amended, the National Aeronautics and Space Administration announces a meeting of the NASA Advisory Council, Life and Microgravity Sciences and Applications Advisory Committee.

DATES: Thursday, October 21, 1999, 10:00 a.m. to 5:00 p.m.; and Friday, October 22, 1999, 8:00 a.m. to 12:00 Noon.

ADDRESSES: National Aeronautics and Space Administration Headquarters, 300 E Street, SW, MIC–6, Room 6H46, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Dr. Stephen C. Davison, Code UG, National Aeronautics and Space Administration, Washington, DC 20546, 202/358–0647.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the seating capacity of the room. The agenda for the meeting is as follows:

—Action Status
—Update: Office of Life & Microgravity Sciences and Applications
—FY 1999 OLMSA Performance Targets
—NRC Studies and Relation to OLMSA
—ISO 9001 Implementation
—PFO Workshop
—Flight PI/NASA Interactions
—Access to Space/Space Station
—Discussion of Committee Findings and Recommendations

It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants. Visitors will be requested to sign a visitor's register.

Dated: September 28, 1999.

Matthew M. Crouch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 99–25736 Filed 10–1–99; 8:45 am]

BILLING CODE 7510–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 99–126]

NASA Advisory Council, Aero-Space Technology Advisory Committee, Goals Subcommittee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration announces a NASA Advisory Council, Aero-Space Technology Advisory Committee, Goals Subcommittee meeting.

DATES: Tuesday, November 16, 1999, 8:00 a.m. to 5:00 p.m.; Wednesday, November 17, 1999, 8:00 a.m. to 5:00 p.m.; and Thursday, November 18, 1999, 8:00 a.m. to 12:00 noon.

ADDRESSES: National Aeronautics and Space Administration, 300 E Street, SW., Washington, DC 20546–0001. The meeting will be held in the Program Review Center, Room 9H–40.

FOR FURTHER INFORMATION CONTACT: Ms. Enzie M. Ebron, National Aeronautics and Space Administration, 300 E Street, SW., Washington, DC 20546–0001, 202–358–4642.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the seating capacity of the room. Agenda topics for the meeting are as follows:

Review the progress the NASA Aero-Space Technology Enterprise has made on the following Enabling Technology Goals (ETG):

- ETG 4—While maintaining safety, triple the throughput, in all weather conditions, within 10 years.
- ETG 7—Enable doorstep-to-destination travel at 4 times the speed of highways to 25% of the Nation's suburban, rural, and remote communities in 10 years and more than 90% in 25 years.
- ETG 8—Provide the next generation design tools and experimental craft to increase design confidence, and cut the design cycle time for air and space transportation vehicles in half.
- ETG 9—Reduce the payload costs to low-earth orbit by an order of magnitude from $10,000 to $1,000 per pound within 10 years, and by an additional order of magnitude, from thousands to hundreds of dollars per pound, within 25 years.

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants. Visitors will be requested to sign a visitors register.

Dated: September 28, 1999.

Matthew M. Crouch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 99–25737 Filed 10–1–99; 8:45 am]

BILLING CODE 7510–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 99–127]

NASA Advisory Council, Life and Microgravity Sciences and Applications Advisory Committee, Life Sciences Advisory Subcommittee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Pub. L. 92–463, as amended, the National Aeronautics and Space Administration announces a meeting of the NASA Advisory Council, Life and Microgravity Sciences and Applications Advisory Committee, Life Sciences Advisory Subcommittee.

DATES: Wednesday, October 20, 1999, 8:00 a.m. to 5:00 p.m.

ADDRESSES: National Aeronautics and Space Administration Headquarters, 300 E Street, SW., Program Review Center (PRC), Room 9H40, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Dr. Frank M. Sulzman, Code UL, National Aeronautics and Space Administration, Washington, DC 20546, 202/358–0220.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the seating capacity of the room. The agenda for the meeting is as follows:

—Action Status
—Update: Life Sciences Division
—Life Sciences Division FY99 Performance Metrics
—Human Research Facility Report
—Mars Robotic Missions Status
—Flight Manifest Status
—Discussion of Joint Findings and Recommendations
—Life Sciences Procedures for Flight Selection
—Commercial Procedures for Flight Selection
—Life Sciences Use of Commercial Hardware
—Commercial Use of Life Sciences Hardware
—ISS Research and Commercial Utilization

It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants. Visitors will be requested to sign a visitor's register.

Dated: September 28, 1999.

Matthew M. Crouch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 99–25738 Filed 10–1–99; 8:45 am]

BILLING CODE 7510–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (99–129)]

NASA Advisory Council (NAC), Aero-Space Technology Advisory Committee (ASTAC); Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Pub. L. 92–463, as amended, the National Aeronautics and Space Administration announces a forthcoming meeting of the NASA Advisory Council, Aero-Space Technology Advisory Committee.

DATES: Thursday, October 28, 1999, 9:00 a.m. to 5:00 p.m.; and Friday, October 29, 1999, 8:00 a.m. to 12:00 Noon.

ADDRESSES: National Aeronautics and Space Administration, Room 7H46, 300 E Street, SW, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Ms. Mary-Ellen McGrath, Office of Aero-Space Technology, National Aeronautics and Space Administration, Washington, DC 20546 (202/358–4729).

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the seating capacity of the room. The agenda for the meeting is as follows:

—Aero-Space Technology Overview
—Facilities Working Group
—Role of the ASTAC in the Government Performance and Results Act
—Subcommittee Reports
—FAA/NASA Executive Committee
—Intelligent Synthesis Environment Program

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants.

Dated: September 29, 1999.

Matthew M. Crouch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 99–25740 Filed 10–1–99; 8:45 am]

BILLING CODE 7510–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (99–124)]

Notice of Prospective Patent License

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Prospective Patent License.

SUMMARY: NASA hereby gives notice that Fisk Ventures, Inc., of Racine, WI has applied for a partially exclusive license to practice the inventions described and claimed in U.S. Patent No. 5,153,132, entitled ''Three-Dimensional Co-Culture Process;'' U.S. Patent No. 5,308,764, entitled ''Multi-Cellular Three-Dimensional Living Mammalian Tissue;'' U.S. Patent No. 5,330,908, entitled ''High Density Cell Culture System;'' U.S. Patent No. 4,839,046, entitled ''Bio-Reactor Chamber;'' U.S. Patent No. 5,002,890, entitled ''Spiral-Vane Bio-Reactor;'' U.S. Patent No. 5,155,034, entitled ''Three-Dimensional Cell to Tissue Assembly Process;'' U.S. Patent No. 5,627,021, entitled ''Multi-Cellular, Three-Dimensional Living Mammalian Tissue;'' U.S. Patent No. 5,496,722, entitled ''Cultured Normal Mammalian Tissue and Process;'' U.S. Patent No. 5,589,112, entitled ''Constructing a High-Density Cell Culture System;'' U.S. Patent No. 5,851,816, entitled ''Cultured High-Fidelity Three Dimensional Human Urogenital Tract Carcinomas and Process;'' U.S. Patent No. 5,846,807, entitled ''Media Compositions for Three-Dimensional Mammalian Tissue Growth Under Microgravity Culture Conditions;'' U.S. Patent No. 5,858,783, entitled ''Production of Normal Mammalian Organ Culture Using a Medium Containing Mem-Alpha, Leibovitz L–15, Glucose Galactose Fructose;'' and in the pending U.S. Patent Application identified as NASA Case No. MSC–22122–1, entitled ''Horizontal Rotating-Wall Vessel Propagation in Vitro Human Tissue Models.'' Each of the above U.S. Patents and the Patent Application are assigned to the United States of America as represented by the Administrator of the National Aeronautics and Space Administration. Partially exclusive license rights were also applied for in NASA's undivided interest in the U.S. Patent Application identified as NASA Case No. MSC–22859–1, entitled ''Production of Functional Proteins: Balance of Shear Stress and Gravity;'' and pending PCT application, NASA Case No. MSC–22859–1(PCT), entitled ''Production of Functional Proteins: Balance of Shear Stress and Gravity.'' Written objections to the prospective grant of a license should be sent to the Johnson Space Center.

DATES: Responses to this notice must be received by December 3, 1999.

FOR FURTHER INFORMATION CONTACT: James Cate, Patent Attorney, Johnson Space Center, Mail Stop HA, Houston, TX 77058–8452; telephone (281) 483–1001.

Dated: September 27, 1999.

Edward A. Frankle,

General Counsel.

[FR Doc. 99–25644 Filed 10–1–99; 8:45 am]

BILLING CODE 7510–01–P

NATIONAL FOUNDATION ON THE ARTS AND HUMANITIES

Submission for OMB Review; Comment Request

AGENCY: National Endowment for the Humanities.

ACTION: Notice.

SUMMARY: The National Endowment for the Humanities (NEH) has submitted the following public information collection

request (ICR) to the Office of Management and Budget (OMB) for review and approval as required by the provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13,44 U.S.C. Chapter 35). Copies of this ICR, with applicable supporting documentation, may be obtained by calling the National Endowment for the Humanities, Assistant Director, Grants Office, Susan G. Daisey (202–606–8494) or may be requested by email to sdaisey@neh.gov. Comments should be sent to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the National Endowment for the Humanities, Office of Management and Budget, Room 10235, Washington, DC 20503 (202–395–7316), within 30 days from the date of this publication in the **Federal Register.** If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed above as soon as possible.

SUPPLEMENTARY INFORMATION: The Office of Management and Budget (OMB) is particularly interested in comments which: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond.

Agency: National Endowment for the Humanities.

Title of Proposal: My History is America's History Website.

OMB Number: 3136–0136.

Frequency of Collection: Continual.

Affected Public: General Public.

Number of Respondents: Approximately 100,000 per year.

Estimated Time per Respondent: Approximately one hour per response.

Estimated Total Burden Hours: 350,000.

Total Annualized capital/startup costs: 0.

Total annual costs (operating/maintaining systems or purchasing services): 0.

Description: This submission requests approval from OMB within sixty days for a three-year extension of this currently approved collection of information.

FOR FURTHER INFORMATION CONTACT: Ms. Susan G. Daisey, Assistant Director, Grants Office, National Endowment for the Humanities, 1100 Pennsylvania Avenue, NW, Room 311, Washington, DC 20506, or by email to: sdaisey@neh.gov. Telephone: 202–606–8494.

George Farr,

Acting Deputy Chairman.

[FR Doc. 99–25681 Filed 10–1–99; 8:45 am]

BILLING CODE 7536–01–M

NUCLEAR REGULATORY COMMISSION

[EA 98–081]

Morrison Knudsen SGT, LLC; Confirmatory Order (Effective Immediately)

I

Morrison Knudsen (MK) is a construction engineering firm with operation at multiple reactor and nuclear materials facilities regulated by the U.S. Nuclear Regulatory Commission (NRC or Commission). MK headquarters is located in Cleveland, Ohio. SGT, LLC (SGT) is an affiliate of MK involved in the steam generator replacement projects for MK.

II

On March 13, 1997, the NRC Office of Investigations (OI) initiated an investigation to determine if a former Corporate Group Welding Engineer (GWE) for MK had been discriminated against for raising safety concerns. In its report issued on February 6, 1998 (OI Case No. 3–97–013), OI concluded that there was sufficient evidence to substantiate that discrimination occurred. Specifically, OI concluded that the GWE's identification of deficiencies in welding procedures by MK and SGT employees at the Point Beach Nuclear Plant was at least a contributing factor in MK's decision to remove him from his position as MK Corporate GWE on January 15, 1997. In addition, in a decision issued on October 28, 1997, a Department of Labor (DOL) Administrative Law Judge (ALJ), in DOL Case No. 97–ERA–34, determined that the removal of the GWE was in retaliation for his engaging in protected activity. Subsequently, on May 21, 1998, the ALJ approved a settlement agreement between the GWE and MK.

On January 27, 1999, a predecisional enforcement conference was held between MK and the NRC staff to discuss the apparent violation of the NRC's employee protection requirements (10 CFR 50.7). MK retained the services of a law firm to perform an independent investigation. MK submitted the report of this investigation and additional materials to the NRC for review in support of its position that the removal of the GWE was based upon legitimate performance considerations and not upon the GWE having engaged in protected activity. While MK and SGT [1] do not agree that a violation of the Energy Reorganization Act, as amended, or the Commission's regulations occurred, in response to the DOL and OI findings, MK and SGT have agreed to take the actions as described in Section V of this Order.

III

MK, and its affiliate SGT, have agreed to take certain actions to assess the work environment at their corporate headquarters and temporary nuclear reactor and materials job sites. Specifically, MK and SGT have committed to conduct a comprehensive cultural assessment to be performed by an independent consultant and to utilize the results of such an assessment to improve their employee concerns program and to implement a mandatory continuing training program for all supervisors and managers. The training program will have the objectives of reinforcing the importance of maintaining a safety conscious work environment and of assisting managers and supervisors in responding to employees who raise safety concerns in the workplace. MK and SGT agreed to include in such training the requirements of 10 CFR 50.7, including, but not limited to, the definition of protected activity and discrimination, and appropriate responses to the raising of safety concerns by employees. MK and SGT also agreed that such training will be conducted by an independent trainer with expertise in employee concerns programs and employee protection requirements in the nuclear industry.

In addition, MK and SGT also have committed to taking the following corrective action to ensure that employees feel free to raise safety concerns without fear of retaliation: (1) posting this Confirmatory Order and the employee protection requirements of Section 211 of the Energy Reorganization Act, as amended, and NRC Form 3, at all MK and SGT temporary nuclear reactor and materials job sites and at the MK corporate headquarters in Cleveland, Ohio; (2) implementing the recommendations of the independent third party assessment

[1] Both MK and SGT employees were involved in the alleged discrimination against the MK Corporate Group Welding Engineer.

to improve the MK and SGT employee concerns program; (3) conducting periodic updates of an employee cultural survey developed by an independent contractor to ensure that MK and SGT employees feel free to raise safety concerns without fear of retaliation; and (4) expanding the current MK and SGT exit surveys to include safety conscious work environment issues and to conduct exit surveys of their permanent and contract employees to ensure that such employees feel free to raise safety concerns while employed by MK or SGT.

IV

Since MK and SGT have committed to taking comprehensive corrective actions as set forth below, and since MK and SGT have committed to monitor the work environment and to promote an atmosphere conducive to the raising of safety concerns by employees without fear of retaliation by implementing this Confirmatory Order, the NRC staff has determined that its concerns regarding employee protection at MK corporate headquarters and at MK and SGT temporary nuclear reactor and materials job sites can be resolved through NRC's confirmation of MK and SGT commitments as outlined in this Order. Accordingly, the staff is exercising its enforcement discretion pursuant to Section VII.B.6 of the NRC Enforcement Policy and will not issue a Notice of Violation or a civil penalty in this case.

By letter dated July 9, 1999, MK and SGT consented to issuance of this Order with the commitments described in Section V below. By letter dated August 9, 1999, MK and SGT waived any right to a hearing on this Order. MK and SGT further consented to the immediate effectiveness of this Order.

I find that MK and SGT's commitments, as set forth in Section V below, are acceptable and necessary and conclude that with these commitments, the public health and safety are reasonably assured. In view of the foregoing, I have determined that public health and safety require that these commitments be confirmed by this Order. Based on the above, and MK and SGT's consent, this Order is immediately effective upon issuance.

V

Accordingly, pursuant to sections 103, 161b, 161i, 161o, 182 and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202 and 10 C.F.R Part 50, *It is hereby ordered,* effective immediately, that:

1. MK and SGT shall hire an independent consultant to conduct audits, to review the MK and SGT Employees Concerns Program (ECP), and to conduct training for MK and SGT supervisors and managers as discussed below in Condition #2 of this Order. MK and SGT will hire this independent consultant, with experience in ECPs, to also conduct an independent evaluation of MK's and SGT's ECP to be completed by March, 2000. MK and SGT shall inform the NRC by November 1, 1999, as to the identity of its independent consultant. MK and SGT shall either implement the recommendations outlined by the consultant to ensure a safety conscious work environment exists at MK and SGT corporate and temporary nuclear reactor and materials job sites or explain to the NRC why it cannot implement such recommendations outlined by the consultant. MK and SGT shall provide the report of recommendations of their independent consultant by March, 2000 to the NRC Branch Chief, Quality Assurance, Vendor Inspection, Maintenance and Allegations Branch, Office of Nuclear Reactor Regulation at U.S. NRC, Mailstop O–9A1, Washington DC 20555.

2. MK and SGT will conduct mandatory continuing training programs on an annual basis beginning in the calendar year 2000 for all MK and SGT supervisors and managers at their corporate and temporary nuclear reactor and materials job sites. All temporary craft and permanent MK and SGT employees shall receive initial employee protection training as part of their access program or orientation when they begin work at an MK or SGT job site. The independent consultant, as outlined in Condition #1 of this Order, will approve this training. The training program for supervisors and managers should be conducted by an independent trainer as approved by the independent consultant, if the consultant does not conduct such training, and include:

(A) Annual training on the requirements of 10 CFR 50.7, or similar regulations, through at least calendar year 2002, including, but not limited to, what constitutes protected activity and what constitutes discrimination, and appropriate responses to the raising of safety concerns by employees. Such training shall stress the freedom of employees in the nuclear industry to raise safety concerns without fear of retaliation by their supervisors or managers.

(B) Scheduled training on building positive relationships and conflict resolution. The training program will have the objective of reinforcing the importance of maintaining a safety conscious work environment and assisting managers and supervisors in dealing with conflicts in the work place in the context of a safety conscious work environment at MK and SGT and at their temporary nuclear reactor and materials job sites.

3. MK and SGT will integrate, into their overall program for enhancing the work environment and safety culture at their corporate headquarters and their temporary nuclear reactor and materials job sites, a cultural assessment survey (*i.e.* questionnaire) developed by the independent consultant. The time frame for integration of cultural assessments into the ECP shall be submitted, to the NRC Branch Chief mentioned in Condition #1 of this Order, by the MK and SGT independent consultant. MK and SGT agree to conduct at least three additional annual assessments. These audits should be geared toward ensuring that employees are aware of the provisions of 10 CFR 50.7, or similar regulations, are willing to come forward and report safety concerns when appropriate, and know how to implement the ECP (*e.g.* that the existence of the safety concerns hotline is well known to all employees). MK and SGT also agree to conduct audits at their temporary nuclear reactor and materials job sites soon after the initial staffing of the sites and periodically afterwards as warranted. Lastly, MK and SGT also agree to expand their exit survey to include safety conscious work environment issues and to conduct exit surveys of their permanent corporate employees and contract employees so as to ensure that all employees feel free to raise safety concerns without fear of retaliation. The questionnaires, audits, surveys, and the resulting analysis reports of these ECP documents will be submitted to the NRC for review for a period of three years from the date of this Order by sending the materials to the NRC contact stated in Condition ι1 of this Order. MK and SGT will provide information to the NRC pertaining to any follow-up actions to address issues raised by the survey and audit results.

4. Following the issuance of this Confirmatory Order, MK and SGT will issue and post this Confirmatory Order, Section 211 of the Energy Reorganization Act, as amended, and NRC Form 3, to inform all of its employees of this Confirmatory Order, as well as their right to raise safety concerns to management and to the NRC without fear of retaliation. These publications shall also be posted at all temporary nuclear reactor and materials job sites and at the companies' corporate headquarters.

The Director, Office of Enforcement may relax or rescind, in writing, any of the above conditions upon a showing by MK and SGT of good cause.

VI

Any person adversely affected by this Confirmatory Order, other than MK or SGT, may request a hearing within 20 days of its issuance. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be made in writing to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and include a statement of good cause for the extension. Any request for a hearing shall be submitted to the Secretary, U.S. Nuclear Regulatory Commission, ATTN: Chief, Rulemaking and Adjudications Staff, Washington, D.C. 20555. Copies of the hearing request shall also be sent to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington D.C. 20555, to the Assistant General Counsel for Materials Litigation and Enforcement at the same address, to the Regional Administrator, NRC Region III, 801 Warrenville Road, Lisle, IL 60532–4351, and to MK and SGT. If such a person requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.714(d).

If the hearing is requested by a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Confirmatory Order shall be sustained.

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section V above shall be final 20 days from the date of this Order without further order or proceeding. If an extension of time requesting a hearing has been approved, the provisions specified in Section V shall be final when the extension expires if a hearing request has not been received. An answer or a request for a hearing shall not stay the immediate effectiveness of this order.

Dated at Rockville, Maryland this 24th day of September, 1999.

For the U.S. Nuclear Regulatory Commission.

Frank Miraglia,

Deputy Executive Director for Reactor Programs.

[FR Doc. 99–25719 Filed 10–1–99; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–336 and 50–423]

Northeast Nuclear Energy Company, et al.; Millstone Nuclear Power Station, Unit Nos. 2 and 3; Issuance of Final Director's Decision Under 10 CFR 2.206

Notice is hereby given that the Director of the Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission (NRC), has issued a Final Director's Decision with regard to two related Petitions, both dated April 14, 1999, submitted by Mr. Scott Cullen, on behalf of Standing for Truth About Radiation, the Nuclear Information Resource Service, New York State Senator Ken LaValle, and New York State Assembly members Fred Thiele and Patricia Acampora (the Petitioners), requesting action under Title 10 of the Code of Federal Regulations, Section 2.206 (10 CFR 2.206). The Petitions pertain to the Millstone Nuclear Power Station, Unit Nos. 2 and 3, operated by Northeast Nuclear Energy Company (NNECO, or the licensee).

In the first Petition, the Petitioners requested that (1) the NRC immediately suspend NNECO's licenses to operate the Millstone Nuclear Power Station until there are reasonable assurances that adequate protective measures for Fishers Island, New York, can and will be taken in the event of a radiological emergency at Millstone, (2) the operating licenses should be suspended until such time as ''a range of protective actions have been developed for the plume exposure pathway EPZ [emergency planning zone] for emergency workers and the public'', and (3) these matters be the subject of a public hearing, with full opportunity for public comment. The basis for the Petitioners' requests is that the Millstone Nuclear Power Station is not in full compliance with the law. Specifically, the Petitioners contend that the site is in violation of 10 CFR 50.54(q) and 10 CFR 50.47 with regard to emergency planning requirements because Fishers Island, New York, which is located within the 10-mile EPZ for Millstone, has no functional emergency plan.

In the second Petition, the Petitioners requested that the NRC institute a proceeding, pursuant to 10 CFR 2.202, to suspend the operating licenses for the Millstone Nuclear Power Station until the facility is in full compliance with the law. Specifically, the Petitioners maintain that all of the regulatory listed factors, that is, ''demography, topography, land characteristics, access routes, and jurisdictional boundaries,'' were ignored in establishing the 10-mile plume exposure pathway EPZ (10-mile EPZ) for emergency planning at the Millstone Nuclear Power Station and, as such, constitute a violation of 10 CFR 50.54(q) and 10 CFR 50.47.

By letter dated May 14, 1999, the NRC informed the Petitioners that their request for the immediate suspension of the operating licenses for the Millstone Nuclear Power Station, Unit Nos. 2 and 3 (first Petition, Request 1), was denied. In that letter, the NRC also informed the Petitioners that their request for an informal public hearing (first Petition, Request 3) was denied. The NRC also told the Petitioners in the May 14, 1999, letter that their request, in the second Petition, to initiate a proceeding pursuant to 10 CFR 2.202 to suspend the operating licenses for Millstone did not satisfy the criteria for consideration as a 10 CFR 2.206 Petition. The reasons for these decisions were explained in the May 14, 1999, letter and in the ''Final Director's Decision Pursuant to 10 CFR 2.206'' (DD–99–12).

As noted in the May 14, 1999, letter, the NRC stated that the areas identified in the Petitions related to the adequacy of evacuation and protective measures planning for Fishers Island, New York, would be evaluated within a reasonable time. The staff has completed its review of this area with the assistance of the Federal Emergency Management Agency. For the reasons given in the Final Director's Decision, DD–99–12, dated September 28, 1999, Request 2 of the first Petition is denied.

Additional information is contained in the ''Final Director's Decision Pursuant to 10 CFR 2.206'' (DD–99–12), the complete text of which follows this notice and which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document rooms located at the Learning Resources Center, Three Rivers Community-Technical College, 574 New London Turnpike, Norwich, Connecticut, and at the Waterford Library, 49 Rope Ferry Road, Waterford, Connecticut.

As provided in 10 CFR 2.206(c), a copy of this Final Director's Decision will be filed with the Secretary of the

Commission for the Commission's review. This Final Director's Decision will constitute the final action of the Commission 25 days after its issuance, unless the Commission, on its own motion, institutes review of the Decision within that time.

Dated at Rockville, Maryland, this 28th day of September 1999.

For the Nuclear Regulatory Commission.

Samuel J. Collins,

Director, Office of Nuclear Reactor Regulation.

Final Director's Decision Pursuant to 10 CFR 2.206

I. Introduction

By letter dated April 14, 1999, Mr. Scott Cullen, on behalf of Standing for Truth About Radiation (STAR), the Nuclear Information Resource Service (NIRS), New York State Senator Ken LaValle, and New York State Assembly members Fred Thiele and Patricia Acampora (the Petitioners) submitted two separate but related Petitions pursuant to Title 10 of the Code of Federal Regulations, § 2.206 (10 CFR 2.206). In the first Petition, the Petitioners requested that (1) the U.S. Nuclear Regulatory Commission (NRC) immediately suspend Northeast Nuclear Energy Company's (NNECO's) licenses to operate the Millstone Nuclear Power Station until there are reasonable assurances that adequate protective measures for Fishers Island, New York, can and will be taken in the event of a radiological emergency at Millstone; (2) the operating licenses should be suspended until such time as ''a range of protective actions have been developed for the plume exposure pathway EPZ [emergency planning zone] for emergency workers and the public''; and (3) these matters be the subject of a public hearing, with full opportunity for public comment. The basis for the Petitioners' requests is that the Millstone Nuclear Power Station is not in full compliance with the law. Specifically, the Petitioners contend that the site is in violation of 10 CFR 50.54(q) and 10 CFR 50.47 with regard to emergency planning requirements because Fishers Island, New York, which is located within the 10-mile EPZ for Millstone, has no functional emergency plan.

In the second Petition, the Petitioners requested that the NRC institute a proceeding, pursuant to 10 CFR 2.202, to suspend the operating licenses for the Millstone Nuclear Power Station until the facility is in full compliance with the law. Specifically, the Petitioners maintain that there are no mechanisms by which the conditional factors of demography, topography, land characteristics, access routes, and jurisdictional boundaries can be evaluated, resulting in a complete lack of reasonable assurances that adequate protective measures can and will be taken on Long Island in the event of an accident at Millstone. The Petitioners' contend that this constitutes a violation of 10 CFR 50.54(q) and 10 CFR 50.47.

The NRC informed the Petitioners in a letter to Mr. Cullen dated May 14, 1999, that their request for immediate suspension of the operating licenses for the Millstone Nuclear Power Station, Unit Nos. 2 and 3 (first Petition, Request 1), was denied. The denial was based on the NRC's finding about the current state of emergency preparedness at Millstone. The Federal agency with lead responsibility for assessing the emergency preparedness of State and local governments within the EPZs surrounding nuclear power plants is the Federal Emergency Management Agency (FEMA). FEMA's responsibilities are defined in NRC's and FEMA's regulations (10 CFR Part 50 and 44 CFR Part 350, respectively) and in a memorandum of understanding between the two agencies (58 FR 47996, September 14, 1993). The NRC evaluates onsite emergency planning and reviews FEMA's evaluation of offsite emergency preparedness for the purpose of making findings on the overall state of emergency preparedness. As stated in 10 CFR 50.54(s)(3):

> The NRC will base its finding on a review of the FEMA findings and determinations as to whether State and local emergency plans are adequate and capable of being implemented, and on the NRC assessment as to whether the licensee's emergency plans are adequate and capable of being implemented.

FEMA has reviewed the State of Connecticut's emergency plan. FEMA has also reviewed the plans for the nine local communities within the Millstone plume exposure pathway EPZ, including Fishers Island, New York. Further, FEMA has evaluated several exercises of these plans. FEMA originally provided its findings and determinations to the NRC in October 1984 on the adequacy of offsite planning for Millstone, in accordance with 44 CFR Part 350 of its regulations. Following the latest exercise, FEMA confirmed that the offsite radiological emergency response plans and procedures for the State of Connecticut and the affected local jurisdictions, including Fishers Island, New York, specific to the Millstone Nuclear Power Station, can be implemented and are adequate to provide reasonable assurance that appropriate measures can be taken to protect the health and safety of the public in the event of a radiological emergency at Millstone. This was documented in a December 29, 1997, letter from FEMA to the NRC. The letter forwarded FEMA's report for the August 21, 1997, full-participation plume pathway and the October 8–10, 1997, ingestion pathway exercises of the offsite radiological emergency plans for Millstone. Regarding Fishers Island, no deficiencies or areas requiring corrective action were identified in the exercises.

Further, the NRC has found that the licensee's emergency plans are an adequate basis for an acceptable state of onsite emergency preparedness in accordance with the requirements of 10 CFR 50.47(b) and Appendix E to 10 CFR Part 50 as documented in the NRC's letter to the licensee dated June 4, 1998.

In the first Petition, the Petitioners raised a concern about the evacuation of Fishers Island residents to New London, Connecticut, a direction closer to the site and to an area that may have already been affected by a radiological emergency at Millstone. Fishers Island is located about 7½ miles east/southeast of Millstone. The New London port is located about 5 miles northeast of Millstone. As stated in the NRC's May 14, 1999, letter to the Petitioners, the NRC found no prima facie evidence in the information submitted by the Petitioners that the protective action of evacuation to New London will not provide an adequate level of protection to the public. Further, the Petitioners did not submit any other information that would raise an immediate concern with the NRC's finding regarding the adequacy of emergency planning for Millstone. On the basis of a review of FEMA's findings and determinations on the adequacy of offsite emergency preparedness and on the NRC's assessment of the adequacy of onsite emergency preparedness, the NRC determined that (1) there was reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency and (2) there was insufficient evidence to grant the Petitioners' request to immediately suspend the operating licenses for Millstone Nuclear Power Station, Unit Nos. 2 and 3.

The Petitioners were also told in the May 14, 1999, acknowledgment letter that their request for an informal public hearing (first Petition, Request 3) was denied. The denial was based on the NRC's finding about the current state of emergency preparedness at Millstone. Specifically, the denial was based on the NRC staff's determination that the information provided in the Petitions did not identify deficiencies in offsite

emergency preparedness that would preclude the implementation of adequate protective measures for the public in the event of a radiological emergency at Millstone. Further, the NRC staff determined that the issues did not rise to the level of significance that justified conducting an informal hearing on the Petitions.

The Petitioners were told, however, that their Petition did raise the potential that enhancements could be made to emergency planning for Millstone that could improve the protection of public health and safety. Further, the May 14, 1999, acknowledgment letter indicated that the areas identified in the Petitions related to the adequacy of evacuation and protective measures planning for Fishers Island would be evaluated within a reasonable time. Since FEMA has the primary responsibility for evaluating the emergency preparedness of State and local governments, the NRC requested the assistance of FEMA, in a letter dated June 4, 1999, in evaluating the potential enhancements identified in the Petitions.

The NRC also told the Petitioners in the May 14, 1999, letter that the request in their second Petition to initiate a proceeding, pursuant to 10 CFR 2.202, to suspend the operating licenses for Millstone did not satisfy the criteria for consideration as a 10 CFR 2.206 Petition. Specifically, the NRC concluded that the referenced factors regarding the determination of the 10-mile plume exposure pathway EPZ were properly taken into account. The NRC determined that the second Petition request did not contain sufficient information to warrant further action by the NRC to require that the 10-mile EPZ be expanded to include the eastern end of Long Island, New York.

II. Discussion

The Commission's regulations in 10 CFR 50.54(q) and (s) governing emergency planning for operating nuclear power plants require the submittal and implementation of licensee (onsite) and State and local government (offsite) emergency plans that conform to the emergency planning standards in 10 CFR 50.47(b) and the requirements in Appendix E to 10 CFR Part 50. FEMA is the Federal agency with the lead responsibility for evaluating offsite radiological emergency response plans and preparedness.

Fishers Island, New York, is located within the 10-mile plume exposure pathway EPZ for the Millstone Nuclear Power Station and is included in the State of Connecticut's Radiological Emergency Response Plan for Millstone. This plan has been approved by FEMA in accordance with 44 CFR Part 350 of its regulations. The Connecticut emergency plan (Revision 1, dated July 1997) contains the following information regarding Fishers Island:

> Fishers Island, located about 7½ miles east/southeast of Millstone, is primarily residential with a small year-round population of about 300 persons and a summer population estimated to be approximately 3000 persons. On the Independence Day (July 4) weekend, this transient population may peak at approximately 5000 persons. Fishers Island is a Hamlet, [a] political subdivision of the Town of Southold, New York, which is in Suffolk County on Long Island.
>
> Because of the logistics associated with the island's location, there has been a long-standing operational agreement between officials of Fishers Island, the Town of Southold, Suffolk County, the State of New York, and the State of Connecticut. Under this agreement, the lead responsibility for assessing the initial radiological impact of an incident on Fishers Island, and providing assistance with the implementation of any protective actions, belongs to the State of Connecticut. Officials of Fishers Island and the Town of Southold, however, have the authority to implement public protective actions.
>
> The State of New York coordinates the assessment process and resulting protective action recommendations made by the State of Connecticut for Fishers Island, maintains communications with Suffolk County, and provides support to Suffolk County and Fishers Island, as necessary. The Town of Southold, as well as Suffolk County, provides back-up communication capabilities and support, and would lend additional emergency services to the island, if requested.
>
> The State of Connecticut offers resource support to Fishers Island in the area of protective actions. Emergency Alerting System (EAS) announcements for Fishers Island will be made over the Connecticut Emergency Alerting System. The island relies on the nearby Town of Groton, Connecticut, for back-up activation of the public alerting system. Fishers Island residents are designated to go to the host community of Windham[, Connecticut].

On September 2, 1999, FEMA responded to the NRC's request for assistance, including a report prepared by the Regional Assistance Committee (RAC) Chair of FEMA Region I, the FEMA region in which Millstone is located. The RAC Chair is the leading staff technical person with radiological emergency preparedness responsibilities in each FEMA region. FEMA stated that they performed a thorough review and assessment of the emergency evacuation planning for Fishers Island, New York. FEMA noted that Fishers Island is included in the State of Connecticut's approved radiological emergency response plan and that the Fishers Island plan has been tested several times since it was approved, most recently during the August 1997 exercise of the State of Connecticut's plans for Millstone.

FEMA's report stated that in the unlikely event of a nuclear incident at Millstone, the residents of Fishers Island would be directed to shelter in place or to evacuate. If directed to evacuate, the Fishers Island evacuees would be moved by ferry to New London, then transported by bus to the host community in Windham, Connecticut. New London was chosen as the ferry's destination because the Fishers Island Ferry District, which would provide service in the event of an evacuation, is based on Fishers Island and normal everyday traffic travels between New London and Fishers Island. Should an incident at Millstone require the evacuation of Fishers Island, residents would evacuate the island using the regular ferry service, and would be transported to the host community in Windham, Connecticut, by way of the Port of New London. Should New London not be available to the Fisher Island evacuees (*i.e.*, if radiological conditions have resulted in its evacuation), then the Connecticut Emergency Management Director and the State of New York Emergency Management Office would jointly choose to direct the ferry to another port, such as Stonington, Connecticut, located northeast of Fishers Island and east of New London. FEMA's report noted that the protective actions of sheltering and evacuation are the same two protective actions that appear in all other Connecticut emergency response plans.

With regard to the Petitioners' specific concern about the August 8, 1997, Millstone exercise, FEMA's report stated that the postulated condition of the Millstone plant during the exercise was such that the Governor of Connecticut ordered residents in all EPZ communities to evacuate. With the postulated conditions, the protective action for Fishers Island was to evacuate through New London. The Petitioners were concerned that this was a direction that brought the evacuees closer to the plant. FEMA indicated that the Fishers Island evacuees would not have been at risk during the conduct of this protective action because the plume, had it been real, was traveling in a westerly direction, away from New London, according to the exercise scenario. As such, during this scenario, the evacuees could pass through New London without the threat of exposure to radiation. As discussed previously, should New London not be available

(for example, the plume has passed over New London and adverse radiological conditions exist), the ferry would be directed to another port.

FEMA's report indicates that certain enhancements to the Fishers Island plan are being considered and its September 2, 1999, report summarized some of the ongoing emergency planning activities. In July 1998, Northeast Utilities (the licensee), the Connecticut Office of Emergency Management, and FEMA Regions I and II, participated in a demonstration of a ferry run from Fishers Island to Stonington, Connecticut. The objective of this demonstration was to determine the feasibility of having the ferry pick up people from Fishers Island and take them to Stonington, which is located about 7 miles northeast of Fishers Island. The plan and preparations for adding the Port of Stonington, Connecticut, as a receiving port for Fishers Island evacuees is projected to be completed by the end of 1999. Windham, Connecticut, will continue to be used as the host community for Fishers Island residents. FEMA will review changes to the offsite emergency plans to ensure that the plans are adequate and capable of being implemented.

FEMA's report stated that an agreement exists between the Connecticut Office of Emergency Management and the Fishers Island Ferry District for the exclusive use of their ferries in the event of an incident at Millstone. Further, FEMA indicated that negotiations are in progress for an agreement between the Connecticut Office of Emergency Management and the Cross Sound Ferry Company for the use of five of their ferries in the event of an emergency at Millstone.

FEMA's report also noted that in September 1998, a meeting between Connecticut and New York State emergency management agencies was held in Hartford, Connecticut, to discuss offsite emergency preparedness for Millstone and the degree of coordination and communications. At the meeting were representatives of the Connecticut Office of Emergency Management, the New York State Emergency Management Office, Northeast Utilities, FEMA, and the NRC. Further, in October 1998, the Connecticut Office of Emergency Management and the New York State Emergency Management Office met to discuss other ways of improving communications in making appropriate protective action decisions for Fishers Island.

On June 22, 1999, the Connecticut Office of Emergency Management held its quarterly emergency management director's meeting on Fishers Island to discuss emergency response issues concerning Millstone. The emergency management directors from the Millstone EPZ communities attended this meeting, including those from Fishers Island, the Town of Southold, New London, Stonington, and the host community of Windham, Connecticut. This meeting gave these key emergency management directors an opportunity to communicate directly.

In its September 2, 1999, letter to the NRC, FEMA stated that on the basis of its assessment of emergency planning for the Millstone Nuclear Power Station, there is continued reasonable assurance that adequate protective measures can be taken to protect the public health and safety in the event of a radiological emergency at Millstone.

III. Conclusion

After reviewing FEMA's findings and determinations on the adequacy of offsite emergency preparedness and the NRC's assessment of onsite emergency preparedness, the NRC has determined that there is continued reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency at Millstone. In addition, based on FEMA's findings on the adequacy of emergency preparedness for Fishers Island, the NRC concludes that the Fishers Island emergency plan is adequate and there is reasonable assurance that it can be implemented. Further, the NRC recognizes that potential enhancements are being implemented to improve the protection of the health and safety of the population on Fishers Island. As a result of these findings by FEMA and the NRC, the NRC has determined that the Petitioner's request to suspend the operating licenses for Millstone Unit Nos. 2 and 3 until a range of protective actions are developed for the 10-mile EPZ (first Petition, Request 2) is denied.

A Copy of this Final Director's Decision will be placed in the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document rooms located at the Learning Resources Center, Three Rivers Community-Technical College, 574 New London Turnpike, Norwich, Connecticut, and at the Waterford Library, 49 Rope Ferry Road, Waterford, Connecticut.

As provided in 10 CFR 2.206(c), a copy of this Final Director's Decision will be filed with the Secretary of the Commission for the Commission's review. This Final Director's Decision will constitute the final action of the Commission 25 days after its issuance, unless the Commission, on its own motion, institutes review of the Decision within that time.

Dated at Rockville, Maryland, this 28th day of September 1999.

For the Nuclear Regulatory Commission.

Samuel J. Collins,

Director, Office of Nuclear Reactor Regulation.

[FR Doc. 99–25716 Filed 10–1–99; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 030–14016; License No. 21–18668–01; EAs 99–097 & 99–169]

Testing Engineers & Consultants, Inc.; Troy, Michigan; Order Imposing Civil Monetary Penalty

I

Testing Engineers & Consultants, Inc. (Licensee) is the holder of Byproduct Materials License No. 21–18668–01 which was last renewed in its entirety by the Nuclear Regulatory Commission (NRC or Commission) on September 17, 1996. The license authorizes the Licensee to use certain byproduct material in accordance with the conditions specified therein.

II

Between July 28, 1998 and March 23, 1999, an inspection and an investigation of the Licensee's activities were conducted. The results of the inspection and the investigation indicated that the Licensee had not conducted its activities in full compliance with NRC requirements. A written Notice of Violation and Proposed Imposition of Civil Penalties (Notice) was served upon the Licensee by letter dated July 8, 1999. The Notice states the nature of the violations, the provisions of the NRC's requirements that the Licensee had violated, and the amount of the civil penalties proposed for the violations.

The Licensee responded to the Notice in letters dated August 4 and 13, 1999. In its responses, the Licensee agreed with the information presented in the Notice, admitted the violations, but requested mitigation or remission of the civil penalties.

III

After consideration of the Licensee's response and the statements of fact, explanation, and argument for mitigation contained therein, the NRC staff has determined, as set forth in the Appendix to this Order, that the violations occurred as stated and that

the penalties proposed for the violations designated in the Notice should be imposed.

IV

In view of the foregoing and pursuant to Section 234 of the Atomic Energy Act of 1954, as amended (Act), 42 U.S.C. 2282, and 10 CFR 2.205, *it is hereby ordered* that:

The Licensee pay civil penalties in the amount of $5,500 within 30 days of the date of this Order, in accordance with NUREG/BR–0254. In addition, at the time of making the payment, the Licensee shall submit a statement indicating when and by what method payment was made, to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852–2738.

V

The Licensee may request a hearing within 30 days of the date of this Order. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be made in writing to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and include a statement of good cause for the extension. A request for a hearing should be clearly marked as a ''Request for an Enforcement Hearing'' and shall be submitted to the Secretary, U.S. Nuclear Regulatory Commission, ATTN: Rulemakings and Adjudications Staff, Washington, DC 20555. Copies also shall be sent to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, to the Assistant General Counsel for Hearings and Enforcement at the same address, and to the Regional Administrator, NRC Region III, 801 Warrenville Road, Lisle, Illinois 60532.

If a hearing is requested, the Commission will issue an Order designating the time and place of the hearing. If the Licensee fails to request a hearing within 30 days of the date of this Order (or if written approval of an extension of time in which to request a hearing has not been granted), the provisions of this Order shall be effective without further proceedings. If payment has not been made by that time, the matter may be referred to the Attorney General for collection.

In the event the Licensee requests a hearing as provided above, the issue to be considered at such hearing shall be:

Whether on the basis of the violations admitted by the Licensee, this Order should be sustained.

Dated this 24th day of September, 1999.

For the Nuclear Regulatory Commission.

R. W. Borchardt,

Director, Office of Enforcement.

Appendix: Evaluations and Conclusion

On July 8, 1999, a Notice of Violation and Proposed Imposition of Civil Penalty (Notice) was issued for violations identified during an NRC inspection and an investigation. Testing Engineers & Consultants, Inc. (Licensee or TEC) responded to the Notice by two letters dated August 4 and 13, 1999. The Licensee admitted the violations occurred, but requested mitigation or remission of the civil penalties. The NRC's evaluation and conclusion regarding the licensee's requests are as follows:

Summary of Licensee's Request for Remission or Mitigation

The Licensee states that no escalated enforcement has occurred since September 1995 and that its overall performance of licensed activities has been good. The Licensee contends that compliance with license requirements as well as prompt identification and comprehensive corrective action of violations has always been emphasized and encouraged. The Licensee states that it understands the severity of the violations and will make every effort to regain the trust and confidence of the NRC by ensuring that it acts with integrity and abides by requirements designed to protect public health and safety.

The Licensee maintains that every effort is made to educate its employees to implement all of the terms and conditions of its NRC license. According to the Licensee, the employee involved had been properly trained and instructed and there was little else that could have been done to prevent this incident from occurring. The Licensee suggested that the NRC should fine the individual as well as the company.

NRC Evaluation of Licensee's Request for Remission or Mitigation

The NRC concurs with the Licensee regarding its enforcement history and overall good performance. Enforcement history and licensee performance are used in determining which enforcement action will be taken. In accordance with Section VI.B.2. of the ''General Statement of Policy and Procedures for NRC Enforcement Actions'' (Enforcement Policy), NUREG 1600, Revision 1, enforcement history is considered in two of the four decisional points in the civil penalty assessment process. Specifically, when the NRC determines that a non-willful Severity Level III violation has occurred, and the licensee has not had any previous escalated actions during the past 2 years or 2 inspections, whichever is longer, the NRC considers whether the licensee's corrective action for the violation is reasonably prompt and comprehensive. If a willful Severity Level III violation has occurred—or if, during the past 2 years or 2 inspections, the licensee has been issued at least one other escalated action—the civil penalty assessment normally considers the factor of identification *in addition* to corrective action. As to the second decisional point, the NRC may exercise discretion by either escalating or mitigating a sanction based, in part, on the enforcement history. For example, the NRC may either propose a civil penalty where application of the factors would otherwise result in zero penalty or escalate the amount of the resulting civil penalty in cases involving particularly poor licensee performance, or involving willfulness. On the other hand, the NRC may exercise discretion and refrain from issuing a civil penalty in cases where the overall sustained performance of the licensee has been good.

In this case, the Licensee's enforcement history is irrelevant with regard to the first decisional point because the violations were willful. As to the second decisional point, the NRC considered the Licensee's enforcement history and determined that, on balance, neither escalation nor mitigation was warranted because, while the Licensee's enforcement history has been good, the violations involved willfulness. Willful violations are of particular concern because the Commission's regulatory program is based on licensees acting with integrity and communicating with candor.

With regard to the assessment factors, both noncompliances were characterized as willful Severity Level III violations and, consistent with Section VI.B.2. of the Enforcement Policy, the NRC considered both identification and corrective action. In this case, the NRC concluded that credit was not warranted for identification because NRC staff identified the violations, but credit was warranted for corrective action based on the promptness and comprehensiveness of the actions taken. Consideration of the identification and corrective action factors yielded a base civil penalty of $2,750 for each of the violations described in the Notice.

As to the Licensee's argument about its efforts to educate employees and to prevent the incident, according to Section VI.B of the Enforcement Policy, management involvement, direct or indirect, in a violation may lead to an increase in the civil penalty; however, the lack of management involvement in a violation may not be used to mitigate a civil penalty. The Licensee is responsible for violations caused by its employees, whether arising from inadvertent error or willful acts. The licensee hires, trains, and supervises its employees. All licensed activities are carried out by employees of the licensee and, therefore, all violations are caused by employees of the licensee. A licensee enjoys the benefits of good employee performance and suffers the consequences of poor employee performance. To not hold the licensee responsible for the actions of its employees, whether such actions result from incompetence, negligence, or willfulness, is equivalent to not holding the licensee responsible for its use and possession of licensed material. If the NRC were to adopt such a premise, there would be no incentive for licensees to assure compliance with NRC requirements.

With respect to the licensee's suggestion about fining the individual as well as the company, the NRC notes that while it is not the Commission's general policy to monetarily penalize individuals, the NRC takes enforcement sanctions against individuals. Notices of Violation and Orders

are examples of enforcement actions that may be appropriate against individuals. The Notice of Violation issued to the Licensee's employee was deemed the appropriate action in this case.

NRC Conclusion

The NRC has concluded that the Licensee did not provide an adequate basis for remission or mitigation of the civil penalties. Consequently, the proposed civil penalty in the amount of $5,500 should be imposed.

[FR Doc. 99–25718 Filed 10–1–99; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Standard Review Plan: Licensee Requests To Delay Initiation of Decommissioning Activities

NRC's ''Timeliness in Decommissioning of Materials Facility'' rule (hereafter the Timeliness Rule), became effective on August 15, 1994. The Timeliness Rule established the criteria necessary to avoid future problems resulting from delayed decommissioning of contaminated inactive facilities, separate buildings, and outdoor areas.

In May 1996, the Nuclear Energy Institute (NEI) filed a petition for rulemaking to amend the Timeliness Rule to allow licensees to delay decommissioning and operate in a ''standby'' mode. NRC denied NEI's petition for rulemaking because the Timeliness Rule contains provisions which allow licensee's to request delays or postponement of decommissioning, provided they can demonstrate that the delay is not detrimental to the public health and safety and is otherwise in the public interest. However, along with denying the petition, the Commission requested that NRC staff prepare guidance to identify the acceptance criteria necessary to demonstrate that postponement of decommissioning activities will not be detrimental to the public health and safety and is otherwise in the public interest.

In response to the Commission request, NRC staff has developed the draft Standard Review Plan (SRP) titled, ''Licensee Requests to Delay Initiation of Decommissioning Activities.'' NRC posted the draft SRP on the internet *(www.nrc.gov/NMSS/DWM/DECOM/decomm.htm)* on August 11, 1999, to provide interested parties an opportunity to review and comment on NRC's acceptance criteria necessary to demonstrate that postponement of decommissioning activities will not be detrimental to the public health and safety and is otherwise in the public interest. NRC staff received no comments on the draft SRP by the end of the initial comment period. Therefore, NRC staff is extending the comment period until October 15, 1999. NRC will consider all comments received in finalizing the SRP for implementation.

The draft SRP is available for inspection at the NRC's Public Document Room, 2120 L Street NW., Washington, DC 20555–0001.

Dated at Rockville, Maryland, this 22nd day of September 1999.

For the Nuclear Regulatory Commission.

Larry W. Camper,

Chief, Decommissioning Branch, Division of Waste Management, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 99–25717 Filed 10–1–99; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Federal Salary Council

AGENCY: Office of Personnel Management.

ACTION: Notice of meeting.

SUMMARY: According to the provisions of section 10 of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given that the fifty-sixth meeting of the Federal Salary Council will be held at the time and place shown below. At the meeting, the Council will continue discussing issues relating to locality-based comparability payments authorized by the Federal Employees Pay Comparability Act of 1990 (FEPCA). The meeting is open to the public.

DATES: October 15, 1999, at 1:00 p.m.

ADDRESSES: Office of Personnel Management, 1900 E Street NW., Room 7310, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Jerome D. Mikowicz, Chief, Salary and Wage Systems Division, Office Of Personnel Management, 1900 E Street NW., Room 7H31, Washington, DC 20415–0001. Telephone number: (202) 606–2838.

For the President's Pay Agent.

Janice R. Lachance,

Director.

[FR Doc. 99–25798 Filed 10–1–99; 8:45 am]

BILLING CODE 6325–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94–409, that the Securities and Exchange Commission will hold the following open meeting during the week of October 4, 1999.

An open meeting will be held on Wednesday, October 6, 1999, at 10:00 a.m.

The subject matter of the open meeting scheduled for Wednesday, October 6, 1999, at 10:00 a.m. will be:

The Commission will consider proposing new rules and amendments to current rules to improve disclosure relating to the functioning of corporate audit committees and to enhance the reliability and credibility of financial statements of public companies. For further information contact: Mark Borges, Attorney-Adviser, Division of Corporation Finance (202–942–2900), Meridith Mitchell, Senior Counselor, Office of the General Counsel (202–942–0900), or Robert E. Burns, Chief Counsel, or W. Scott Bayless, Associate Chief Accountant, Office of the Chief Accountant (202–942–4400).

At times, changes in Commission priorities require alternations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 942–7070.

Dated: September 29, 1999.

Jonathan G. Katz,

Secretary.

[FR Doc. 99–25799 Filed 9–30–99; 1:16 pm]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

Release No. 34–41912; File No. SR–CBOE–99–24

Self-Regulatory Organizations; Chicago Board Options Exchange, Inc.: Order Approving Proposed Rule Change Relating to Option Trading Permit Auction Procedures

September 24, 1999.

I. Introduction

On June 9, 1999, the Chicago Board Options Exchange, Inc. (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act

of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to alter the Exchange's option trading permit auction procedures.

The proposed rule change, including Amendment No. 1,[3] was published in the **Federal Register** on August 24, 1999.[4] The Commission did not receive any comments on the proposed rule change. This order approves the proposed rule change, as amended.

II. Description of the Proposal

CBOE Rule 3.27(a)(3) provides for the creation of a Permit lease pool to be administered by the Exchange.[5] Under these procedures, the Exchange conducts an auction every six months during which members and non-members who have qualified for membership may submit bids equal to the monthly rent that the bidder is willing to pay for a month-to-month Permit lease. Upon the close of the bidding period, Permits in the lease pool are awarded to the highest bidders in a number equal to the total number of Permits in the lease pool at that time. Under the existing procedures, the monthly rent to be paid by a lessee is the dollar value of the bid submitted by that lessee. Following each auction, the Exchange continues to accept bids for Permit leases. Should any Permit lessee desire to give up that lessee's Permit prior to the next auction, the Permit is transferred to the highest bidder at a monthly lease price equal to the new lessee's bid for the remainder of the six month auction cycle.

The proposal would amend the method of the auction to establish a procedure known as a Dutch auction. Under the Dutch auction, bidders will submit bids equal to the monthly rent which they are willing to pay for a six-month lease, and, upon the close of the bidding period, Permits in the lease pool will continue to be awarded to the highest bidders in a number equal to the total number of Permits in the lease pool at that time. Under the Dutch auction procedure, however, each successful bidder will pay only the price of the lowest successful bid. Following each Dutch auction, the Exchange will continue to accept bids, with a minimum bid established at the price set in the most recent Dutch auction.

The proposal also contains several other amendments, most of which set forth existing Exchange practices in greater detail, including:

- The proposed rule change establishes a minimum qualifying bid level for all bidding which occurs between Dutch auctions. The minimum qualifying bid is set at the lease rate established in the most recent Dutch auction. This change is designed to equalize Permit lease rates and enhance administrative efficiency by encouraging lessees to use the Dutch auction process, rather than attempt to obtain a lower priced lease by bidding between the Dutch auctions.
- The proposed rule change permits a lessee to terminate the lessee's Permit during the lease period, by written notice to the Membership Department, but provides that the termination notice shall be irrevocable. The Membership Department will post notice of the availability of the Permit for at least two business days on the Exchange bulletin board. The Permit will be transferred to the highest bidder whose bid is received by 3:30 p.m. on the first Wednesday after notice of the Permit's availability has been posted for at lest two business days.
- The proposed rule change also allows Permits to be transferred among nominees of an organization with appropriate notice to the Exchange, as is the case with CBOE membership.
- The proposed rule change provides that an individual can lease only one Permit from the lease pool at a time Therefore, an individual who is already a Permit lessee may not submit a Permit bid during the six month lease period (except to bid in the next Dutch auction) unless and until the lessee first terminates the lessee's current lease.
- Finally, the proposed rule change establishes a six month Permit lease instead of the current month-to-month lease, for easier and more efficient administration of the lease process.

III. Discussion

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange. In particular, the Commission believes the proposal is consistent with the requirements of Section 6(b)(5) of the Act[5] because it is designed to promote just and equitable principles of trade, perfect the mechanism of a free and open national market system, and, in general, to further investor protection and the public interest. Under the proposal, the current auction procedure for Permit leases would be replaced by a procedure known as a Dutch auction. The proposed Dutch auction differs from the current procedures because each successful bidder will pay only the price of the lowest successful bid for Permits, instead of the dollar value of the bid submitted by that lessee. The Commission believes that it is reasonable for the Exchange to determine how to distribute the Permits. The Commission also believes that the Dutch auction procedure as described in the proposal is a competitive process that is a fair and equitable method for distributing the Permits. The Commission further believes that the proposal clearly sets forth in sufficient detail the parameters of and for the proposed Dutch auction process so that Exchange members can fully understand the proposed process, including how to bid, when to bid, restrictions on bidding and holding Permit leases, and how to terminate or transfer a Permit lease.

IV. Conclusion

It is Therefore Ordered, pursuant to Section 19(b)(2) of the Act,[7] that the proposed rule change (SR–CBOE–99–24), is amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–25701 Filed 10–1–99; 8:45 am]

BILLING CODE 8010–01–M

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1 was filed on August 2, 1999. Amendment No. 1 expanded the discussion on the proposed rule change and clarified the proposed test of the rule change. *See* letter from Christopher R. Hill, Attorney, CBOE, to Heather Traeger, Attorney, Division of Market Regulation, dated August 2, 1999.

[4] Securities Exchange Act Release No. 41747, (August 16, 1999), 64 FR 46221.

[5] The procedures for the administration on the lease pool were previously filed with and approved by the Commission. SR–CBOE–97–14 provided for the issuance of Permits in connection with the transfer of the options business of the New York Stock Exchange, Inc. to CBOE and defined the rights and obligations associated with Permits. *See* Securities Exchange Act Release No. 38541 (April 23, 1997), 62 FR 23516 (April 30, 1997). In SR–CBOE–97–47, CBOE amended the manner in which the CBOE accesses the fee that it charges when a person submits a bid to receive a Permit. *See* Securities Exchange Act No. 39179 (October 1, 1997), 62 FR 52602 (October 8, 1997).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(2).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–41916; File No. SR–MSRB–99–9]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Municipal Securities Rulemaking Board Relating to Reports of Sales and Purchases, Pursuant to Rule G–14

September 27, 1999.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and rule 19b–4 thereunder,[2] notice is hereby given that on September 7, 1999, the Municipal Securities Rulemaking Board (''Board'' or ''MSRB'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') a proposed rule change. The proposed rule change is described in Items, I, II, and III below, which Items have been prepared by the Board. The MSRB has designated this proposal as one constituting a stated policy, practice or interpretation with respect to the enforcement of an existing rule under Section 19(b)(3)(A)[3] of the Act, which renders the proposal effective upon receipt of the filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Board is filing a proposed rule change describing its plan to use transaction information collected under the Board's current Transaction Reporting System[4] to demonstrate a possible method for disseminating ''real-time'' transaction reports in the municipal securities market. The Demonstration System can be accessed from the Board's web site, www.msrb.org. The Board is requesting comment on this Demonstration System to assist it in designing its next major phase of the Transaction Reporting Program.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] U.S.C. 78s(b)(3)(A).

[4] *See, e.g.,* Securities Exchange Act Release No. 37998 (November 29, 1996), 61 FR 64782 (December 6, 1996), in which the Commission approved the current system for collecting transaction information.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Board included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Board has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Since 1995, the Board's Transaction Reporting Program has provided increasing levels of transaction price information using transaction data that is reported to the Board each day by brokers, dealers and municipal securities dealers (''dealers'') pursuant to Board Rule G–14 on Transaction Reporting The Board is reviewing ways too make the transaction price information now available to the public more comprehensive and more contemporaneous with the execution of trades in the market. The Board is now making available a Demonstration System, designed to show a possible means of publicly disseminating transaction information that, in the future, the Board expects to collect from dealers on a ''real-time'' basis. The Demonstration System can be accessed from the Board's web site, www.msrb.org. The Board is requesting comments on the content and format of information in the planned demonstration.

Background: Current Daily Reports of Transaction Prices. The Transaction Reporting Program now produces two Daily Reports that summarize the municipal securities market by providing high, low and average prices for the ''frequently traded'' issues, *i.e.,* issues trading four or more times on a given day. The Inter-Dealer Daily Report gives a view of the inter-dealer market, and the Combined Daily Report covers both inter-dealer transactions and transactions between dealers and customers. Before the end of the year, the Board expects to produce a new ''Daily Transaction Report'' that will cover the same transactions as the Combined Daily Report, but that will list individual prices and quantities for each transaction, instead of giving the high, low and average prices for the issue.[5]

Goal: ''Real-Time'' Transaction Reports. Both the current Daily Reports and the planned Daily Transaction Report make prices available early on the morning of the day after the trade date, and the prices given on the reports are only for ''frequently traded'' issues. The MSRB, however, is looking at ways to make available transaction price information in a more comprehensive and contemporaneous manner and is in the early stages of designing a system for that purpose.

There are a number of issues that must be addressed before a system can be designed to make municipal securities transaction prices available to all interested parties on a ''real-time'' basis or a near ''real-time'' basis. For example, many dealers have automated trade processing systems that are set up to process and transmit trade data using an ''overnight batch'' method. Time will be needed to work through the steps necessary for the industry to convert from overnight trade processing to data processing environment that approaches real-time. The MSRB will be working with dealers, their clearing brokers, service bureaus, and industry utilities to find the most efficient and cost-effective manner to complete this transition.

Separate from the issue of how data is to be collected from dealers is the issue of how trade data will be made available to investors, dealers and others interested in following prices in the market. The Demonstration System is intended to generate comment on this issue. It simulates one way in which transaction prices might be formatted and disseminated to investors, dealers and others through the world wide web. Comments on the Demonstration System from potential users of the system will not only assist the Board in arriving at the best possible system for disseminating trade data, but also may help the MSRB to arrive at the procedures and systems necessary for collecting this data from dealers.

Description of Demonstration System. Like the existing Daily Reports, the Demonstration System is structured to take into account the unique nature of the municipal securities markets. In contrast to the approximately 10,000 issues of stock traded in the equity markets, there are over 13 million different issues of municipal securities. Because of this large number of issues and the infrequent trading of most

[5] *See* ''Public Reporting of Individual Transactions in Frequently Traded Municipal Securities: Rule G–14,'' *MSRB Reports,* Vol. 19, No. 3 (September 1999), and File No. SR–99–8 (September 7, 1999).

issues, it is not practical to list each issue. Therefore, the Demonstration System allows the user to view simulated transaction activity during the day, regarding either a specific security or the most frequently traded issues.

The Demonstration System uses actual transaction prices reported to the Board for trade date November 4, 1998. On that day, 22,606 transactions were reported as having occurred in 9,660 separate issues of municipal securities. Most of these trade records were reported to the Board, as required by the current Rule G–14, on the night of trade date. The Demonstration System uses the ''time of trade'' reported on each trade to simulate how a ''real-time'' transaction reporting system might look if the transactions were being reported simultaneously with execution. In a real system, of course, some time would be necessary for the dealer to create the trade record and enter it into its own system and for that record to be received, processed and disseminated by the Board's system. Nevertheless, the use of actual transaction data should give potential users a sense of what a ''real-time'' system would be like.

For each transaction reported, the Demonstration System shows the CUSIP number, a short description of the issue, the par value traded, the time of trade reported by the dealer, and the individual price of the transaction. Yield is included if it was submitted by the dealer with the transaction report. Transaction reports are categorized as one of three transaction types: (i) sales by dealers to customers, (ii) purchases by dealers from customers, and (iii) inter-dealer trades. These three categories of transactions are meant to provide additional useful information to system users, beyond the mere fact that a transaction was effected at a specific price. These categories of transactions are similar to the categories the Board has proposed in the Daily Transaction Report, mentioned above. The Demonstration System by default will use the time of the user's computer to simulate a time of day on November 4. However, the user may change the default time to simulate any time of day desired.

Comments Requested. The Board is requesting comment on the content and format of information in the Demonstration System. Comments can be sent to the Board by letter or by e-mail to webdemo@msrb.org.[6] All comments, whether by letter or e-mail, should refer to ''Web Demonstration System,'' should contain the name and address of the commentator, and should indicate whether the comments offered are on behalf of a specific organization or company.

2. Basis

The Board believes the proposed rule change is consistent with Section 15B(b)(2)(C) of the Act,[7] which provides that the Board's rules shall:

> * * * be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating * * * transactions in municipal securities, to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest * * *

B. Self-Regulatory Organization's Statement on Burden on Competition

The Board does not believe that the proposed rule change will impose any burden on competition because it applies equally to all dealers in municipal securities.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Comments on the production of the Demonstration System have neither been solicited nor received. The Demonstration System itself, however, has been produced specifically to obtain comment on the Board's view of ''real-time'' transaction reporting for municipal securities. The Board expects to make one or more filings with the Commission in the future on ''real-time'' transaction reporting and will discuss comments that have been made on the Demonstration System at that time.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Board has designated this proposed rule change as constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing Board rule under Section 19(b)(3)(A)[8] of the Act, and Rule 19b–4(f)(1) thereunder,[9] which renders the proposed rule change effective upon receipt of this filing by the Commission. The data used in the Demonstration System was collected by the Board under Rule G–14 and the Board's Transaction Reporting System, a rule and facility that previously have been approved by the Commission.[10] The proposed rule change describes a demonstration designed to obtain comment on a dissemination system for ''real-time'' transaction reporting so that the Board may move expeditiously forward with its previously announced plan to make public transaction data more contemporaneous and comprehensive.[11] At any time within sixty days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing will also be available for inspection and copying at the Board's principal offices. All submissions should refer to File No. SR–MSRB–99–9 and should be submitted by October 25, 1999.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–25668 Filed 10–1–99; 8:45 am]

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[6] The Demonstration System includes an option for sending e-mail comments directly to this address.

[7] 15 U.S.C. 78o–4(b)(2)(C).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(1).

[10] *See supra* note 4.

[11] *See* letter from Robert Drysdale, Chairman, MSRB, to Arthur Levitt, Chairman, SEC, dated November 3, 1994.

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–41920; File No. SR–NASD–99–36]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Selection of Chairs and Vice Chairs of the National Adjudicatory Council

September 27, 1999.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 4, 1999, the National Association of Securities Dealers, Inc. (''NASD'' or ''Association''), through its wholly owned subsidiary, NASD Regulation, Inc. (''NASD Regulation'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by NASD Regulation. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons. For the reasons discussed below, the Commission is granting accelerated approval of the proposed rule change.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASD Regulation is proposing to amend its by-laws to clarify that the outgoing members of the National Adjudicatory Council (''NAC'') will select a Chair and Vice Chair from among the members who will be serving on the NAC the following year. Currently, the new Board selects the Chair and Vice Chair. Below is the text of the proposed rule change. Proposed new language is in *italics*; proposed deletions are in brackets.

By-Laws of NASD Regulation, Inc.

Article V

National Adjudicatory Council

Appointment and Authority

Sec. 5.1 No change.

Number of Members and Qualifications

Sec. 5.2(a) No change.

(b) [As soon as practicable following the appointment of members, the] *The incumbent* National Adjudicatory Council shall elect a Chair and a Vice Chair from among [its] *the* members *serving during the following term*. The Chair and Vice Chair shall have such powers and duties as may be determined from time to time by the National Adjudicatory Council. The Chair also shall serve as a Director of the NASD Regulation Board and a Governor of the NASD Board for a one-year term as provided in the by-laws and Restated Certificate of Incorporation of the NASD and these by-laws. The Board, by resolution adopted by a majority of Directors then in office and after notice to the NASD Board, may remove the Chair or Vice Chair from such position at any time for refusal, failure, neglect, or inability to discharge his or her duties.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASD Regulation included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. NASD Regulation has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(1) Purpose

On January 15, 1998, the adjudicatory functions of the National Business Conduct Committee (''NBCC'') were transferred to the NAC. Presently, the Association believes that the NASD Regulation By-Laws are unclear as to whether the outgoing or newly appointed NAC select the Chair and Vice Chair. Since the formation of the NAC, there has been only one selection and the Chair and Vice Chair were selected from the newly appointed NAC. The NASD proposes to direct the outgoing NAC to select either a returning or a new member of the NAC to serve in these positions for the following year. The NASD believes that the outgoing NAC members are particularly well suited to select the Chair and Vice Chair for the following year, and will prevent delay in the selection of the Chair, who is also a member of the NASD Board of Governors, and Vice Chair. The Association represents that this proposal is also consistent with the practice that was used by the NBCC, the predecessor of the NAC, in selecting its Chair and Vice Chair.

(2) Statutory Basis

The NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[3] which requires, among other things, that the Association's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The NASD believes that permitting the outgoing NAC to select the Chair and Vice Chair for the following year will prevent delay and result in the selection of the most highly qualified candidates, who will serve important roles in reviewing disciplinary, membership and other matters for the Association.

B. Self-Regulatory Organization's Statement on Burden on Competition

The NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submissions, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. § 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78*o*–3(b)(6).

SR–NASD–99–36 and should be submitted by October 25, 1999.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

Upon review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.[4] In particular, the Commission believes the proposal is consistent with Section 15A(b)(6) of the Act which requires, amongst other things, that the rules of an association be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, and, in general, to protect investors and the public.[5] The Association believes that the NASD Regulation By-Laws are unclear on how the Chair and Vice-Chair for the incoming NAC are chosen. While neither agreeing or disagreeing with this interpretation of the current NASD Regulation By-Laws, the Commission believes that the proposed rule change, which permits the incumbent NAC to select the Chair and Vice Chair of the incoming NAC, will facilitate selection of these important positions and prevent delays ion the exercise of the NAC's delegated self-regulatory responsibilities.[6] Additionally, the Commission notes that the proposal is consistent with the practice utilized by the NBCC, the NAC's predecessor.

Finally, the Commission finds good cause pursuant to Section 19(b)(2)[7] for approving the proposed rule change prior to the 30th day after its publication in the **Federal Register**. Accelerated approval of the proposed rule change should insure that the proposed selection procedures for the NAC Chair and Vice Chair can be used for the scheduled November 1999, appointment of the new NAC.

It Is Therefore Ordered, pursuant to Section 19(b)(2) of the Act,[8] that the proposed rule change (SR–NASD–99–36) be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–25667 Filed 10–1–99; 8:45 am]

BILLING CODE 8010–01–M

[4] In approving this rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[5] 15 U.S.C. 78*o*–3(b)(6).

[6] The NASD will generally attempt to provide the incumbent NAC with a two week period during which the names of the newly appointed NAC members can be reviewed. Telephone conversation between Eric Moss, Assistant General Counsel, Office of General Counsel, NASD Regulation and Marc McKayle, Attorney, Division of Market Regulation, Commission, dated August 24, 1999.

[7] 15 U.S.C. 78s(b)(2).

[8] *Id.*

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–41937; File No. SR–NASD–99–43]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Central Registration Depository Fees

September 28, 1999.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 7, 1999, the National Association of Securities Dealers, Inc. (''NASD'' or ''Association''), through its wholly owned subsidiary NASD Regulation, Inc. (''NASD Regulation'' or ''NASDR''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD Regulation. The NASD has designated this proposal as one changing a due, fee, or other charge imposed by the NASD under Section 19(b)(3)(A) of the Act,[3] which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NASD proposes to amend Schedule A of the NASD By-Laws to revise the fees imposed for filings made with the Central Registration Depository (''CRD''). Below is the text of the proposed rule change. Proposed new language is italicized; proposed deletions are in brackets.

Schedule A to the NASD By-Laws

Section 2—Fees

(b) The NASD shall assess each member a fee of:

* * * * *

[(3) $20.00 for each amended Form U–4 or Form U–5 filed by the member with the NASD;]

[(4)] *(3)* $95.00 for the additional processing of each initial or amended Form U–4 or Form U–5 that includes the initial reporting, amendment, or certification of one or more disclosure events or proceedings;

[(5)] *(4)* $10.00 for each fingerprint card submitted by the member to the NASD, plus any other charge that may be imposed by the United States Department of Justice for processing such fingerprint card; and

[(6)] *(5)* [$15.00] *$30.00* annually for each of the member's registered representatives and principals [to renew the registration for the following year] *for system processing.*

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NASDR included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NASDR has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change amends Schedule A of the NASD By-Laws to revise certain fees charged for operating the Central Registration Depository (''CRD''). Currently, the NASD charges a $20.00 fee for each Form U–4 and U–5 amendment, and a $15.00 annual registration renewal fee for each registered person. The NASD has determined to discontinue charging the $20.00 amendment fee and instead charge an annual $30.00 system processing fee, which is designed to cover the costs of both registration renewals and amendments. This fee structure is more predictable and will assist firms in budgeting for CRD-related expenses and the NASD in forecasting its revenues to help ensure that all CRD

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

costs are covered by fee revenues. NASD Regulation plans to make the proposed fee change effective on January 1, 2000. The proposed rule change will be announced in a Notice to Members at least 30 days in advance of the effective date.

2. Statutory Basis

The NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(5) of the Act,[4] which requires, among other things, that the Association's rules must provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the Association operates or controls. The NASD believes that the amended fees will be easier for firms and the NASD to administer and are equitably allocated.

B. Self-Regulatory Organization's Statement on Burden on Competition

The NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change is effective immediately upon filing pursuant to Section 19(b)(3)(A)(ii) of the Act[5] and subparagraph (f)(2) of Rule 19b–4 under the Act[6] because the proposal is establishing or changing a due, fee or other charge. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act.[7] Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR–NASD–99–43 and should be submitted by October 25, 1999.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–25700 Filed 10–1–99; 8:45 am]

BILLING CODE 8010–01–M

[4] 15 U.S.C. 78*o*–3(b)(5).

[5] 15 U.S.C. 78s(b)(3)(A).

[6] 17 CFR 240.19b–4(f)(2).

[7] In reviewing this proposal, the Commission has considered its potential impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[8] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activity Under OMB Review

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for extension of currently approved collections. The ICR describes the nature of the information collection and its expected burden. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on May 6, 1999, [64 FR 24447].

DATES: Comments must be submitted on or before November 3, 1999. A comment to OMB is most effective if OMB receives it on or before November 3, 1999.

FOR FURTHER INFORMATION CONTACT: Judy Street on (202) 267–9895.

SUPPLEMENTARY INFORMATION:

Federal Aviation Administration (FAA)

Title: Training and Qualification Requirements for Check Airmen and Flight Instructors.

Type of Request: Extension of a currently approved collection.

OMB Control Number: 2120–0600.

Form(s): N/A.

Affected Public: Estimated 3,100 pilots.

Abstract: This rule allows some experienced pilots who would otherwise qualify as flight instructors or check airmen but who are not medically eligible to hold the requisite medical certificate, to perform flight instructor or check airmen functions in a simulator.

Estimated Annual Burden Hours: 13 recordkeeping burden hours.

ADDRESSES: Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725–17th Street, NW., Washington, DC 20503, Attention: FAA Desk Officer.

Comments Are Invited On: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued in Washington, DC, on September 28, 1999.

Steve Hopkins,

Manager, Standards and Information Division, APF–100.

[FR Doc. 99–25731 Filed 10–01–99; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Passenger Facility Charge (PFC) Approvals and Disapprovals

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Monthly Notice of PFC Approvals and Disapprovals. In August 1999, there were nine applications approved. This notice also includes information on two applications,

approved in July 1999, inadvertently left off the July 1999 notice. Additionally, 12 approved amendments to previously approved applications are listed.

SUMMARY: The FAA publishes a monthly notice, as appropriate, of PFC approvals and disapprovals under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and part 158 of the Federal Aviation Regulations (14 CFR Part 158). This notice is published pursuant to paragraph (d) of § 158.29.

PFC Applications Approved

Public Agency: South Jersey Transportation Authority, Atlantic City, New Jersey

Application Number: 99–01–C–00–ACY.

Application Type: Impose and Use a PFC.

PFC Level: $3.00.

Total PFC Revenue Approved in This Decision: $7,224.348.

Earliest Charge Effective Date: October 1, 1999.

Estimated Charge Expiration Date: March 1, 2004.

Class of Air Carriers Not Required To Collect PFC's: Air taxi/commercial operators filing FAA Form 1800–31 and enplaning less than 500 passengers annually.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at Atlantic City International Airport.

Brief Description of Projects Approved for Collection and Use:

Master plan study/environmental assessment/Part 150 noise study.
Secure area systems.
Terminal expansion—phases I–VI.
Improvements to airport access road—phases I and II.
Purchase of aircraft rescue and firefighting vehicle.
Aircraft fueling access road.
Master plan study—environmental impact statement.
Purchase snow removal equipment and high speed runway broom vehicle.
Aircraft deicing facilities—design.
Improvements to airport security system.
Rehabilitation of runway 13/31.
Terminal exit road.
Improvements to terminal baggage conveyor system.

Brief Description of Projects Approved for Collection Only:

Air Surveillance Radar-9 relocation.
Terminal apron expansion.
Taxiway H relocation.
Snow removal equipment building.

Decision Date: July 27, 1999.

FOR FURTHER INFORMATION CONTACT: Dan Vornea, New York Airports District Office, (516) 227–3812.

Public Agency: Potomac Highlands Airport Authority, Cumberland, West Virginia

Application Number: 97–02–U–00–CBE.

Application Type: Use PFC revenue.

PFC Level: $3.00.

Total PFC Revenue To Be Used in This Decision: $150,000.

Charge Effective Date: July 1, 1994.

Estimated Charge Expiration Date: June 1, 2001.

Class of Air Carriers Not Required To Collect PFC's: No change from previous decision.

Brief Description of Project Approved for Use: Rehabilitate runway 5/23—phase I (preliminary design only).

Decision Date: July 30, 1999.

FOR FURTHER INFORMATION CONTACT: Arthur Winder, Washington Airports District Office, (703) 661–1363.

Public Agency: Jackson Hole Airport Board, Jackson, Wyoming

Application Number: 99–06–U–00–JAC.

Application Type: Use PFC revenue.

PFC Level: $3.00.

Total PFC Revenue To Be Used in This Decision: $1,850,000.

Charge Effective Date: August 1, 1998.

Estimated Charge Expiration Date: January 1, 2003.

Class of Air Carriers Not Required To Collect PFC's: No change from previous decision.

Brief Description of Project Approved for Use: Overlay runway and safety areas.

Decision Date: August 10, 1999.

FOR FURTHER INFORMATION CONTACT: Christopher Schaffer, Denver Airports District Office, (303) 342–1258.

Public Agency: City of Lebanon, New Hampshire

Application Number: 99–03–C–00–LEB.

Application Type: Impose and use a PFC.

PFC Level: $3.00.

Total PFC Revenue Approved in This Decision: $181,075.

Earliest Charge Effective Date: February 1, 2000.

Estimated Charge Expiration Date: August 1, 2002.

Class of Air Carriers Not Required to Collect PFC's: None.

Brief Description of Project Approved for Use:

Reconstruct runway 18/36.
Replace seven hilltop obstruction beacons.
Airport master plan update air service study.
PFC administration.

Decision Date: August 11, 1999.

FOR FURTHER INFORMATION CONTACT: Priscilla Scott, New England Region Airports Division, (781) 238–7614.

Public Agency: Cedar Rapids Airport Commission, Cedar Rapids, Iowa

Application Number: 99–02–C–00–CID.

Application Type: Impose and use a PFC.

PFC Level: $3.00.

Total PFC Revenue Approved in This Decision: $4,210,583.

Earliest Charge Effective Date: July 1, 2000.

Estimated Charge Expiration Date: February 1, 2004.

Class of Air Carriers Not Required To Collect PFC's: Air taxi commercial operators.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at The Eastern Iowa Airport.

Brief Description of Projects Approved for Collection and Use:

Replace snow removal multipurpose unit broom, snow blower, and snowplow.
Replace two snow plow trucks.
Acquire high rise turret.
Disabled passenger lift.
Install multiple user flight information display system.
Renovate terminal.
Construct loading bridge.

Brief Description of Project Partially Approved for Collection and Use: Construct snow removal equipment and deicing material storage building.

Determination: Partially approved. The FAA has determined that only 25,300 square feet (57.5 percent) of the 44,000 square foot building is eligible. The approved amount is limited to the cost of the eligible portion of the building. Therefore, the approved amount was reduced from the amount requested.

Decision Date: August 13, 1999.

FOR FURTHER INFORMATION CONTACT: Lorna Sandridge, Central Region Airports Division, (816) 426–4730:

Public Agency: Meridian Airport Authority, Meridian, Mississippi

Application Number: 99–06–C–00–MEI.

Application Type: Impose and use a PFC.

PFC Level: $3.00.

Total PFC Revenue Approved in This Decision: $148,000.

Earliest Charge Effective Date: September 1, 2002.

Estimated Charge Expiration Date: May 1, 2004.

Class of Air Carriers Not Required To Collect PFC's: None.

Brief Description of Projects Approved for Collection and Use:

Rehabilitate beacon.
Rehabilitate security fencing.
Emergency access road.
Rehabilitate runway 1/19 high intensity runway lights and taxiway B medium intensity taxiway light.
Replace terminal seating.
Rehabilitate general aviation ramp.
Update master plan.

Decision Date: August 13, 1999.

FOR FURTHER INFORMATION CONTACT: David Shumate, Jackson Airports District Office, (601) 965–4628.

Public Agency: Port Authority of New York and New Jersey, New York, New York

Application Number: 97–04–C–EWR, 97–04–C–00–JFK, and 97–04–C–00–LGA.

Application Type: Impose and use a PFC.

PFC Level: $3.00.

Total PFC Revenue Approved in This Decision: $823,000,000.

Earliest Charge Effective Date: January 1, 2001.

Estimated Charge Expiration Date: January 1, 2009.

Class of Air Carriers Not Required To Collect PFC's at Each Airport: Air Taxis, except commuter air carriers.

Determination: Approved. Based on information contained in the public agency's applications, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at Newark International Airport (EWR), John F. Kennedy International Airport (JFK), and LaGuardia Airport (LGA).

Brief Description of Project Partially Approved for Use at JFK: Howard Beach Light Rail System (LRS) component.

Determination: Partially approved for use of PFC revenue. The operations, maintenance, and storage facility is generally ineligible under paragraphs 301(a)(3) and 501, as well as item 11 of Appendix 2 of FAA order 5100.38A, Airport Improvement Program (AIP) Handbook (October 24, 1989), with the exception of equipment needed to provide operational control of the ''opening day'' system. Therefore, the use of PFC revenue for the following elements of the maintenance facility, at a minimum, are not eligible: spare parts or spare equipment; any equipment required to perform any maintenance, whether that maintenance be on rail cars, structural elements, operations systems, or other components; administrative offices; any build-up of operational equipment in order to accommodate future expansion of the system; and the track necessary to access this facility (assuming that the system is built so that only unoccupied trains bound for maintenance enter this facility). Also, any equipment needed for fare collections, whether for LRS fares or for the connecting system (New York City transit (NYCT) subway, are not eligible for use of PFC revenues. In addition, the FAA is aware that the public agency may, in the future, be interested in use of the LRS by NYCT subway cars transiting from the NYCT system to the LRS. Since this potential use is speculative at this time, and has not been evaluated from technical and environmental standpoints, the component cost of over-design to accommodate this potential use is not eligible for PFC funding. Items to be examined include, but are not limited to: station length; structural strength; additional controls or control system components needed to accommodate both ''on airport'' and ''off airport'' users; and any connecting track at Howard Beach to permit cars to move from the NYCT subway to the LRS.

Brief Description of Projects Partially Approved for Collection at EWR, JFK, and LGA and Use at JFK: Central Terminal Area LRS component.

Determination: Partially approved for collection and use of PFC revenue. Any equipment needed for fare collections, whether for LRS fares or for the connecting system (NYCT subway or Long Island Railroad (LIRR)), are not eligible for the collection and use of PFC revenues. In addition, the FAA is aware that the public agency may, in the future, be interested in use of the LRS by NYCT subway cars and/or LIRR trains transiting from their respective systems to the LRS. Since this potential use is speculative at this time, and has not been evaluated from technical and environmental standpoints, the component cost of over-design to accommodate this potential use is not eligible for PFC funding. Items to be examined include, but are not limited to: station length; structural strength; and additional controls or control system components needed to accommodate both ''on airport'' and ''off airport'' users. Jamaica-JFK LRS component.

Determination: Partially approved for collection and use of PFC revenue. Any equipment needed for fare collections, whether for LRS fares or for the connecting system (LIRR trains or NYCT subway), are not eligible for the collection or use of PFC revenues. In addition, the FAA is aware that the public agency may, in the future, be interested in use of the LRS by LIRR trains and/or NYCT subway cars transiting from the NYCT system to the LRS. Since this potential use is speculative at this time, and has not been evaluated from technical and environmental standpoints, the component cost of over-design to accommodate this potential use is not eligible for PFC funding. Items to be examined include, but are not limited to: station length; structural strength; additional controls or control system components needed to accommodate both ''on airport'' and ''off airport'' users; and any connecting track at Jamaica Station to permit cars to move from the LIRR and/or NYCT subway to the LRS.

Decision Date: August 16, 1999.

FOR FURTHER INFORMATION CONTACT: Thomas Felix, Eastern Region Airports Division, (718) 553–3335.

Public Agency: Birmingham Airport Authority, Birmingham, Alabama

Application Number: 99–02–C–00–BHM.

Application Type: Impose and use a PFC.

PFC Level: $3.00.

Total PFC Revenue Approved in This Decision: $4,232,094.

Earliest Charge Effective Date: February 1, 2000.

Estimated Charge Expiration Date: February 1, 2001.

Class of Air Carriers Not Required To Collect PFC's: Part 135 air taxi/commercial operators filing FAA Form 1800–31.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at Birmingham International Airport.

Brief Description of Projects Approved for Collection and Use:

Taxiway/holding apron improvements.
Culvert rehabilitation.
Water hydrant system.

Brief Description of Project Approved for Use: Reconstruct/rehabilitate runway 5/23.

Decision Date: August 18, 1999.

FOR FURTHER INFORMATION CONTACT: Keafur Grimes, Jackson Airports District Office, (601) 965–4628.

Public Agency: City of Cortez, Colorado

Application Number: 99–01–C–00–CEZ.

Application Type: Impose and use a PFC.

PFC Level: $3.00.

Total PFC Revenue Approved in This Decision: $200,078.

Earliest Charge Effective Date: November 1, 1999.

Estimated Charge Expiration Date: January 1, 2008.

Class of Air Carriers Not Required To Collect PFC's: None.

Brief Description of Projects Approved For Collection and Use:

Distance remaining signs.
Reconstruct commercial ramp.
Purchase of snowplow.
Construct taxiway B.
Construction of south half of parallel taxiway A.
Land acquisition (parcels 21 and 22).
Acquire Index A fire truck.

Decision Date: August 18, 1999.

FOR FURTHER INFORMATION CONTACT: Christopher Schaffer, Denver Airports District Office, (303) 342–1258.

Public Agency: Charlottesville-Albemarle Airport Authority, Charlottesville, Virginia

Application Number: 99–13–U–00–CHO.

Application Type: Use PFC revenue.

PFC Level: $3.00.

Total PFC Revenue To Be Used in This Decision: $1,005,500.

Charge Effective Date: April 1, 2002.

Estimated Charge Expiration Date: April 1, 2005.

Classes of Air Carriers Not Required To Collect PFC's: (1) Air taxi/commercial operators filing FAA Form 1800–31; and (2) charters.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at Charlottesville-Albemarle Airport.

Brief Description of Project Approved for Use: Construct air carrier terminal access road.

Decision Date: August 20, 1999.

FOR FURTHER INFORMATION CONTACT: Arthur Winder, Washington Airports District Office, (703) 661–1363.

Public Agency: State of Connecticut, Department of Transportation, Bureau of Aviation and Ports, Windsor Locks, Connecticut

Application Number: 99–09–I–00–BDL.

Application Type: Impose a PFC.

PFC Level: $3.00.

Total PFC Revenue Approved in This Decision: $4,400,000.

Earliest Charge Effective Date: November 1, 1999.

Estimated Charge Expiration Date: January 1, 2000.

Class of Air Carriers Not Required To Collect PFC's: On-demand air taxi commercial operators.

Determination: Approved. Based on information contained in the public agency's application, the FAA has determined that the proposed class accounts for less than 1 percent of the total annual enplanements at Bradley International Airport.

Brief Description of Project Approved for Collection Only: Reconstruction of the east end of taxiway ''S''.

Decision Date: August 23, 1999.

FOR FURTHER INFORMATION CONTACT: Priscilla Scott, New England Region Airports Division, (781) 238–7614.

Amendments to PFC Approvals

Amendment No. city, state	Amendment approved date	Original approved net PFC revenue	Amended approved net PFC revenue	Original estimated charge exp. date	Amended estimated charge exp. date
94–01–C–02–MLI, Moline, IL	07/15/99	$11,551,645	$9,058,187	11/01/08	11/01/08
98–02–C–01–MLI, Moline, IL	07/15/99	5,128,404	8,226,127	01/01/26	07/01/09
94–02–C–01–BRD, Brainerd, MN	07/28/99	271,345	266,345	08/01/01	07/01/01
92–01–C–02–CMX, Hancock, MI	08/09/99	171,224	164,920	08/01/01	07/01/01
94–02–U–01–CMX, Hancock, MI	08/09/99	NA	NA	08/01/01	07/01/01
95–03–U–01–CMX, Hancock, MI	08/09/99	NA	NA	08/01/01	07/01/01
95–02–C–03–BGM, Binghamton, NY	08/16/99	971,843	1,021,843	08/01/05	04/01/06
92–01–C–01–JHW, Jamestown, NY	08/16/99	434,822	449,624	02/01/00	02/01/00
98–05–C–01–BNA, Nashville, TN	08/18/99	1,655,000	2,355,000	07/01/01	08/01/01
96–01–C–01–TRI, Bristol, TN	08/19/99	8,476,249	5,859,025	02/01/09	11/01/05
96–04–C–01–SMF, Sacramento, CA	08/20/99	96,224,000	78,993,780	07/01/06	08/01/06
98–07–I–01–PHL, Philadelphia, PA	08/27/99	666,098,000	672,000,000	07/01/11	07/01/11

Issued in Washington, DC on September 28, 1999.

Eric Gabler,

Manager, Passenger Facility Charge Branch.

[FR Doc. 99–25729 Filed 10–1–99; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

September 21, 1999.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2110, 1425 New York Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before November 3, 1999 to be assured of consideration.

Departmental Offices/Community Development Financial Institutions (CDFI) Fund

OMB Number: 1505–0171.

Form Number: CDFI Form 0008.

Type of Review: Extension.

Title: Streamlining Survey.

Description: The purpose of the streamlining surveys is to determine what steps the Fund can take to minimize the paperwork burden on its applicants.

Respondents: Not-for-profit institutions, Business or other for-profit.

Estimated Number of Respondents: 30.

Estimated Burden Hours Per Respondent: 30 minutes.

Frequency of Response: On occasion.

Estimated Total Reporting Burden: 15 hours.

Clearance Officer: Lois K. Holland, (202) 622–1563, Departmental Offices, Room 2110, 1425 New York Avenue, NW Washington, DC 20220.

OMB Reviewer: Alexander T. Hunt, (202) 395–7860, Office of Management and Budget, Room 10202, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports Management Officer.

[FR Doc. 99–25660 Filed 10–1–99; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

September 21, 1999.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2110, 1425 New York Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before November 3, 1999 to be assured of consideration.

Bureau of Alcohol, Tobacco and Firearms (BATF)

OMB Number: 1512–0551.

Form Number: ATF F 5300.42.

Type of Review: Extension.

Title: Certification of Secure Gun Storage or Safety Devices.

Description: The requested information will be used to ensure that applicants for a Federal firearms license are in compliance with the requirements pertaining to the availability of Secure gun storage or safety devices.

Respondents: Business or other for-profit.

Estimated Number of Respondents: 31,000.

Estimated Burden Hours Per Respondent: 1 minute.

Frequency of Response: Other (non-required).

Estimated Total Reporting Burden: 600 hours.

OMB Number: 1512–0552.

Form Number: None.

Type of Review: Extension.

Title: Open Letter to Federal Firearms Licensees.

Description: The requested information will be used to determine why Federal firearms licensees have failed to enroll with the FBI. This is necessary because non-enrolled licensees that transfer a firearm to a non-licensed individual are in violation of the Gun Control Act, as amended.

Respondent: Business or other for-profit, Federal Government.

Estimated Number of Respondents: 18,000.

Estimated Burden Hours Per Respondent: 1 minute.

Frequency of Response: On occasion.

Estimated Total Reporting Burden: 306 hours.

Clearance Officer: Robert N. Hogarth, (202) 927–8930, Bureau of Alcohol, Tobacco and Firearms, Room 3200, 650 Massachusetts Avenue, NW Washington, DC 20226.

OMB Reviewer: Alexander T. Hunt, (202) 395–7860, Office of Management and Budget, Room 10202, New Executive Office Building, Washington, DC 20503

Lois K. Holland,

Departmental Reports Management Officer.

[FR Doc. 99–25661 Filed 10–1–99; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

September 22, 1999.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2110, 1425 New York Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before November 3, 1999 to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–0008.

Form Number: IRS Forms W–2, W–2c, W–2AS, W–2GU, W–2VI, W–3, W–3c, W–3cPR, W–3PR, W–3SS.

Type of Review: Extension.

Title:

Wage and Tax Statement (W–2);
Corrected Wage and Tax Statement (W–2c);
American Samoa Wage and Tax Statement (W–2AS);
Guam Wage and Tax Statement (W–2GU);
U.S. Virgin Islands Wage and Tax Statement (W–2VI);
Transmittal of Wage and Tax Statements (W–3);
Transmittal of Corrected Wage and Tax Statements (W–3c);
Informe de Comprobantes de Retención (Transmittal of Withholding Statements W–3PR);
Transmisión de Comprobantes de Retención Corregidos (Transmittal of Corrected Wage and Tax Statements) (W–3cPR); and
Transmittal of Wage and Tax Statements (W–3SS).

Description: Employers report income and withholding on Form W–2. Forms W–2AS, W–2GU and W–2VI are the U.S. possessions versions of Form W–2. The Form W–3 series is used to transmit Forms W–2 to SSA. Forms W–2c, W–3c and W-3cPR are used to correct previously filed Forms W–2, W–3 and W–3PR. Individuals use Form W–2 to prepare their income tax return.

Respondents Business or other for-profit, individuals or households, not-for-profit institutions, farms, Federal Government, State, Local or Tribal Government.

Estimated Number of Respondents: 5,882,789.

Estimated Burden Hours Per Respondent:

Form No.	Response time (in minutes)
W–2	32
W–2AS	22
W–2c	52
W–2GU	23
W–2VI	22
W–3	28
W–3c	22
W–3cPR	31
W–3PR	27
W–3SS	25

Frequency of Response: Annually.

Estimated Total Reporting Burden: 1 hour.

OMB Number: 1545–1028.

Regulation Project Numbers: INTL–941–86 (NPRM) and INTL–655–87 Temporary.

Type of Review: Extension.

Title: Passive Foreign Investment Companies.

Description: These regulations specify how U.S. persons who are shareholders of passive foreign investment companies (PFICs) make elections with respect to their PFIC stock.

Respondents: Business or other for-profit.

Estimated Number of Respondents: 275,000.

Estimated Burden Hours Per Respondent: 25 minutes.

Frequency of Response: Annually.

Estimated Total Reporting Burden: 112,500 hour.

Clearance Officer: Garrick Shear, Internal Revenue Service, Room 5244, 1111 Constitution Avenue, NW, Washington, DC 20224.

OMB Reviewer: Alexander T. Hunt, (202) 395–7860, Office of Management and Budget, Room 10202, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports Management Officer.

[FR Doc. 99–25662 Filed 10–1–99; 8:45 am]

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Corrections

Federal Register

Vol. 64, No. 191

Monday, October 4, 1999

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

NATIONAL COUNTERINTELLIGENCE CENTER

32 CFR Part 1800

Freedom of Information Act; Privacy Act; and Executive Order 12958; Implementation

Correction

In rule document 99–23243 beginning on page 49878, in the issue of Tuesday, September 14, 1999, make the following correction:

§ 1800.31 [Corrected]

On page 49883, in the first column, in § 1800.31(c)(4)(ii), in line sixteen of the first column, paragraph designation ''(i)'' should read ''(ii)''.

[FR Doc. C9–23243 Filed 10–1–99; 8:45 am]

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federal register

Monday
October 4, 1999

Part II

Department of Commerce

Patent and Trademark Office

37 CFR Parts 1, 3, 5, and 10
Changes to Implement the Patent Business Goals; Proposed Rule

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Parts 1, 3, 5, and 10

[Docket No.: 980826226–9185–02]

RIN 0651–AA98

Changes To Implement the Patent Business Goals

AGENCY: Patent and Trademark Office, Commerce.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Patent and Trademark Office (Office) has established business goals for the organizations reporting to the Assistant Commissioner for Patents (Patent Business Goals). The focus of the Patent Business Goals is to increase the level of service to the public by raising the efficiency and effectiveness of the Office's business processes. In furtherance of the Patent Business Goals, the Office is proposing changes to the rules of practice to eliminate unnecessary formal requirements, streamline the patent application process, and simplify and clarify their provisions.

DATES: *Comment Deadline Date:* To be ensured of consideration, written comments must be received on or before December 3, 1999. While comments may be submitted after this date, the Office cannot ensure that consideration will be given to such comments. No public hearing will be held.

ADDRESSES: Comments should be sent by electronic mail message over the Internet addressed to regreform@uspto.gov. Comments may also be submitted by mail addressed to: Box Comments—Patents, Assistant Commissioner for Patents, Washington, D.C. 20231, or by facsimile to (703) 308–6916, marked to the attention of Hiram H. Bernstein. Although comments may be submitted by mail or facsimile, the Office prefers to receive comments via the Internet. Where comments are submitted by mail, the Office would prefer that the comments be submitted on a DOS formatted 3¼ inch disk accompanied by a paper copy.

The comments will be available for public inspection at the Special Program Law Office, Office of the Deputy Assistant Commissioner for Patent Policy and Projects, located at Room 3–C23 of Crystal Plaza 4, 2201 South Clark Place, Arlington, Virginia, and will be available through anonymous file transfer protocol (ftp) via the Internet (address: ftp.uspto.gov). Since comments will be made available for public inspection, information that is not desired to be made public, such as an address or phone number, should not be included in the comments.

FOR FURTHER INFORMATION CONTACT: Hiram H. Bernstein or Robert W. Bahr, by telephone at (703) 305–9285, or by mail addressed to: Box Comments—Patents, Assistant Commissioner for Patents, Washington, DC 20231, or by facsimile to (703) 308–6916, marked to the attention of Mr. Bernstein.

SUPPLEMENTARY INFORMATION: The organizations reporting to the Assistant Commissioner for Patents have established five business goals (Patent Business Goals) to meet the Office's Year 2000 commitments. The Patent Business Goals have been adopted as part of the Fiscal Year 1999 Corporate Plan Submission of the President. The five Patent Business Goals are:

Goal 1: Reduce Office processing time (cycle time) to twelve months or less for all inventions.

Goal 2: Establish fully-supported and integrated Industry Sectors.

Goal 3: Receive applications and publish patents electronically.

Goal 4: Exceed our customers' quality expectations, through the competencies and empowerment of our employees.

Goal 5: Align fees commensurate with resource utilization and customer efficiency.

This rulemaking proposes changes to the regulations to support the Patent Business Goals. A properly reengineered or reinvented system eliminates the redundant or unnecessary steps that slow down processing and frustrate customers. In furtherance of the Patent Business Goals, these proposed changes to the rules of practice take a fresh view of the business end of issuing patents, and continue a process of simplification. Formal requirements of rules that are no longer useful would be eliminated. When the intent of an applicant is understood, the Office would simply go forward with the processing. The essentials are maintained, while formalities are greatly reduced. The object is to focus on the substance of examination and decrease the time that an application for patent is sidelined with unnecessary procedural issues.

Additionally, the Office desires to continue to make its rules more understandable, such as by using plain language instead of legalese. The Office is seeking efficiency by improving the clarity of the wording of the regulations so that applicants and Office employees understand unequivocally what is required at each stage of the prosecution and can get it right on the first try. The Office welcomes comments and suggestions on this effort.

In streamlining this process, the Office will be able to issue a patent in a shorter time by eliminating formal requirements that must be performed by the applicant, his or her representatives and the Office itself. Applicants will benefit from a reduced overall cost to them for receiving patent protection and from a faster receipt of their patents.

Finally, these proposed changes are intended to improve the Office's business processes in the context of the current legal and technological environment. Should these environments change (*e.g.*, by adoption of an international Patent Law Treaty, enactment of patent legislation, or implementation of new automation capabilities), the Office would have to reconsider its business processes and make such further changes to the rules of practice as are necessary.

Advance Notice of Proposed Rulemaking

The Office published an advance notice of proposed rulemaking (Advance Notice) presenting a number of changes to patent practice and procedure under consideration to implement the Patent Business Goals. See Changes to Implement the Patent Business Goals; Advance Notice of Proposed Rulemaking, 63 FR 53497 (October 5, 1998), 1215 Off. Gaz. Pat. Office 87 (October 27, 1998). The Advance Notice set forth twenty-one topics on which the Office specifically requested public input:

Topic (1) Simplifying requests for small entity status;

Topic (2) Requiring separate surcharges and supplying filing receipts;

Topic (3) Permitting delayed submission of an oath or declaration, and changing time period for submission of the basic filing fee and English translation;

Topic (4) Limiting the number of claims in an application;

Topic (5) Harmonizing standards for patent drawings;

Topic (6) Printing patents in color;

Topic (7) Reducing time for filing corrected or formal drawings;

Topic (8) Permitting electronic submission of voluminous material;

Topic (9) Imposing limits/requirements on information disclosure statement submissions;

Topic (10) Refusing information disclosure statement consideration under certain circumstances;

Topic (11) Providing no cause suspension of action;

Topic (12) Requiring a handling fee for preliminary amendments and supplemental replies;

Topic (13) Changing amendment practice to replacement by paragraphs/claims;

Topic (14) Providing for presumptive elections;

Topic (15) Creating a rocket docket for design applications;

Topic (16) Requiring identification of broadening in a reissue application;

Topic (17) Changing multiple reissue application treatment;

Topic (18) Creating alternative review procedures for applications under appeal;

Topic (19) Eliminating preauthorization of payment of the issue fee;

Topic (20) Reevaluating the Disclosure Document Program; and

Topic (21) Creating a Patent and Trademark Office review service for applicant-created forms.

See Changes to Implement the Patent Business Goals, 63 FR at 53499, 1215 Off. Gaz. Pat. Office at 89.

Changes Set Forth in the Advance Notice Included in This Notice of Proposed Rulemaking (Notice)

This notice proposes changes to the rules of practice based upon the following topics in the Advance Notice:

(1) Simplifying request for small entity status (Topic 1—§§ 1.9, 1.27, and 1.28);

(2) Harmonizing standards for patent drawings (Topic 5—§ 1.84);

(3) Printing patents in color (Topic 6—§ 1.84);

(4) Reducing time for filing corrected or formal drawings (Topic 7—§§ 1.85 and 1.136);

(5) Permitting electronic submission of voluminous material (Topic 8—§§ 1.96, 1.821, 1.823, and 1.825);

(6) Imposing limits/requirements on information disclosure statement submissions (Topic 9—§§ 1.97 and 1.98);

(7) Requiring a handling fee for preliminary amendments and supplemental replies (Topic 12—§§ 1.111 and 1.115);

(8) Changing amendment practice to replacement by paragraphs/claims (Topic 13—§§ 1.52 and 1.121);

(9) Creating a rocket docket for design applications (Topic 15—§ 1.155);

(10) Changing multiple reissue application treatment (Topic 17—§ 1.177); and

(11) Eliminating preauthorization of payment of the issue fee (Topic 19—§§ 1.25 and 1.311).

The Office has taken into account the comments submitted in reply to the Advance Notice in arriving at the specific changes to the rules of practice being proposed in this notice. These comments are addressed with the relevant proposed rule change in the section-by-section discussion portion of this notice.

This notice also includes a number of proposed changes to the rules of practice that are not based upon proposals set forth in the Advance Notice. This notice proposes changes to the following sections of title 37 of the Code of Federal Regulations: 1.4, 1.6, 1.9, 1.12, 1.14, 1.17, 1.19, 1.22, 1.25, 1.26, 1.27, 1.28, 1.33, 1.41, 1.47, 1.48, 1.51, 1.52, 1.53, 1.55, 1.56, 1.59, 1.63, 1.64, 1.67, 1.72, 1.77, 1.78, 1.84, 1.85, 1.91, 1.96, 1.97, 1.98, 1.102, 1.103, 1.111, 1.112, 1.121, 1.125, 1.131, 1.132, 1.133, 1.136, 1.137, 1.138, 1.152, 1.154, 1.155, 1.163, 1.173, 1.176, 1.177, 1.178, 1.193, 1.303, 1.311, 1.312, 1.313, 1.314, 1.322, 1.323, 1.324, 1.366, 1.446, 1.497, 1.510, 1.530, 1.550, 1.666, 1.720, 1.730, 1.740, 1.741, 1.780, 1.809, 1.821, 1.823, 1.825, 3.27, 3.71, 3.73, 3.81, 5.1, 5.2, 5.12, and 10.23. Additionally, this notice proposes to amend title 37 of the Code of Federal Regulations by removing §§ 1.44 and 1.174, and adding §§ 1.76, 1.105, and 1.115.

Changes Set Forth in the Advance Notice That Are NOT Included in This Notice

This notice does not include proposed changes to the rules of practice based upon the following topics in the Advance Notice:

(1) Requiring separate surcharges and supplying filing receipts (Topic 2);

(2) Permitting delayed submission of an oath or declaration, and changing the time period for submission of the basic filing fee and English translation (Topic 3);

(3) Limiting the number of claims in an application (Topic 4);

(4) Refusing information disclosure statement consideration under certain circumstances (Topic 10);

(5) Providing no cause suspension of action (Topic 11);

(6) Providing for presumptive elections (Topic 14);

(7) Requiring identification of broadening in a reissue application (Topic 16);

(8) Creating alternative review procedures for applications under appeal (Topic 18);

(9) Reevaluating the Disclosure Document Program (Topic 20); and (10) Creating a Patent and Trademark Office review service for applicant-created forms (Topic 21).

Comments received in response to the Advance Notice on these topics are addressed below.

Requiring Separate Surcharges and Supplying Filing Receipts (Topic 2)

The Office indicated that it was considering charging separate surcharges in a nonprovisional application under 35 U.S.C. 111(a) for (a) the delayed submission of an oath or declaration, and (b) the delayed submission of the basic filing fee. That is, a single surcharge (currently $130) would be required if one of (a) the oath or declaration or (b) the basic filing fee were not present on filing. Two surcharges (totaling $260) would be required if both the oath or declaration and the basic filing fee were not present on filing. Therefore, the absence (on filing) of the oath or declaration or the basic filing fee would have necessitated a separate surcharge. The Office also indicated that it was considering issuing another filing receipt, without charge, to correct any errors or to update filing information, as needed.

While a few comments supported the proposal (indicating that the additional services were worth the additional fees), a majority of comments opposed charging separate surcharges. These included arguments that: (1) the proposal is simply a fee increase with no advantage to applicants; and (2) a separate surcharge should be required only if the oath or declaration and the basic filing fee are submitted separately because there is no additional cost to the Office to process both the oath or declaration and the basic filing fee in the same submission.

Response: This notice does not propose changing § 1.53 to charge separate surcharges in a nonprovisional application under 35 U.S.C. 111(a) for the delayed submission of an oath or declaration, and for the delayed submission of the basic filing fee.

Permitting Delayed Submission of an Oath or Declaration, and Changing the Time Period for Submission of the Basic Filing Fee and English Translation (Topic 3)

The Office indicated that it was considering: (1) Amending § 1.53 to provide that an executed oath or declaration for a nonprovisional application would not be required until the expiration of a period that would be set in a ''Notice of Allowability'' (PTOL–37); and (2) amending §§ 1.52 and 1.53 to provide that the basic filing fee and an English translation (if necessary) for a nonprovisional application must be submitted within one month (plus any extensions under § 1.136) from the filing date of the application. The Office was specifically considering amending § 1.53 to provide

that an executed oath or declaration for a nonprovisional application would not be required until the applicant is notified that it must be submitted within a one-month period that would be set in a ''Notice of Allowability,'' provided that the following are submitted within one month (plus any extensions under § 1.136) from the filing date of the application: (1) The name(s), residence(s), and citizenship(s) of the person(s) believed to be the inventor(s); (2) all foreign priority claims; and (3) a statement submitted by a registered practitioner that: (a) an inventorship inquiry has been made, (b) the practitioner has sent a copy of the application (as filed) to each of the person(s) believed to be the inventor(s), (c) the practitioner believes that the inventorship of the application is as indicated by the practitioner, and (d) the practitioner has given the person(s) believed to be the inventor(s) notice of their obligations under § 1.63(b). The Office was also specifically considering amending §§ 1.52 and 1.53 to provide, by rule, that the basic filing fee and an English translation (if the application was filed in a language other than English) for a nonprovisional application must be submitted within one month (plus any extensions under § 1.136) from the filing date of the application. Applicants would not be given a notice (*e.g.*, a ''Notice To File Missing Parts of Application'' (PTO–1533)) that the basic filing fee is missing or insufficient, unless the application is filed with an insufficient basic filing fee that at least equals the basic filing fee that was in effect the previous fiscal year. The filing receipt, however, would indicate the amount of filing fee received. Further, the filing receipt would remind applicants that the basic filing fee must be submitted within one month (plus any extensions under § 1.136) from the filing date of the application.

While some comments supported this proposed change, a majority of comments opposed permitting delayed submission of an oath or declaration; and changing the time period for submission of the basic filing fee and English translation.

The reasons given for opposition to the proposed change to permit delayed submission of an oath or declaration included arguments that: (1) The proposed inventorship inquiry and notification requirements for practitioners who submitted an application without an executed oath or declaration would be too onerous; (2) an application should not be examined until inventorship is settled and the inventors have acknowledged their duty of disclosure; (3) the delayed submission of an oath or declaration would cause confusion as to ownership of the application, which would cause confusion as to who is authorized to appoint a representative in the application; (4) the delayed submission of an oath or declaration would increase the difficulty in acquiring the inventor's signatures on an oath or declaration, which would lead to an increase in the number of petitions under § 1.47, as well as an increase in the number of oaths or declarations signed by the legal representatives of deceased inventors; and (5) the delayed submission of an oath or declaration would increase the number of certified copies of an application not having a copy of the executed oath or declaration (considered undesirable). Some comments suggested that the Office seek legislation to eliminate the oath requirement of 35 U.S.C. 115.

The reasons given for opposition to the proposed change to the time period for submission of the basic filing fee and English translation included arguments that: (1) A one-month period for submitting the basic filing fee or English translation is too short because applicants may not know the assigned application number within one month of the application filing date (*i.e.*, this period should be two or three months); (2) the period for submitting the basic filing fee or English translation should be tied to the mail date of the Filing Receipt; and (3) the public relies upon the current Notice to File Missing Parts of Application practice to inform applicants as to whether the filing fee and the oath or declaration has been received by the Office (*i.e.*, verify whether the Office has received the basic filing fee and oath or declaration), and to inform applicants of the period for reply for supplying the missing basic filing fee and/or oath or declaration.

Response: This notice does not propose changing §§ 1.52 and 1.53 to provide that: (1) An executed oath or declaration for a nonprovisional application would not be required until the expiration of a period that would be set in a ''Notice of Allowability'' (PTOL–37); or (2) the basic filing fee and an English translation (if necessary) for a nonprovisional application must be submitted within one month (plus any extensions under § 1.136) from the filing date of the application.

Limiting the Number of Claims in an Application (Topic 4)

The Office indicated in the Advance Notice that it was considering a change to § 1.75 to limit the number of total and independent claims that will be examined (at one time) in an application. The Office was specifically considering a change to the rules of practice to: (1) Limit the number of total claims that will be examined (at one time) in an application to forty; and (2) limit the number of independent claims that will be examined (at one time) in an application to six. In the event that an applicant presented more than forty total claims or six independent claims for examination at one time, the Office would withdraw the excess claims from consideration, and require the applicant to cancel the excess claims.

While the comments included sporadic support for this proposed change, the vast majority of comments included strong opposition to placing limits on the number of claims in an application. The reasons given for opposition to the proposed change included arguments that: (1) Decisions by the Court of Appeals for the Federal Circuit (Federal Circuit) leave such uncertainty as to how claims will be interpreted that additional claims are necessary to adequately protect the invention; (2) the applicant (and not the Office) should be permitted to decide how many claims are necessary to adequately protect the invention; (3) there are situations in which an applicant justifiably needs more than six independent and forty total claims to adequately protect an invention; (4) the proposed change exceeds the Commissioner's rule making authority; (5) the change will simply result in more continuing applications and is just a fee raising scheme; (6) the Office currently abuses restriction practice and this change will further that abuse; and (7) since only five percent of all applicants exceed the proposed claim ceiling, there is no problem. Several comments which opposed the proposed change offered the following alternatives: (1) Charge higher fees (or a surcharge) for applications containing an excessive number of claims; (2) charge fees for an application based upon what it costs (*e.g.*, number of claims, pages of specification, technology, IDS citations) to examine the application; and (3) credit examiners based upon the number of claims in the application. Several comments which indicated that the proposed change would be acceptable, placed the following conditions on that indication: (1) That a multiple dependent claim be treated as a single claim for counting against the cap; (2) that a multiple dependent claim be permitted to depend upon a multiple dependent claim; (3) that a Markush claim be treated as a single claim for counting

against the cap; (4) that any additional applications are taken up by the same examiner in the same time frame; (5) that allowed dependent claims rewritten in independent form do not count against the independent claim limit; (6) that the Office permit rejoinder of dependent claims upon allowance; and (7) that higher claim limits are used.

Response: This notice does not propose changing § 1.75 to place a limit on the number of claims that will be examined in a single application.

Refusing Information Disclosure Statement Consideration Under Certain Circumstances (Topic 10)

The Office indicated in the Advance Notice that it was considering revising § 1.98 to reserve the Office's authority to not consider submissions of an Information Disclosure Statement (IDS) in unduly burdensome circumstances, even where all the stated requirements of § 1.98 are met. The Office was specifically considering an amendment to § 1.98 to permit the Office to refuse consideration of an unduly burdensome IDS submission (*e.g.*, extremely large documents and compendiums), and give the applicant an opportunity to modify the submission to eliminate the burdensome aspect of the IDS.

While the proposal received support from a significant minority of the comments, the large majority of comments included strong opposition to the proposal to revise § 1.98. The reasons given for opposition to the proposed change included arguments that: (1) The term ''unduly burdensome'' is not defined objectively; thus, decisions as to whether a submission is too burdensome for consideration will be subjective; (2) without a clear definition of ''unduly burdensome'' (to provide a standard), the proposal would not pass the Administrative Procedure Act tests of scrutiny; (3) the Office will have to expend time and effort in deciding the petitions and defending, in court, its subjective decisions not to consider ''unduly burdensome'' IDSs (thus, the proposal will cost the Office time in the long run); (4) the proposal gives the examiner unlimited ability to not consider art submitted due to the ambiguous standard for refusal of an IDS submission coupled with the examiner's discretion to advance the status of the application to a point where the IDS would not be timely even though it is corrected; (5) the Office's refusal to examine unduly burdensome IDS submissions despite compliance with the rules (other than the burdensome aspect) would impose a huge financial and time burden upon applicants to fix what the examiner deems as unduly burdensome; (6) imposing this new financial and time burden would be contrary to the stated purpose of the Office to expedite prosecution and to relieve the burdens on the examination process; (7) burdensome IDS situations exist, and the Office should learn to deal with them as a service to its customers and in order to meet its mission of issuing valid patents (the Office cannot realistically ignore situations where the IDS documents cited are complex or lengthy, and nothing can be done about the complexity or length by applicant); (8) the burdensome IDS problem is not frequent and the rare unduly burdensome IDS submissions should be addressed on a case-by-case basis (thus, no rule change is needed); (9) no data has been presented to show the problem is wide-spread, and more facts are needed to show the extent and nature of the unduly burdensome IDS problem; (10) citations should not be discarded from the record where the unduly burdensome IDS has not been corrected since an original and only copy of the citation (which is submitted so the examiner can more fully appreciate the citation) may be very expensive or even impossible to replace; (11) reducing the size of a citation can make it less valuable, the submitted ''relevant portions'' (the partial citation) may be taken out-of-context of the entire citation, and the excerpt containing the relevant portion would not provide additional assistance to the examiner as to background, terminology, and alternative subject matter which may bear on the examination.

Response: This notice does not propose changing § 1.98 to reserve the Office's authority to not consider submissions of an IDS in unduly burdensome circumstances, even where all the stated requirements of § 1.98 are met.

Providing No Cause Suspension of Action (Topic 11)

The Office indicated that it was considering adding an additional suspension of action practice, under which an applicant may request deferred examination of an application without a showing of ''good and sufficient cause,'' and for an extended period of time, provided that the applicant waived the confidential status of the application under 35 U.S.C. 122, and agreed to publication of the application. The Office was specifically considering a procedure under which the applicant may (prior to the first Office action) request deferred examination for a period not to exceed three years, provided that: (1) The application is entitled to a filing date; (2) the filing fee has been paid; (3) any needed English-language translation of the application has been filed; and (4) all ''outstanding requirements'' have been satisfied (except that the oath or declaration need not be submitted if the names of all of the persons believed to be the inventors are identified).

The comments included support and opposition in roughly equal measure to the proposed extended suspension of action procedure. The reasons given for opposition to the proposal included arguments that: (1) The ''deferred examination'' of application under an extended suspension of action and the publication of an application under such suspension of action would create uncertainty over legal rights; and (2) the publication provisions of such a suspension of action procedure amount to an eighteen-month publication system that is not authorized by 35 U.S.C. 122.

Response: This notice does not propose changing § 1.103 to provide for extended suspension of action.

Providing for Presumptive Elections (Topic 14)

The Office indicated in the Advance Notice that it was considering a change to the restriction practice to eliminate the need for a written restriction requirement and express election in most restriction situations. The Office was specifically considering a change to the restriction practice to provide: (1) That if more than one independent and distinct invention is claimed in an application, the applicant is considered to have constructively elected the invention first presented in the claims; (2) for rejoinder of certain process claims in an application containing allowed product claims; and (3) for rejoinder of certain combination claims in an application containing allowed subcombination claims.

While some comments supported this proposed change, a large majority of comments opposed providing for presumptive elections. The reasons given for opposition to the proposed change included arguments that: (1) The commercially important invention may change (or is not known until) after the application is prepared and filed; (2) the change will increase cost of preparing an application since the order of claims must be carefully considered; (3) examiners aggressively apply restriction, and presumptive elections will increase the number of restrictions; and (4) the loss of the ability to contest improper restrictions prior to examination on the merits will lead to less likelihood of success in persuading

examiner to withdraw an improper restriction. Several comments which opposed the proposed change offered as an alternative that the Office adopt the PCT unity of invention standard in considering restriction. Several comments which indicated that the proposed change would be acceptable placed the following conditions on that indication: (1) That any presumptive election practice not apply to an election of species; and (2) that an election by presumption apply only if an attempted telephone restriction requirement is not successful.

Response: This notice does not propose changing § 1.141 *et seq.* to provide for a presumptive election. The Office is considering the impact of applying the ''unity of invention'' standard of the PCT, rather than the ''independent and distinct'' standard of 35 U.S.C. 121, in restriction practice. Nevertheless, this change to restriction practice, without a corresponding change to other patent fees, would have a negative impact on the Office's ability to obtain the necessary operating funding.

Requiring Identification of Broadening in a Reissue Application (Topic 16)

The Office indicated in the Advance Notice that it was considering a change to § 1.173 to require reissue applicants to identify all occurrences of broadening of the patent claims in a reissue application. As proposed, reissue applicants would have to point out all occurrences of broadening in the claims as an aid to examiners who should consider issues involving broadening relative to the two-year limit and the recapture doctrine.

While a few comments supported this proposed change, a large majority of comments strongly opposed the concept. A number of those commenting were wary of the consequences in court resulting from their failure to identify all issues of broadening in a reissue application. Several of the commenters expressed concerns that patent owners could have their patent claims put at risk in litigation if they unintentionally failed to identify all occurrences of broadening, which they feared could be a basis for charging patentees with inequitable conduct. Some were concerned about saddling applicants with yet another burden which more properly should be left with the Office and the examiner. Others felt that any unintentional omission of a broadening identification could raise problems for the practitioner, which problems are not offset by any increase in benefits derived by presenting this information to the Office.

Response: This notice does not propose changing § 1.173 to require an identification of all occurrences of broadening in reissue claims. In view of the comments received, the Office will continue to rely on the examiner to identify any occurrences of broadening during the examination of the reissue application, and not impose any additional burden on the reissue applicants. The Office does not wish to undo the benefits of the recently liberalized reissue oath/declaration requirements by proposing additional rule changes which may add burdens as well as possible unforeseen risks.

Creating Alternative Review Procedures for Applications Under Appeal (Topic 18)

The Office indicated in the Advance Notice that it was considering alternative review procedures to reduce the number of appeals forwarded to the Board of Patent Appeals and Interferences. The Office was specifically considering two alternative review procedures to reduce the number of appeals having to be forwarded to the Board of Patent Appeals and Interferences for decision. Both review procedures would have involved a review that would be available upon request and payment of a fee by the appellant, and would have involved review by at least one other Office official. The first review would have occurred after the filing of a notice of appeal but before the filing of an appeal brief and have involved a review of all rejections of a single claim being appealed to see whether any rejection plainly fails to establish a *prima facie* case of unpatentability. The second review would have occurred after the filing of an appeal brief and have involved a review of all rejections on appeal.

The comments were split between supporting and opposing the appeal review procedures under consideration. Most comments opposing the appeal review procedures under consideration supported the concept of screening the tenability of rejections in applications before they are forwarded to the Board of Patent Appeals and Interferences, but argued that: (1) The proposed appeal review amounts to quality control for which the applicant should not be required to pay (appeal fees should be raised if appropriate); (2) an appeal review is meaningless (only advisory) unless the decision is binding on the examiner; (3) the Board of Patent Appeals and Interferences may give undue deference to a rejection that has been through an appeal review; and (4) the proposed appeal review will delay ultimate review by the Board of Patent Appeals and Interferences. Several comments indicated that the proposed change would be acceptable, but included the following conditions with that indication: (1) That the applicant need not pay for either review; (2) that the reviewer be someone outside the normal chain of review for an application being forwarded to the Board of Patent Appeals and Interferences for decision; (3) that the reviewer be someone who has at least full signatory authority; (4) that the report gives a detailed explanation of the results of the appeal review (especially if a position is changed/application allowed); (5) that fees (appeal or appeal review) be refunded if the review results in the allowance of the application; (6) that the pre-brief review involve review of the application by more than one person; (7) that the pre-brief review also determine whether any *prima facie* case of unpatentability has been overcome; and (8) that the appeal process should be revised to model the German Patent Office.

Response: This notice does not propose changing § 1.191 *et seq.* to provide for appeal reviews. The Office intends to increase the use of the current appeal conference procedures as set forth in section 1208 of the Manual of Patent Examining Procedure (7th ed. 1998)(MPEP).

Reevaluating the Disclosure Document Program (Topic 20):

The Office indicated in the Advance Notice that it was reevaluating the Disclosure Document Program (DDP) because this program has been the subject of numerous abuses by so-called ''invention development companies'' resulting in complaints from individual inventors, and therefore may be *detrimental* to the interests of its customers. At the same time, the distinctly different provisional applications provide a viable alternate route whereby, for the basic small entity filing fee of $75 (§ 1.16(k)), a provisional application may be filed by a small entity. A provisional application does not require a claim in compliance with 35 U.S.C. 112, ¶ 2, or an inventor's oath under 35 U.S.C. 115. Although abandoned after one year, provisional applications are retained by the Office for at least twenty years, or longer if it is referenced in a patent. A provisional application is considered a constructive reduction to practice of an invention as of the filing date accorded the provisional application if it describes the invention in sufficient detail to enable a person of ordinary skill in the art to make and use the invention and

discloses the best mode known by the inventor for carrying out the invention. Unlike the DDP, a provisional application may be used under the Paris Convention to establish a priority date for foreign filing. In other words, except for adding the best mode requirement, the disclosure requirements for a provisional application are identical to the disclosure requirements for a Disclosure Document and a provisional application provides users with a filing date without starting the patent term period. Thus, almost any paper filed today as a proper Disclosure Document can now be filed as a provisional application with the necessary cover sheet.

For these reasons, the Office posed in the Advance Notice several questions directed to whether the DDP served a useful function. Only one comment presented evidence of a single instance where a disclosure document was used in conjunction with an interference, but this person was an extensive user of the DDP and cautioned that independent inventors fail to keep records of the date of their invention. The same commenter suggested that if the attorney signing the provisional application could also claim small entity status for his client, this would diminish the need for the DDP. This appears likely to be adopted since, contemporaneously with this proposal, under Topic 1 (relating to the simplification of the request for small entity status), it is being proposed that applicant or applicant's attorney may assert entitlement to small entity status. This proposal will make it easier for both attorneys or applicants to assert small entity status when filing provisional applications. See discussion of proposed changes to §§ 1.9, 1.27 and 1.28 relating to small entity status for further details.

Six commenters felt that the program should be eliminated because there is no value to applicants in light of the provisional application procedure. Some felt that the program creates a dangerous situation in that applicants may assume they are getting some type of patent protection or that the statutory bar provision in 35 U.S.C. 102(b) has been avoided. One commenter characterized the DDP as an ''unwitting vehicle and accomplice for fraud and delusion of small inventors by so-called ''invention development companies'', or self-delusions of independent inventors, who have been mailing thousands of these 'Disclosure Documents' to the PTO * * *.'' Another commenter, however, postulated that if the only difference between the DDP and provisional applications was the cost, then the cancellation of the DDP would only result in the abuse of the provisional patent applications at a higher cost to unsuspecting inventors.

Four commenters confused the DDP with defensive publications as their responses wrongfully indicated a belief that the DDP involved publication of the disclosures. One commenter suggested that before the program is eliminated that the Office should engage in an educational program (with a survey) to explain the questionable value of the program and alternative procedures available to the public. The commenter further stated that the education program should focus on those individuals who use the DDP and could include a survey of those individuals to determine the benefit to the public. A second commenter supported the concept of contacting the independent inventors. At least one other comment suggested that elimination might be detrimental to individual inventors.

Response: A review of the comments on this proposal reveals that the independent inventor community submitted only a few of the responses. The Office considers it inappropriate to proceed with this proposal in the absence of greater input from the independent inventor community. Therefore, this notice does not propose changes to the rules of practice concerning the Disclosure Document Program. The Office will continue to study the Disclosure Document Program and seek greater input from the independent inventor community before any further action is taken. In this regard, the matter will be referred to the Office of Independent Inventor Programs, headed by Director Donald Grant Kelly. The Office of Independent Inventor Programs was established on March 15, 1999. Reporting directly to the Commissioner, this new office was established to provide assistance to independent inventors, particularly in terms of improved communications, educational outreach, and Office-based support. In addition, the Office of Independent Inventor Programs will work to establish or strengthen cooperative efforts with the Federal Trade Commission, the Department of Justice, and various Bar Associations to address the growing problem of invention development company marketing scams.

Creating a Patent and Trademark Office Review Service for Applicant-Created Forms (Topic 21)

The Office indicated that it was considering establishing a new service, under which the Office would (for a fee) review applicant-created forms intended to be used for future correspondence to the Office. After the review is completed, the Office would provide a written report, including comments and suggestions (if any), but the Office would not formally ''approve'' any form. If a (reviewed) form is modified in view of a Office written report, comments and/or suggestion, the revised form could be resubmitted to the Office for a follow up review for an additional charge (roughly estimated at approximately $50). After a form has been reviewed and revised, as may be needed, to comply with the Office's written report, it would be acceptable for the form to indicate if it is a substitute for an Office form, and that it has been ''reviewed by the Patent and Trademark Office.''

The Office received few comments on this proposal. Of those comments received on this proposal, most supported this new service. The comments included the following specific concerns and suggestions: (1) That the form review service be optional and not mandatory; (2) that there be one fee per form, regardless of the number of submissions needed to have the form reviewed; (3) the service had little value unless the Office would be willing to approve a form; and (4) the time has come to require the use of mandatory forms.

Response: The Office indicated in the Advance Notice that this new service would involve significant start-up costs, and, absent positive feedback on the matter, the Office does not intend to implement this new service. See Changes to Implement the Patent Business Goals, 63 FR at 53530, 1215 Off. Gaz. Pat. Office at 117. In view of the limited interest shown by the comments in this new service, the Office has decided not to proceed with the proposal to provide a review service for applicant-created forms.

Discussion of Specific Rules

Title 37 of the Code of Federal Regulations, Parts 1, 3, 5, and 10, are proposed to be amended as follows:

Part 1

Section 1.4: Section 1.4(b) is proposed to be amended to refer to a patent or trademark application, patent file, trademark registration file, or other proceeding, rather than only an application file. Section 1.4(b) is also proposed to be amended to provide that the filing of duplicate copies of correspondence in a patent or trademark application, patent file, trademark registration file, or other proceeding should be avoided (except in situations in which the Office requires the filing of duplicate copies), and that the Office

may dispose of duplicate copies of correspondence in a patent or trademark application, patent file, trademark registration file, or other proceeding. Finally, § 1.4(b) and § 1.4(c) are also proposed to be amended to change ''should'' to ''must'' because the Office needs separate copies of papers directed to two or more files, or of papers dealing with different subjects.

Section 1.6: Section 1.6(d)(9) is proposed to be amended to delete the reference to recorded answers under § 1.684(c), as § 1.684(c) has been removed and reserved.

Section 1.9: Section 1.9(f) is proposed to be amended to provide the definition of who can qualify to pay small entity fees, and paragraphs (c) through (e) of § 1.9 are proposed to be removed and reserved.

Paragraph (f) of § 1.9 is proposed to: (1) Be reformatted, (2) define a ''person'' to include inventors and also noninventors holding rights in the invention, (3) explain that qualification depends on whether any rights in the invention were transferred and to whom, and (4) provide that a license by a person to the Government under certain situations does not bar entitlement to small entity status.

Section 1.9 paragraph (f) is proposed to be reformatted to place the subject matter relating to definitions of small entities: (1) Persons, (2) small business concerns; and (3) nonprofit organizations, in one paragraph rather than as currently in paragraphs (c) through (e). The expression ''independent inventor'' of current paragraph (c) is proposed to be replaced with the term ''person'' in paragraph (f)(1) (and other paragraphs of this section). The term ''person'' in paragraph (f) is proposed to be defined to include individuals who are inventors and also individuals who are not inventors but who have been transferred some right or rights in the invention. This would clarify that individuals who are not inventors but who have rights in the invention are covered by the provisions of §§ 1.9 and 1.27.

Paragraphs (f)(2)(i) and (f)(3)(i) of § 1.9 are proposed to be added to clarify that in order for small entity businesses and nonprofit organizations to remain entitled to small entity status, they must not in some manner transfer or be under an obligation to transfer any rights in the invention to any party that would not qualify for small entity status. Current § 1.27 paragraphs (b), (f)(1)(iii), and (f)(1)(iii) make clear that this rights transfer requirement applies to all parties (independent inventors, small businesses and nonprofit organizations, respectively). The absence of this requirement however, from current § 1.9 paragraphs (d) and (e) (small business and nonprofit organization, respectively), notwithstanding its presence in § 1.9 paragraph (c) (independent inventor), has lead to confusion as to the existence of such a requirement for small businesses and nonprofit organizations. In view of the appearance of the rights transfer requirement in § 1.9, it is proposed to be removed from all paragraphs of § 1.27.

Paragraph (f)(4)(i) of § 1.9 is proposed to be added to provide a new exception relating to the granting of a license to the U.S. Government by a person, that results from a particular rights determination. Such a license would not bar entitlement to small entity status. Similarly paragraph (f)(4)(ii) of § 1.9 is proposed to be added to have transferred to it (from current § 1.27 paragraphs (c)(2) and (d)(2)) the current exceptions relating to a licence to a Federal agency by a small business or a nonprofit organization resulting from a particular funding agreement. Again, such a license would not bar entitlement to small entity status.

For additional proposed changes to small entity requirements see §§ 1.27 and 1.28.

Section 1.9(i) is proposed to be added to define ''national security classified.'' Section 1.9(i), as proposed, defines ''national security classified'' as used in 37 CFR Chapter 1 as meaning ''specifically authorized under criteria established by an Act of Congress or Executive order to be kept secret in the interest of national defense or foreign policy and, in fact, properly classified pursuant to Act of Congress or Executive order.''

Section 1.12: Section 1.12(c)(1) is proposed to be amended to change the reference to the fee set forth in ''§§ 1.17(i)'' to the fee set forth in ''§ 1.17(h).'' This change is for consistency with the changes to § 1.17(h) and § 1.17(i). See discussion of changes to § 1.17(h) and § 1.17(i).

Section 1.14: Section 1.14 is proposed to be amended to make it easier to understand. Section 1.14 is also proposed to be amended to provide that the Office will no longer give status information or access in certain situations where applicants have an expectation of confidentiality.

Section 1.14(a) is proposed to be amended to define ''status information'' and ''access.'' ''Status information'' is proposed to be defined as information that the application is pending, abandoned, or patented, as well as the application numeric identifier. An application's numeric identifier is (a) the application number, or (b) the serial number and filing date, or date of entry into the national stage. If an international application has not been assigned a U.S. application number, no such application number can be provided by the Office.

Section 1.14 as proposed would also eliminate the provisions making available data on any continuing cases of an application identified in a patent. (The provisions of current § 1.14(a)(1)(ii) are proposed to be deleted.)

Section 1.14(b) is proposed to be amended to state when status information may be supplied, retaining the reasons set forth in current § 1.14(a)(1)(i). Section 1.14(b)(3) is proposed to be simplified so as to indicate that status information will be given for international applications in which the United States is designated, even if that application has not yet entered the national stage.

Section 1.14(c) is proposed to be amended to contain the provisions of current § 1.14(a)(2).

The provisions of current §§ 1.14(a)(3)(i), 1.14(a)(3)(iv)(C) and 1.14(a)(3)(iv)(D) are proposed to be deleted, and the remaining provisions of § 1.14(a)(3) are proposed to be separated into § 1.14(d) and 1.14(e).

Section 1.14(d), as proposed, substantially corresponds to current § 1.14(a)(3)(iii) with additional text from current § 1.14(e)(2). Section 1.14(d), as proposed, states that an applicant, an attorney or agent of record, or an applicant's assignee may have access to an application by filing a power to inspect. In addition, § 1.14(d), as proposed, provides that if an executed oath or declaration has not been filed, a registered attorney or agent named in the papers filed with the application may have access, or authorize another person to have access, to an application by filing a power to inspect. The form for a power to inspect is PTO/SB/67.

Section 1.14(e), as proposed, substantially corresponds to current § 1.14(a)(3) and states that any person may obtain access to an application by submitting a request for access if certain conditions apply. Access to international phase application files is governed by the provisions of the PCT and not by § 1.14. The form for a request for access to an abandoned application is PTO/SB/68. Section 1.14(e)(1), as proposed, corresponds to current § 1.14(a)(3)(ii). Section 1.14(e)(2)(i) corresponds to current § 1.14(a)(3)(iv)(A). Section 1.14(e)(2)(ii), as proposed, corresponds to current § 1.14(a)(3)(iv)(B).

Current § 1.14 (b), (c), (d), (f), and (g) are proposed to be redesignated § 1.14 (f), (g), (h), (i) and (j), respectively.

Current § 1.14(e) is proposed to be redesignated § 1.14(k) and to be amended to explain the requirements of a petition for access and include the provisions of current § 1.14(e)(1). Current § 1.14(e)(2) is proposed to be moved to proposed § 1.14(d).

Section 1.14(k) is also proposed to indicate that the Office may provide access or copies of an application if necessary to carry out an Act of Congress or if warranted by other special circumstances. The Office may, for example, provide access to, or copies of, applications to another federal government agency, such as a law enforcement agency, whether the Office is acting on its own initiative or in response to a petition from the other agency when access is needed for a criminal investigation. The Office may additionally provide access or copies without requiring the other federal agency to file a petition including a showing that access to the application is necessary to carry out an Act of Congress or that special circumstances exist which warrant petitioner being granted access to the application.

Section 1.17: Section 1.17(h) and § 1.17(i) are proposed to be amended to characterize the fee set forth in § 1.17(h) as a petition fee, and the fee set forth in § 1.17(i) as a processing fee. Section 1.17(h) is proposed to be amended to list only those matters that require the exercise of judgment or discretion in determining whether the request/petition will be granted or denied (*e.g.*, 1.47, 1.53, 1.182, 1.183, 1.313). Section 1.17(i) is proposed to be amended to list those matters that do not require the exercise of judgment or discretion, but which are routinely granted once the applicant has complied with the stated requirements (*e.g.*, 1.41, 1.48, 1.55). Thus, the Office proposes to amend § 1.17(h) and § 1.17(i) to locate matters requiring a petition in § 1.17(h), and those matters that do not require a petition, but only a processing fee, in § 1.17(i). Section 1.17(i) is also proposed to be amended to provide a processing fee for: (1) Filing a nonprovisional application in a language other than English (§ 1.52(d)), now in § 1.17(k); and (2) filing an oath or declaration pursuant to 35 U.S.C. 371(c)(4) naming an inventive entity different from the inventive entity set forth in the international stage (§ 1.497(d)).

Section 1.17(k) is proposed to be amended to provide a $200 fee for processing an application containing color drawings or photographs.

Section 1.17 (l) and (m) are proposed to be amended for clarity and to eliminate unassociated text.

Section 1.17(q) is proposed to be amended for consistency with § 1.17(h) and § 1.17(i), as the matters listed therein apply to provisional applications.

Section 1.17(t) is proposed to be added to provide a fee for filing a request for expedited examination under § 1.155(a).

Section 1.19: Section 1.19(a) is proposed to be amended to clarify that the fees set forth in § 1.19(a)(1) do not apply to patents containing a color photograph or drawing, that the fee in § 1.19(a)(2) applies to plant patents in color, and that the fee in § 1.19(a)(3) applies to patents (other than plant patents) containing a color drawing.

Section 1.19(b)(2) is proposed to be amended to provide a fee of $250 for a certified or uncertified copy of a patent-related file wrapper and contents of 400 or fewer pages, and an additional fee of $25 for each additional 100 pages or portion thereof. Due to increases in the number of pages in the contents of patent, patent application, and patent-related interference files, the Office is adjusting the fee specified in § 1.19(b)(2) to recover its cost of providing copies of these files. To better allocate costs, the Office is proposing to charge a ''flat'' rate of $250 for a copy of a patent-related file wrapper and contents of 400 or fewer pages (which includes most patent-related files), but charge an additional fee of $25 for each additional 100 pages or portion thereof to make persons requesting copies of patent-related files having contents containing a large number of pages (*e.g.*, interference proceedings) bear the cost of making copies of such files. Since the Office cannot ascertain the exact number of pages of the contents of a patent-related file, the Office expects to determine the additional fee in proposed § 1.19(b)(2)(ii) by estimating (*e.g.*, by measuring file thickness) rather than actually counting pages.

Section 1.19(h) is proposed to be removed. The $25 fee under § 1.19(h) for obtaining a corrected or duplicate filing receipt is no longer necessary as the Office is now performing that service without charge. Consequently, where a filing receipt has an error in it, applicants no longer need to provide a showing that the error was due to Office mistake or pay a $25 fee for the corrected receipt. See Changes In Practice In Supplying Certified Copies And Filing Receipts, Notice, 1199 Off. Gaz. Pat. Office 38 (June 10, 1997).

Section 1.22: Section 1.22(b) is proposed to be amended to change ''should'' to ''must'' because the Office needs fees to be submitted in such a manner that it is clear for which purpose the fees are paid. Section 1.22(b) is also proposed to be amended to provide that the Office may return fees that are not itemized as required by § 1.22(b), and that the provisions of § 1.5(a) do not apply to the resubmission of fees returned pursuant to § 1.22.

Section 1.22(c) is proposed to be added to define, based upon current Office practice, when a fee is considered paid. Section 1.22(c)(1)(i) is proposed to provide that a fee paid by an authorization to charge such fee to a deposit account containing sufficient funds to cover the applicable fee amount (§ 1.25) is considered paid on the date the paper for which the fee is payable is received in the Office (§ 1.6), if the paper including the deposit account charge authorization was filed prior to or concurrently with such paper. Section 1.22(c)(1)(ii) is proposed to provide that a fee paid by an authorization to charge such fee to a deposit account containing sufficient funds to cover the applicable fee amount (§ 1.25) is considered paid on the date the paper including the deposit account charge authorization is received in the Office (§ 1.6), if the deposit account charge authorization is filed after the filing of the paper for which the fee is payable. The provision of § 1.22(c)(1)(ii) would apply, for example, in the following situation: In reply to an Office action setting a three-month shortened statutory period for reply, a paper is filed three and one-half months after the mail date of the Office action without payment of the fee for a one-month extension of time. Thereafter, the applicant discovers the lack of payment and files a second paper including an authorization to charge the appropriate fee for any extension of time required, but the second paper is received in the Office (§ 1.6) four and one-half months from the mail date of the Office action. The fee required for the reply to the Office action to be timely is considered paid when the second paper was received (§ 1.6) in the Office. Section 1.22(c)(1)(iii) is proposed to provide that a fee paid by an authorization to charge such fee to a deposit account containing sufficient funds to cover the applicable fee amount (§ 1.25) is considered paid on the date of the agreement, if the deposit account charge authorization is the result of an agreement between the applicant and an Office employee as long as the agreement is reduced to a writing. That is, the fee is considered paid on the date of the agreement (*e.g.*,

the date of the interview), and the date the agreement is subsequently reduced to writing (*e.g.*, the mail date of the interview summary) is not relevant to the date the fee is considered paid.

Section 1.22(c)(2) is proposed to provide that a fee paid other than by an authorization to charge such fee to a deposit account is considered paid on the date the applicable fee amount is received in the Office (§ 1.6). Section 1.22(c)(3) is proposed to provide that the applicable fee amount is determined by the fee in effect on the date such fee is paid in full. When fees change (due to a CPI increase under 35 U.S.C. 41(f) or other legislative change), the Office generally accords fee payments the benefit of the provisions of § 1.8 vis-à-vis the applicable fee amount even though the fee is not considered paid until it is received in the Office (§ 1.6). See Revision of Patent Fees for Fiscal Year 1999, Final Rule Notice, 63 FR 67578, 67578–79 (December 8, 1998), 1217 Off. Gaz. Pat. Office 148, 148 (December 29, 1998). This treatment of fee payments is an ''exception'' to the provisions of § 1.22(c) as proposed, in that such fee would be not be entitled to any benefit under § 1.8 vis-à-vis the applicable fee amount but for the express exception provided in the fee change rulemaking. Of course, a fee is considered timely if the fee is submitted to the Office under the procedure set forth in § 1.8(a) (unless excluded under § 1.8(a)(2)), even though the fee is not considered paid until it is actually received in the Office (§ 1.6).

Section 1.25: Section 1.25(b) is proposed to be amended to provide that an authorization to charge fees under § 1.16 in an application submitted under § 1.494 or § 1.495 will be treated as an authorization to charge fees under § 1.492. There are many instances in which papers filed for the purpose of entering the national stage under 35 U.S.C. 371 and § 1.494 or § 1.495 include an authorization to charge fees under § 1.16 (rather than fees under § 1.492). In such instances, the Office treats the authorization as an authorization to charge fees under § 1.492 since: (1) Timely payment of the appropriate national fee under § 1.492 is necessary to avoid abandonment of the application as to the United States; and (2) the basic filing fee under § 1.16 is not applicable to such papers or applications. Therefore, the Office is proposing to change § 1.25(b) to place persons filing papers to enter the national stage under 35 U.S.C. 371 and § 1.494 or § 1.495 on notice as to how an authorization to charge fees under § 1.16 will be treated.

Section 1.25(b) is also proposed to be amended to provide that an authorization to charge fees set forth in § 1.18 to a deposit account is subject to the provisions of § 1.311(b).

Section 1.26: The Office is proposing to amend the rules of practice to provide that all requests for refund must be filed within specified time periods. The rules of practice do not (other than in the situation in which a request for refund is based upon subsequent entitlement to small entity status) set any time period (other than ''a reasonable time'') within which a request for refund must be filed. In the absence of such a time period, Office fee record keeping systems and business planning must account for the possibility that a request for refund may be filed at any time, including many years after payment of the fee at issue.

It is a severe burden on the Office to treat a request for refund filed years after payment of the fee at issue. Since Office fee record keeping systems change over time, the Office must check any system on which fees for the application, patent or trademark registration have been posted to determine what fees were in fact paid. In addition, changes in fee amounts, which usually occur on October 1 of each year, make it difficult to determine with certainty whether a fee paid years ago was the correct fee at the time and under the condition it was paid.

It also causes business planning problems to account for the possibility that a request for refund may be filed years after payment of the fee at issue. Without any set time period within which a request for refund must be filed, the Office must maintain fee records, in any automated fee record keeping system ever used by the Office, in perpetuity. Finally, as the Office can never be absolutely certain that a submitted fee was not paid by mistake or in excess of that required, the absence of such a time period subjects the Office to unending and uncertain financial obligations.

Accordingly, the Office is proposing to amend § 1.26 to provide non-extendable time periods within which any request for refund must be filed to be timely.

Section 1.26(a) is proposed to be amended by dividing its first sentence into two sentences. Section 1.26(a) is further amended for consistency with 35 U.S.C. 42(d) (''[t]he Commissioner may refund a fee paid by mistake or any amount paid in excess of that required''). Under 35 U.S.C. 42(d), the Office may refund: (1) a fee paid when no fee is required (a fee paid by mistake); or (2) any fee paid in excess of the amount of fee that is required. See Ex parte Grady, 59 USPQ 276, 277 (Comm'r Pats. 1943) (the statutory authorization for the refund of fees under the ''by mistake'' clause is applicable only to a mistake relating to the fee payment). In the situation in which an applicant or patentee takes an action ''by mistake'' (*e.g.*, files an application or maintains a patent in force ''by mistake''), the submission of fees required to take that action (*e.g.*, a filing fee submitted with such application or a maintenance fee submitted for such patent) is not a ''fee paid by mistake'' within the meaning of 35 U.S.C. 42(d). Section 1.26(a) is also proposed to be amended to revise the ''change of purpose'' provisions to read ''[a] change of purpose after the payment of a fee, as when a party desires to withdraw a patent or trademark filing for which the fee was paid, including an application, an appeal, or a request for an oral hearing, will not entitle a party to a refund of such fee.''

Section 1.26(a) is also proposed to be amended to change the sentence ''[a]mounts of twenty-five dollars or less will not be returned unless specifically requested within a reasonable time, nor will the payer be notified of such amount; amounts over twenty-five dollars may be returned by check or, if requested, by credit to a deposit account'' to ''[t]he Office will not refund amounts of twenty-five dollars or less unless a refund is specifically requested, and will not notify the payor of such amounts.'' Except as discussed below, the Office intends to continue to review submitted fees to determine that they have not been paid by mistake or in excess of that required, and to *sua sponte* refund fees (of amounts over twenty-five dollars) determined to have been paid by mistake or in excess of that required. Section 1.26(a), however, is proposed to be amended to eliminate language that appears to obligate the Office to *sua sponte* refund fees to be consistent with the provisions of § 1.26(b) which requires that any request for refund be filed within a specified time period.

Section 1.26(a) is also proposed to be amended to facilitate refunds by electronic funds transfer. Section 31001(x) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104–134, 110 Stat. 1321 (1996) (the Debt Collection Improvement Act of 1996), amended 31 U.S.C. 3332 to require that all disbursements by Federal agencies (subject to certain exceptions and waivers) be made by electronic funds transfer. The Department of the

Treasury has implemented this legislation at 31 CFR Part 208. See Management of Federal Agency Disbursements, Final Rule Notice, 63 FR 51489 (September 25, 1998). Thus, § 1.26(a) is proposed to be amended to enable the Office to obtain the banking information necessary for making refunds by electronic funds transfer in accordance with 31 U.S.C. 3332 and 31 CFR Part 208.

Specifically, § 1.26(a) is also proposed to be amended such that if a party paying a fee or requesting a refund does not instruct that refunds be credited to a deposit account, the Office will attempt to make any refund by electronic funds transfer. If such party does not provide the banking information necessary for making refunds by electronic funds transfer, the Commissioner may either require such banking information or use the banking information on the payment instrument to make a refund. This provision will authorize the Office to: (1) Use the banking information on the payment instrument (*e.g.*, a personal check is submitted to pay the fee) when making a refund due to an excess payment; or (2) require such banking information in other situations (*e.g.*, a refund is requested or a money order or certified bank check is submitted containing an excess payment). The purpose of this proposed change to § 1.26(a) is to encourage parties to submit the banking information necessary for making refunds by electronic funds transfer (if not on the payment instrument) up-front, and not to add a step (requiring such banking information) to the refund process. If it is not cost-effective to require the banking information necessary for making refunds by electronic funds transfer, the Office may simply issue any refund by treasury check. *See* 31 CFR 208.4(f).

Section 1.26(b) is proposed to be added to provide that any request for refund must be filed within two years from the date the fee was paid, except as otherwise provided in § 1.26(b) or in § 1.28(a). See the discussion of proposed § 1.22(c) concerning the date a fee is considered paid.

Section 1.26(b) is also proposed to provide that if the Office charges a deposit account by an amount other than an amount specifically indicated in an authorization (§ 1.25(b)), any request for refund based upon such charge must be filed within two years from the date of the deposit account statement indicating such charge, and that such request must be accompanied by a copy of that deposit account statement. This provision of § 1.26(b) would apply, for example, in the following types of situations: (1) A deposit account is charged for an extension of time as a result of there being a prior general authorization in the application (§ 1.136(a)(3)); or (2) a deposit account is charged for the outstanding balance of a fee as a result of an insufficient fee being submitted with an authorization to charge the deposit account for any additional fees that are due. In these situations, the party providing the authorization is not in a position to know the exact amount by which the deposit account will be charged until the date of the deposit account statement indicating the amount of the charge.

Finally, § 1.26(b) is proposed to provide that the time periods set forth in § 1.26(b) are not extendable.

Section 1.27: The Office is considering simplifying applicant's request for small entity status under § 1.27. The currently used small entity statement forms are proposed to be eliminated as they would no longer be needed. Some material in § 1.28 is proposed to be reorganized into § 1.27.

Small entity status would be established at any time by a simple assertion of entitlement to small entity status. The currently required statements, which include a formalistic reference to § 1.9, would no longer be required. Payment of an exact small entity basic filing or national fee would also be considered an assertion of small entity status. This would be so even if the wrong exact basic filing or national fee was selected. To establish small entity status after payment of the basic filing fee as a non-small entity, a written assertion of small entity status would be required to be submitted. The parties who could assert small entity status would be liberalized to include one of several inventors or a partial assignee.

Other clarifying changes are proposed to be made including a transfer of material into § 1.27 from § 1.28 drawn towards: (1) Assertions in related, continuing and reissue applications; (2) notification of loss of entitlement to small entity status; and (3) fraud on the Office in regard to establishing small entity status or paying small entity fees.

While there would be no change in the current requirement to make an investigation in order to determine entitlement to small entity status, a recitation would be added noting the need for a determination of entitlement prior to an assertion of status; the Office would only be changing the ease with which small entity status could be claimed once it has been determined that a claim to such status is appropriate.

For additional proposed changes to small entity requirements see §§ 1.9 and 1.28.

Problem and Background

Section 1.27 currently requires that a request for small entity status be accompanied by submission of an appropriate statement that the party seeking small entity status qualifies in accordance with § 1.9. Either a reference to § 1.9 or a specific statement relating to the provisions of § 1.9 is mandatory. For a small business, the small business must either state that exclusive rights remain with the small business, or if not, identify the party to which some rights have been transferred so that the party to which rights have been transferred can submit its own small entity statement (current § 1.27(c)(1)(iii)). This can lead to the submission of multiple small entity statements for each request for small entity status where rights in the invention are split. The request for small entity status and reference/statement may be submitted prior to paying, or, at the latest, at the time of paying, any small entity fee. In part, to ensure that at least the reference to § 1.9 is complied with, the Office has produced four types of small entity statement forms (including ones for the inventors, small businesses and non-profit organizations) that include the required reference to § 1.9 and specific statements as to exclusive rights in the invention. Where an application has not been assigned and there are multiple inventors, each inventor must actually sign a small entity statement, the execution of which must all be coordinated and submitted at the same time. Similarly, coordination of execution and submission of statements is needed where there is more than one assignee. Additionally, the statement forms relating to small businesses and non-profit organizations need to be signed by an appropriate official empowered to act on behalf of the small business or non-profit organization. Refunds of non-small entity fees can only be obtained if a refund is specifically requested within two months of the payment of the full (non-small entity) fee and is supported by all required small entity statements. *See* current § 1.28(a)(1). The current two-month refund window under § 1.28 is not extendable.

The rigid requirements of §§ 1.27 and 1.28 have led to a substantial number of problems. Applicants, particularly *pro se* applicants, do not always recognize that a particular reference to § 1.9 is required in their request to establish small entity status. They believe that all

they have to do is pay the small entity fee and state that they are a small entity. Further, the time required to ascertain who are the appropriate officials to sign the statement and to have the statements (referring to § 1.9) signed and collected (where more than one is necessary), results, in many instances, in having to pay the higher non-small entity fees and then seek a refund. These situations result in: (1) Small entity applicants also having to pay additional fees (*e.g.*, surcharges and extension(s) of time fees for the delayed submission of the small entity statement form); (2) additional correspondence with the office to perfect a claim for small entity status; and (3) the filing of petitions with petition fees to revive abandoned applications. This increases the pendency of the prosecution of the application in the Office and, in some cases, results in loss of patent term. For example, under current procedures, if a *pro se* applicant files a new application with small entity fees but without a small entity statement, the office mails a notice to the *pro se* applicant requiring the full basic filing fee of a non-small entity. Even if the applicant timely files a small entity statement, the applicant must still timely pay the small entity surcharge for the delayed submission of the small entity statement to avoid abandonment of the application. A second example is a non-profit organization paying the basic filing fee as a non-small entity because of difficulty in obtaining the non-profit small entity statement form signed by an appropriate official. In this situation, a refund pursuant to § 1.26, based on establishing status as a small entity, may only be obtained if a statement under § 1.27 and the request for a refund of the excess amount are filed within the non-extendable two-month period from the date of the timely payment of the full fee. A third example is an application filed without the basic filing fee on behalf of a small business by a practitioner who includes the standard authorization to pay additional fees. The Office will immediately charge the non-small entity basic filing fee without specific notification thereof at the time of the charge. By the time the deposit account statement is received and reviewed, the two-month period for refund may have expired.

Accordingly, a simpler procedure to establish small entity status would reduce processing time within the Office (Patent Business Goal 1) and would be a tremendous benefit to small entity applicants as it would eliminate the time-consuming and aggravating processing requirements that are mandated by the current rules. Thus, the proposed simplification would help small entity applicants to receive patents sooner with fewer expenditures in fees and resources and the office could issue the patent with fewer resources (Patent Business Goals 4 and 5).

Assertion as to Entitlement to Small Entity Status; Assertion by Writing

The Office is proposing to allow small entity status to be established by the submission of a simple written assertion of entitlement to small entity status. The current formal requirements of § 1.27, which include a reference to either § 1.9, or to the exclusive rights in the invention, would be eliminated.

The written assertion would not be required to be presented in any particular form. Written assertions of small entity status or references to small entity fees would be liberally interpreted to represent the required assertion. The written assertion could be made in any paper filed in or with the application and need be no more than a simple sentence or a box checked on an application transmittal letter or reply cover sheet. It is the intent of the Office to modify its application transmittal forms to provide for such a check box. Accordingly, small entity status could be established without submission of any of the current small entity statement forms (PTO/SB/09–12) that embody and comply with the current requirements of § 1.27 and which are now used to establish small entity status.

Assertion by Payment of Small Entity Basic Filing or National Fee

The payment of an exact small entity basic filing or national fee will also be considered to be a sufficient assertion of entitlement to small entity status. An applicant filing a patent application and paying an exact small entity basic filing or national fee would automatically establish small entity status for the application even without any further written assertion of small entity status. This is so even if an applicant were to inadvertently select the wrong type of small entity basic filing or national fee for the application being filed. If small entity status was not established when the basic filing fee was paid, such as by payment of a large entity basic filing or national fee, a later claim to small entity status would require a written assertion. Payment of a small entity fee other than a small entity basic filing or national fee (*e.g.*, extension of time, or issue fee) without inclusion of a written assertion would not be sufficient.

Even though applicants can assert small entity status by payment of an exact small entity basic filing or national fee, the Office strongly encourages applicants to file a written assertion of small entity status. A written assertion would guarantee the applicant that the application will have small entity status even if applicant fails to pay the exact small entity basic filing or national fee. The limited provision providing for small entity status by payment of an exact small entity basic filing or national fee is only intended to act as a safety net to avoid possible financial loss to inventors or small businesses that can qualify for small entity status.

Caution: Even though small entity status would be accorded where the wrong type of small entity basic filing fee or national fee were selected but the exact amount of the fee were paid, applicant would still need to pay the correct small entity amount for the basic filing or national fee where selection of the wrong type of fee results in a deficiency. While an accompanying *general* authorization to charge any additional fees would suffice to pay the balance due of the proper small entity basic filing or national fee, *specific* authorizations to charge fees under § 1.17 or extension of time fees would not suffice to pay any balance due of the proper small entity basic filing or national fee because they do not actually authorize payment of small entity amounts.

Examples: Applications under 35 U.S.C. 111: If an applicant were to file a utility application under 35 U.S.C. 111 yet only pay the exact small entity amount for a design application (currently the small entity filing fees for utility and design applications are $380 and $155, respectively), small entity status for the utility application would be accorded. See the following examples:

(1) Where the utility application was filed inadvertently with the exact small entity basic filing fee for a design application rather than for a utility application and an authorization to charge the filing fee was not present, the Office would accord small entity status and mail a Notice to File Missing Parts of Application, requiring the $225 difference between the small entity utility application filing fee owed and the small entity design application filing fee actually paid plus a small entity surcharge (of $65) for the late submission of the correct filing fee.

(2) Where the utility application was filed without any filing fee but the $155 exact small entity filing fee for a design application was inadvertently paid in response to a Notice to File Missing Parts of Application, small entity status would be established even though the correct small entity filing fee for a utility application was not fully paid. While the Office will notify applicant of the

remaining amount due, the period for reply to pay the correct small entity utility basic filing fee would, however, continue to run. Small entity extensions of time under § 1.136(a) would be needed for the later submission of the $225 difference between the $380 small entity utility basic filing fee owed and the $155 small entity design filing fee inadvertently paid. If there was an authorization to charge a deposit account in the response to the Notice, the $225 difference would have been charged along with the small entity $65 surcharge and the period for response to the Notice to File Missing Parts of Application would not continue to run.

Applications entering that national stage under 35 U.S.C. 371: Section 1.492(a) sets forth five (5) different basic national fee amounts which apply to different situations. If an applicant pays a basic national fee which is the exact small entity amount for one of the fees set forth in § 1.492(a), but not the particular fee which applies to that application, the applicant will be considered to have made an assertion of small entity status. This is true whether the fee paid is higher or lower than the actual fee required. See the following examples.

(1) An applicant pays $485 (the small entity amount due under § 1.492(a)(3), where the United States was neither the International Searching Authority (ISA) nor the International Preliminary Examining Authority (IPEA) and the search report was not prepared by the European Patent Office (EPO) or Japanese Patent Office (JPO)) when in fact the required small entity fee is $420 under § 1.492(a)(5), because the JPO or EPO prepared the search report. The applicant will be considered to have made the assertion of small entity status. The office will apply $420 to the payment of the basic national fee and refund the overpayment of $65.

(2) An applicant pays $420 (the small entity fee due under § 1.492(a)(5) where the search report was prepared by the EPO or JPO). In fact, the search report was prepared by the Australian Patent Office and no preliminary examination fee was paid to the Patent and Trademark Office. Thus, the required small entity fee is $485 under § 1.492(a)(3). The applicant will be considered to have made the assertion of small entity status. If the applicant has authorized payment of fee deficiencies to a deposit account, the Office will charge the $65 to the deposit account and apply it and the $420 to the basic national fee. If there is no authorization or there are insufficient fees in the deposit account, the basic national fee payment is insufficient. If the balance is not provided before 20 or 30 months from the priority date has expired, the application is abandoned.

If payment is attempted to be made of the proper type of basic filing or national fee, but it is not the exact small entity fee required (an incorrect fee amount is supplied) and a written assertion of small entity status is not present, small entity status would not be accorded. The Office would mail a notice of insufficient basic filing or national fee with a surcharge due as in current practice if an authorization to charge the basic filing or national fee were not present. The Office would not consider a basic filing or national fee submitted in an amount above the correct fee amount, but below the non-small entity fee amount, as a request to establish small entity status unless an additional written assertion is also present. Of course, the submission of a basic filing or national fee below the correct fee amount would not serve to establish small entity status.

Where an application is originally filed by a party, who is in fact a small entity, with an authorization to charge fees (including basic filing or national fees) and there is no indication (assertion) of entitlement to small entity status present, that authorization would not be sufficient to establish small entity status unless the authorization was specifically directed to *small entity* basic filing or national fees. The general authorization to charge fees would continue to be acted upon immediately and the full (not small entity) basic filing or national fees would be charged with applicant having three months to request a refund by asserting entitlement to small entity status. This would be so even if the application were a continuing application where small entity status had been established in the prior application.

Parties Who Could Assert Entitlement to Small Entity Status by Writing

The parties who could submit a written assertion of entitlement to small entity status would be any party permitted by Office regulations, § 1.33(b), to file a paper in an application. This eliminates the additional requirement of obtaining the signature of an appropriate party other than the party prosecuting the application. By way of example, in the case of three *pro se* inventors for a particular application, the three inventors upon filing the application could submit a written assertion of entitlement to small entity status and thereby establish small entity status for the application. For small business concerns and non-profit organizations, the practitioner could supply the assertion rather than the current requirement for an appropriate official of the organization to execute a small entity statement form. In addition, a written assertion of entitlement to small entity status would be able to be made by one of several inventors or a partial assignee. Current practice does not require an assignee asserting small entity status to submit a § 3.73(b) certification, and such certifications would not be required under the proposed revision either for partial assignees or for an assignee of the entire right, title, and interest.

Parties who Could Assert Entitlement to Small Entity Status by Payment of Basic Filing or National Fee

Where small entity status is sought by way of payment of the basic filing or national fee, any party may submit payment, such as by check, and small entity status would be accorded.

Inventors Asserting Small Entity Status

Any inventor would be permitted to submit a written assertion of small entity status, including inventors who are not officially named of record until an executed oath/declaration is submitted. *See* § 1.41(a)(1). Where an application is filed without an executed oath/declaration pursuant to § 1.53(f), the Office will accept the written assertion of an individual who has merely been identified as an inventor on filing of the application (*e.g.*, application transmittal letter) as opposed to being named as an inventor. Sections 1.4(d)(2) and 10.18(b) are seen as sufficient basis to permit any individual to provide a written assertion so long as the individual identifies himself or herself as an inventor. Where a § 1.63 oath or declaration is later filed, any original written assertion as to small entity status will remain unless changed by an appropriate party under § 1.27(f)(2). Where a later filed § 1.63 oath or declaration sets forth an inventive entity that does not include the person who initially was identified as an inventor and who asserted small entity status, small entity status will also remain. Where small entity status is asserted by payment of the small entity basic filing, or national fee any party may submit such fee, including an inventor who was not identified in the application transmittal letter, or a third party.

Caution: The fact that certain parties can execute a written assertion of entitlement to small entity status, such as one of several inventors, or a partial assignee, does not entitle that written assertion to be entered in the Official file record and become an effective paper unless the person submitting the paper is authorized to do so under § 1.33(b). In other words, the fact that one of several inventors can sign a written assertion of entitlement to small entity status does not also imply that the same inventor can submit the paper to the Office and have it entered of record.

The written assertion, even though effective once entered in the Official file record, must still be submitted by a party entitled to file a paper under § 1.33(b). Payment of the small entity basic filing or national stage fee would not be subject to such submission requirement and any payment thereof would be accepted and treated as an effective assertion of small entity status.

Policy Considerations

Office policy and procedures already permit establishment of small entity status in certain applications through simplified procedures. For example, small entity status may be established in a continuing or reissue application simply by payment of the small entity basic filing fee if the prior application/patent had small entity status. *See* current § 1.28(a)(2). The instant concept of payment of the small entity basic statutory filing fee to establish small entity status in a new application is merely a logical extension of that practice.

There may be some concern that elimination of the small entity statement forms will result in applicants who are not actually entitled to small entity status requesting such status. On balance, it seems that more errors occur where small entity applicants who are entitled to such status run afoul of procedural hurdles created by the requirements of § 1.27 than the requirements help to prevent status claims for those who are not in fact entitled to such status.

Continued Obligations for Thorough Investigation of Small Entity Status

Applicants should not confuse the fact that the Office is making it easier to qualify for small entity status with the need to do a complete and thorough investigation before an assertion is made that they do, in fact, qualify for small entity status. *It should be clearly understood that, even though it would be much easier to assert and thereby establish small entity status, applicants would continue to need to make a full and complete investigation of all facts and circumstances before making a determination of actual entitlement to small entity status. Where entitlement to small entity status is uncertain it should not be claimed.* See MPEP 509.03. The assertion of small entity status (even by mere payment of the exact small entity basic filing fee) is not appropriate until such an investigation has been completed. Thus, in the previous example of the three *pro se* inventors, before one of the inventors could pay the small entity basic filing or national fee to establish small entity status, the single inventor asserting entitlement to small entity status would need to check with the other two inventors to determine whether small entity status was appropriate.

The intent of § 1.27 is that the person making the assertion of entitlement to small entity status is the person in a position to know the facts about whether or not status as a small entity can be properly established. That person, thus, has a duty to investigate the circumstances surrounding entitlement to small entity status to the fullest extent. Therefore, while the Office is interested in making it easier to claim small entity status, it is important to note that small entity status must not be claimed unless the person or persons can unequivocally make the required self-certification. Section 1.27(g) would recite current provisions in § 1.28(d)(1) and (2) relating to fraud practiced on the Office.

Consistent with § 1.4(d)(2), the payment of a small entity basic filing or national fee, would constitute a certification under § 10.18(b). Thus, a simple payment of the small entity basic filing or national fee, without a specific written assertion, will activate the provisions of § 1.4(d)(2) and, by that, invoke the self-certification requirement set forth in § 10.18(b), regardless of whether the party is a practitioner or non-practitioner.

Clarification of Need for Investigation

Section 1.27 is proposed to be clarified (paragraph (e)) by explicitly providing that a determination ''should'' be made of entitlement to small entity status according to the requirement set forth in § 1.9 prior to asserting small entity status. The need for such a determination of entitlement to small entity status prior to assertion of small entity status is set forth in terms of that there ''should'' be such a determination, rather than there ''must'' be such a determination. In view of the ease with which small entity status would now be obtainable, it is deemed advisable to provide an explicit direction that a determination of entitlement to small entity status pursuant to § 1.9 be made before its assertion. Consideration was given to making the need for a determination a requirement rather than advisory; however, the decision was made to make it advisory, particularly in view of the following possible scenario: One of three inventors submits a written assertion of entitlement to small entity status without making any determination of entitlement to such status, such as by checking with the other two inventors to see if they have assigned any rights in the invention. Small entity status was proper at the time asserted notwithstanding the lack of a proper determination. If the determination is set forth as a requirement (''must''), the lack of such a determination might act to cause an unduly harsh result where small entity status was in fact appropriate and the failure to check prior to assertion was innocent. It is recognized that the use of ''should'' may cause concern that a cavalier approach to asserting entitlement to small entity status may be taken by encouraging some who are asserting status not to make a complete determination as the determination is not set forth as being mandatory. On balance, it is thought that the use of ''should'' would lead to more equitable results. The danger of encouraging the assertion of small entity status without a prior determination as to qualification for small entity status is thought to be small, because, should status turn out to be improper, the lack of a prior determination may result in a failure to meet the lack of deceptive intent requirements under § 1.27(g) or § 1.28(c). The Office has noted that any attempt to improperly establish status as a small entity will be viewed as a serious matter. *See* MPEP 509.03.

Removal of Status

Section 1.27 is also proposed to be clarified (paragraph (f)(2)) that once small entity status is established in an application, any change in status from small to large, would also require a specific written assertion to that extent, rather than only payment of a large entity fee, similar to current practice. For example, when paying the issue fee in an application that has previously been accorded small entity status and the required new determination of continued entitlement to small entity status reveals that status has been lost, applicant should not just simply pay the large issue fee or cross out the recitation of small entity status on the returned copy of the notice of allowance (PTOL–85(b)), but submit a separate paper requesting removal of small entity status pursuant to proposed § 1.27(f)(2).

Correction of any inadvertent and incorrect establishment of small entity status would be by way of a paper under proposed § 1.28(c) as in current practice.

Response to Comments

Many comments supported the proposal without qualification. Only two, however, explicitly mentioned the payment option for obtaining small entity status with one recognizing that any error is now easier to correct under § 1.28(c). Others would eliminate the possibility of obtaining small entity

status based on payment of the exact small entity basic filing (or national fee) due to possible error in paying an unintended small entity basic filing (or national fee) and being accorded an unwanted small entity status. There was only one total opposition to the proposal as a ''bad'' idea.

Comment: Several comments supported the proposal as a positive change that is both helpful to applicants and attorneys and one that will reduce the cost of establishing small entity status, particularly where there are multiple forms required due to joint ownership or licensing of multiple rights. It was noted that the proposal eliminates the time-consuming requirement for obtaining a signature of a person, such as an officer of the company, who may not have been involved in the application drafting process. It was also stated that the need to withhold the filing fee on filing an original application would be eliminated where the current small entity statement cannot be signed in time.

Response: The comments were adopted. The proposal from the Advance Notice is being carried forward in the instant notice. The particular parties who may assert entitlement to small entity status is being further liberalized over the Advance Notice to include only one of the inventors or a partial assignee.

Comment: One individual opposed the proposal because the submission of a paper is the only effective way an attorney can be certain that a client is complying with the requirements for small entity status. Eliminating the form removes the incentive of the client to provide the attorney with needed information, particularly with respect to foreign clients.

Response: A copy of §§ 1.9 and 1.27 can be supplied to a client as easily as the form and should be just as effective with foreign clients. It is not seen that the requirement of signing the form would be a more certain means that compliance exists than if the client would have to state to the attorney, either orally or in a letter, that the client complies with the requirements for asserting entitlement to small entity status. The form itself does not provide the underlying factual basis for entitlement to small entity status. It merely recites the requirement of § 1.9 and that the party executing it seeks small entity status. The attorney is not now required to confirm that a client is in compliance once the form is signed by the client and would not be required to make such confirmation under the proposal. It would continue to be up to the client to determine whether it wishes to assume whatever risk there may be should it decide to do the small entity determination by itself rather than rely on the attorney for aid.

Comment: A few comments would eliminate the option of asserting small entity status by payment of the basic filing (or national fee) due to possible errors in fee payments thereby obtaining unwanted small entity status. One comment recognized that the Office's adoption in the last rulemaking of a straightforward approach to correction under § 1.28(c) would make correction of improper status for good faith errors a simple procedure.

Response: The comment seeking elimination of the payment option is not adopted. The comment noting the previous easing of correction for good faith errors so that the possibility of inadvertent errors should not be a bar to the payment option is adopted. It is expected that this would occur very infrequently if at all in that the exact small entity amount must be submitted. Only errors in amounts paid where the error was the exact small entity amount for the basic filing (or national fee) would trigger small entity status. In view of the continued need for an affirmative determination of entitlement to small entity status to be made, the error would mostly occur by a misreading of a fee chart. Such type of error if it inadvertently leads to the establishment of small entity status would be easily correctable by the current § 1.28(c).

Comment: Some comments sought to ensure that the written assertion would be easy to make by adding a check box to provide for an assertion on: Office forms, the § 1.63 declaration, on the application, or on the transmittal sheet.

Response: The comments are adopted to the extent that this is an implementation issue to be addressed when a final rule is issued. The Office intends at this time to at least supply a check box on its application transmittal forms.

Paragraph by Paragraph Analysis

Section 1.27 is proposed to be amended in its title to recognize a new means of establishing small entity status by replacing ''statement'' with ''assertion,'' to indicate that an assertion of small entity status would permit the payment of small entity fees, and to reflect transfer of subject matter from § 1.28 relating to determination of entitlement to and notification of loss of entitlement to small entity status, and fraud on the Office.

Paragraphs (a) through (d) of § 1.27 is proposed to be reformatted and amended to recite ''assertion'' as a new means for establishing small entity status to replace ''statement'', and new paragraphs (e), (f)(1) and (f)(2), and (g) are proposed to be added.

Paragraph (b) of § 1.27 is proposed to be reformatted to add paragraphs (b)(1) through (b)(4) of § 1.27. Paragraph (b) (1) of § 1.27 would permit assertion of small entity status by a writing that is clearly identifiable as present ((b)(1)(i)), signed ((b)(1)(ii)), and convey the concept of small entity status without the need for specific words but with a clear indication of an intent to assert entitlement to small entity status ((b)(1)(iii)). Paragraph (b)(2) of § 1.27 would make submission of a written assertion to obtain small entity status easier in view of increased categories of parties who could submit such a paper. The parties who could sign the written assertion are identified as: one of the parties who can currently submit a paper under § 1.33(b) ((b)(2)(i) of § 1.27), at least one of the inventors ((b)(2)(ii) of § 1.27) rather than all the inventors (applicants) as required by § 1.33(b)(4) for other types of papers, or a partial assignee ((b)(2)(iii) of § 1.27) rather than all the partial assignees and any applicant retaining an interest as required by § 1.33(b)(3) for other types of papers. A § 3.73(b) certification would not be required for an assignee under either paragraphs (b)(2)(i) or (iii). Paragraph (b)(3) of § 1.27 would permit the payment, by any party, of an exact amount of one of the small entity basic filing or national fees set forth in § 1.16(a), (f), (g), (h), or (k), or § 1.492(a)(1) through (a)(5) to be treated as a written assertion of entitlement to small entity status even where an incorrect type of basic filing or national fee is inadvertently selected in error. Paragraph (b)(3)(i) would provide that where small entity status was accorded based on the payment of a wrong type of small entity basic filing or national fee, the correct small entity amount would still be owed. Paragraph (b)(3)(ii) would provide that payment of a small entity fee in its exact amount for a fee other than what is provided for in paragraph (b)(3) would not be sufficient to establish small entity status absent a concomitant written assertion of entitlement to small entity status. After a basic filing or national fee is paid as a large entity, a refund under § 1.28(a) of the large entity portion can only be obtained by establishing small entity status by a written assertion and not by paying a second basic filing or national fee in a small entity amount. Payment of a large entity basic filing or national fee precludes paying a second basic

filing or national fee in a small entity amount to establish small entity status. Paragraph (b)(4) of § 1.27 recites material transferred from current § 1.28(a)(2).

Paragraph (c) of § 1.27 is proposed to be amended to provide that fees other than the basic filing and national fees can only be paid in small entity amounts if submitted with or subsequent to a written assertion of entitlement to small entity status. The paragraph would clarify that an exception exists under § 1.28(a) for refunds of the large entity portion of a fee within three months of payment thereof if the refund request is accompanied by a written assertion of entitlement to small entity status.

Paragraph (d)(1) of § 1.27 is proposed to be amended to reference § 1.28(b) as the means of changing small entity status. It would be clarified that where rights in an invention are assigned, or there is an obligation to assign, to a small entity subsequent to an assertion of entitlement to small entity status, a second assertion is not required. Paragraph (d)(2) would clarify that once small entity status is withdrawn a new written assertion would be required to again obtain small entity status.

Paragraph (e) of § 1.27 is proposed to be added to clarify the need to do a determination of entitlement to small entity status prior to asserting small entity status, and that the Office generally does not question assertions of entitlement to small entity status.

Paragraph (f)(1) of § 1.27 is proposed to be added to contain material transferred from current § 1.28. Paragraph (f)(2) is proposed to be added to revise the current reference to the party who can sign a notification of loss of entitlement to small entity status to require a party identified in § 1.33(b).

Paragraph (g) of § 1.27 is proposed to be added to contain material transferred from paragraphs (d)(1) and (d)(2) of current § 1.28 relating to fraud attempted or committed on the Office in regard to paying small entity fees.

Section 1.28: Section 1.28 is proposed to be amended to be entirely reformatted with some material transferred to § 1.27.

Section 1.28(a) is proposed to be amended to allow a three-month period (presently a two-month period) for refunds based on later establishment of small entity status. See further discussion in § 1.28(b)(1).

Section 1.28(b)(1) is proposed to be amended to refer to § 1.22(c). Section 1.22(c) sets forth that the filing date for an authorization to charge fees starts the period for refunds under § 1.28(a). The current time period for a refund request is two months from payment of the full fee and the date of payment for refund purposes can vary depending on the means the applicant used to pay the required fee. For example, if the applicant paid the required fee by check, the date of payment is the date on which the fee paper, including the check, was filed in the Office. If the applicant authorized a charge to a deposit account, however, the date of payment is the date the Office debited the deposit account. In view of the proposed change in practice under §§ 1.22(c) and 1.28(b)(1) to accord the same date of payment for checks and authorizations to charge deposit accounts, the refund period would be extended to three months in order to in-part offset any shortening of the refund time period that may result in starting the time period from the filing date of the fee paper instead of the debit date for an authorization to charge a deposit account. Additionally, in view of changes in practice under § 1.27 to ease the claiming of small entity status, the need for refunds should diminish, and the different payment date of an authorization to charge a deposit account for small entity refund purposes should not cause much inconvenience to applicants.

Section 1.28(b)(2) is proposed to be amended to state that the deficiency amount owed under § 1.28(c) is calculated by using the date on which the deficiency was paid in full.

Section 1.28(c) is proposed to be amended to require that deficiency payments must be submitted separately for each file (§ 1.28(c)(1)) and must include the itemization of the deficiency payment by identifying: type of fee along with the current fee amount (§ 1.28(c)(2)(ii)(A)), the small entity amount paid and when (§ 1.28 (c)(2)((ii)(B)), the deficiency owed for each individual fee paid in error (§ 1.28(c)(2)(ii)(C)), the total deficiency payment owed (§ 1.28(c)(2)(ii)(D)), and that any failure to comply with the separate payment and itemization requirements would allow the Office at its option to charge a processing fee or set a non-extendable one month period for compliance to avoid return of the paper (§ 1.28(c)(3)).

Paragraph by Paragraph Analysis

The title of § 1.28 is proposed to be revised to focus on refunds and on how errors in status are excused in view of transfer of material to § 1.27.

Paragraphs (a)–(c) of § 1.28 are proposed to be reformatted.

Paragraph (a)(1) of § 1.28 is proposed to be amended as paragraph (a).

Paragraph (a) of § 1.28 is proposed to be amended to clarify that the period for a refund runs from payment of the ''full fee,'' and that it is the payment of the full fee that is considered the significant event relative to establishing status for a particular fee. Additionally, paragraph (a) would amend the time period for requesting a refund based upon later establishment of small entity status. The proposed time period would be three months measured from the filing date of the fee paper.

Paragraph (a)(2) of § 1.28 is proposed to be amended to have some subject matter transferred to § 1.27(b)(4). The next to last sentence, relating to filing a continuing or reissue application and referencing a small entity statement in the prior application or patent, would be deleted as unnecessary. The currently required reference to status in the prior application or patent would be replaced by the equally easily written assertion of § 1.27(b)(1). Written references to small entity status in a prior application, including submission of a copy of the small entity statement in a prior application, submitted in a continuing application subsequent to the effective date of any final rule, would be liberally construed under the proposed § 1.27(b)(1)(iii). Similarly, the last sentence of current paragraph (a)(2) would be deleted as the payment option for establishing small entity status in continuing or reissue applications has been expanded in § 1.27(b)(3) to include all applications.

Caution: Although the Office intends to liberally construe what is deemed to be an assertion of small entity status, the concept of entitlement must be clearly conveyed.

Example: A prior application has been accorded small entity status. A continued prosecution application (CPA) under § 1.53(d) is filed with a general authorization to charge fees that does not state that the fees to be charged are small entity fees. Even though the CPA contains the same application number as its prior application (and the small entity statement), it would not be accorded small entity status and large entity filing fees would be immediately charged. This would be so because a new determination of entitlement to small entity status must be made upon filing of a new application, such as a CPA. Accordingly, in filing the CPA there must be some affirmative act to indicate that the determination has been done anew and small entity status is still appropriate. Where a copy of the small entity statement from the prior application, or a written assertion in the CPA application transmittal letter, or an authorization to charge small entity fees were present, the result would be reversed and small entity status would be accorded the CPA application on filing.

Paragraph (a)(3) of § 1.28 is proposed to be amended to have its subject matter transferred to § 1.27(d)(1).

Paragraph (b) of § 1.28 is proposed to be amended to have its subject matter transferred to § 1.27(f)(1) and (2). New paragraphs (b)(1) and (b)(2) are proposed to be added. Paragraph (b)(1) of § 1.28 would refer to § 1.22(c) to define the date a fee is paid for the purpose of starting the three-month period for refund. Current practice for authorizations to charge deposit accounts is to give benefit of the date that the deposit account is actually debited by the Office, which is a later time than when the paper authorizing charge of the fee to a deposit account is filed with the Office. Current practice would therefore be changed so that it is the date the paper is filed, not the date of debit of the fee, that would start the three-month refund period. Paragraph (b)(2) of § 1.28 would refer to § 1.22(c) to define the date when a deficiency payment is paid in full, which is the date that determines the amount of deficiency that is due.

Example: A small entity issue fee has been paid in error in January and a paper under § 1.28(c) was submitted the following June with the deficiency payment. The deficiency payment of the issue fee was incorrectly determined so that the full amount owed (for the issue fee) was not submitted in June. If the mistake in the June payment is not discovered until the following November, the extra amount owed must be recalculated to take into account any October 1 increase in the issue fee.

Paragraph (c) of § 1.28 is proposed to be amended to recite that separate submissions, including separate payments and itemizations, are required for any deficiency payment. Paragraph (c)(1) would require that a deficiency paper/submission be limited to one application or patent file. Where, for example, the same set of facts has caused errors in payment in more than one application and/or patent file, a separate paper would need to be submitted in each file for which an error is to be excused. Paragraph (c)(2) would now require that for each fee that was erroneously paid in error the following itemization be provided: The particular fee (*e.g.*, basic filing fee, extension of time fee) (paragraph (c)(2)(ii)((A)), the small entity fee amount actually paid and when (for example, distinguishing between two one-month extension of time fees erroneously paid on two different dates) (paragraph (c)(2)(ii)(B)), the actual deficiency owed for each fee previously paid in error (paragraph (c)(2)(ii)(C)), and the total deficiency owed that is the sum of the individual deficiencies owed (paragraph (c)(2)(ii)(D)). Paragraph (c)(3) would address the failure to comply with the separate submission, including separate payment and itemization requirements of paragraph (c)(1) and (2) of this section. Paragraph (c)(3), upon failure to comply, would permit the Office at its option either to charge a processing fee (§ 1.17(i) would be suitably amended) to process the paper or require compliance within a one-month non-extendable time period to avoid return of the paper.

Paragraphs (d) (1) and (2) of § 1.28, are proposed to be amended to have the material relating to fraud attempted or committed on the Office as to paying of small entity fees, transferred to § 1.27(g). New paragraph (d) of § 1.28 is proposed to be added to clarify that any paper submitted under paragraph (c) of § 1.28 would also be treated as a notification of loss of small entity status under paragraph (f)(2) of § 1.27.

Section 1.33: Paragraph (a) of § 1.33 would be reformatted to create additional paragraphs (a)(1) and (a)(2) to separately identify the parties who can change a correspondence address depending upon the presence or absence of a § 1.63 oath/declaration. The revision is intended to make clear what may be a confusing practice to applicants as to which parties can set forth or change a correspondence address when an application does not yet have a § 1.63 oath or declaration by any of the inventors. See § 1.14(d)(4) for a similar change regarding status and access information. References to a § 1.63 oath/declaration are intended to mean an executed oath/declaration by any inventor, but not necessarily all the inventors.

Paragraph (a) of § 1.33 is proposed to be amended to provide that in a patent application the applicant must, either in an application data sheet (§ 1.76) or in a clearly identifiable manner elsewhere in any papers submitted with an application filing, specify a correspondence address to which the Office will send notices, letters and other communications in or about the application. It is now stated that where more than one correspondence address is specified, the Office would determine which one to establish as the correspondence address. This is intended to cover the situation where an unexecuted application is submitted with conflicting correspondence addresses in the application transmittal letter and in an unexecuted oath/declaration, or other similar situations.

Paragraph (a) of § 1.33 would request the submission of a daytime telephone number of the party to whom correspondence is to be addressed. While business is to be conducted on the written record, § 1.2, a daytime telephone number would be useful in initiating contact that could later be reduced to a writing. The phone number would be changeable by any party who could change the correspondence address.

Paragraph (a)(1) of § 1.33 would provide that any party filing the application and setting forth a correspondence address could later change the correspondence address provided that a § 1.63 oath/declaration by any of the inventors has not been submitted. The parties who may so change the correspondence address would include only the one inventor filing the application even if more than one inventor was identified on the application transmittal letter. If two of three inventors filed the application, the two inventors filing the application would be needed to change the correspondence address. Additionally, any registered practitioner named in the application transmittal letter, or a person who has the authority to act on behalf of the party that will be the assignee (if the application was filed by the party that will be the assignee), could change the correspondence address. A registered practitioner named in a letterhead would not be sufficient, but rather a clear identification of the individual as being a representative would be required. The intent is to permit a company (to whom the invention has been assigned, or to whom there is an obligation to assign the invention) who files an application, to designate the correspondence address, and to change the correspondence address, until such time as a (first) § 1.63 oath/declaration is filed. The mere filing of a § 1.63 oath/declaration, that does not include a correspondence address, including when the company is only a potential partial assignee would not affect any correspondence address previously established on filing of the application, or changed per paragraph (a)(1) of this section. The expression ''party that will be the assignee'' rather than assignee is used in that until a declaration is submitted, inventors have only been identified and any attempted assignment, or partial assignment, cannot operate for Office purposes until the declaration is supplied. Hence, the mere identification of a party as a party that will be an assignee or assignee would be sufficient for it to change the correspondence address without resort to § 3.73(b).

Paragraph (a)(2) of § 1.33 would retain the current requirements for changing a correspondence address when a § 1.63 oath/declaration by any of the inventors has been filed. Where a correspondence address was set forth or changed pursuant to paragraph (a)(1) (prior to the

filing of a § 1.63 oath or declaration), that correspondence address remains in effect upon filing of a § 1.63 declaration and can then only be changed pursuant to paragraph (a)(2).

Paragraph (b) of § 1.33 would be simplified to make it easier to understand who are appropriate parties to file papers, particularly in view of the proposed change under § 3.71(b).

Paragraph (b)(3) of § 1.33 is proposed to be amended to add a reference to § 3.71.

Section 1.41: Section 1.41(a)(1) is proposed to be amended to indicate that a paper including the processing fee set forth in § 1.17(i) is required for supplying or changing the name(s) of the inventor(s) where an oath or declaration prescribed in § 1.63 is not filed during pendency of a nonprovisional application, rather than a petition including a petition fee, for consistency with the proposed amendment to § 1.17(i). Section 1.41(a)(2) is proposed to be amended to indicate that a paper including the processing fee set forth in § 1.17(q) is required for supplying or changing the name(s) of the inventor(s) where a cover sheet prescribed by § 1.53(c)(1) is not filed during the pendency of a provisional application, rather than a petition including a petition fee, for consistency with the proposed amendment to § 1.17(q). Section 1.41(a)(3) is proposed to be amended to delete the language concerning an alphanumeric identifier, and to provide that the name, residence, and citizenship of each person believed to be an actual inventor should be provided when the application papers pursuant to § 1.53(b) are filed without an oath or declaration or application papers pursuant to § 1.53(c) are filed without a cover sheet. Section 1.41(a)(4) is proposed to be added to set forth that the inventors who submitted an application under § 1.494 or § 1.495 are the inventors in the international application designating the United States.

Section 1.44: Section 1.44 is proposed to be removed and reserved to eliminate the requirement that proof of the power or authority of the legal representative be recorded in the Office or filed in an application under §§ 1.42 or 1.43.

Section 1.47: Section 1.47 is proposed to be amended to refer to ''the fee set forth in § 1.17(h)'' for consistency with the proposed amendment to § 1.17(h) and (i). See discussion of the proposed amendment to § 1.17. Section 1.47 is also proposed to be amended to add a new paragraph (c) providing that the Office will send notice of the filing of the application to all inventors who have not joined in the application at the address(es) provided in the petition under § 1.47, and will publish notice of the filing of the application in the *Official Gazette.* This provision is currently included in each of § 1.47(a) and § 1.47(b). Section 1.47(c) is also proposed to provide that the Office may dispense with such notice provisions in a continuation or divisional application where notice regarding the filing of the prior application has already been sent to the nonsigning inventor(s). The patent statute gives the Office great latitude as to the notice that must be given to an inventor who has not joined in an application for patent. *See* 35 U.S.C. 116, ¶2 (''after such notice to the omitted inventor as [the Commissioner] prescribes''), and 118 (upon such notice to [the inventor] as the Commissioner deems sufficient''). Providing notice to a non-joined inventor in a continuation or divisional application places a significant burden on the Office, especially when such continuation or divisional application is filed using a copy of the oath or declaration from a prior application under § 1.63(d). In addition, providing additional notice to the non-joined inventor in the continuation or divisional application provides little (if any) actual benefit to the non-joined inventor, as identical notice was previously given during the processing of the prior application. Thus, the Office considers it appropriate to dispense with notice under § 1.47 in situations (continuations or divisionals of an application accorded status under § 1.47) in which the non-joined inventor was previously given such notice in a prior application.

Section 1.48: Section 1.48 is proposed to be amended to have the title revised to reference the statutory basis for the rule, 35 U.S.C. 116.

Section 1.48 paragraphs (a) through (c) are proposed to be amended to: delete the recitation of ''other than a reissue application'' as such words are unnecessary in view of the indication in the title of the section that the section does not apply to reissue applications and the revision to paragraph (a) (discussed below), to change ''When'' to ''If,'' and to add ''nonprovisional'' before ''application'' where it does not already appear.

Sections 1.48 paragraphs (a)(1) through (e)(1) would be revised to replace the reference to a ''petition'' with a reference to a ''request.'' What is meant to be encompassed by the term ''petition,'' as it is currently used in the section, may be better defined by the term ''request.'' The presence of ''petition'' currently in the section is misleading to the extent that it may indicate to applicants that papers under this section have to be filed with the Office of Petitions when in fact amendments to correct the inventorship under § 1.48 are to be decided by the primary examiners in the Technology Centers and should be submitted there. *See* MPEP 1002.02(e). The requirements for a statement currently in § 1.48 paragraphs (a)(1), (c)(1), and (e)(1) would be placed in § 1.48 paragraphs (a)(2), (c)(2), and (e)(2) and corresponding changes made in subsequent paragraphs.

Section 1.48 paragraphs (b) and (d) are proposed to be revised to indicate that a request to correct the inventorship thereunder must be signed by a party as set forth in § 1.33(b) (which would enable a practitioner alone to sign all the needed papers). The inventors, whether being added, deleted or retained, are not required to participate in a correction under these paragraphs. Thus, the inventor(s) to be deleted pursuant to paragraph (b) in a nonprovisional application, or added pursuant to paragraph (d) in a provisional application, and those inventors that are retained in either situation, are not required to participate in the inventorship correction, such as by signing a statement of facts, or a new oath or declaration under § 1.63.

Section 1.48 paragraphs (a) through (e) are proposed to be revised to define the fee required as a ''processing'' fee, to delete the reference to a ''petition,'' and to indicate that amendment of the application to correct the inventorship would require the filing of a request to correct the inventorship along with other items, as set forth in the respective paragraphs of this section. The latter change is not one of substance but a clarification that the amendment requirement of the statute, 35 U.S.C. 116, merely refers to the change in Office records (face of the application file wrapper corrected, notation on a previously submitted § 1.63 oath/declaration, change in Patent Application Location and Monitoring (PALM) data, and a corrected filing receipt issued) that would be made upon the grant of a § 1.48 request. Thus, amendment of the inventorship in an application is not made as an amendment under § 1.121. Where there is a need to make an actual § 1.121(a)(1) amendment, such as when a cover page of the specification recites the inventive entity, that should also be submitted. In the absence of such an amendment, the Office may, at its option, correct the inventor's names on the cover sheet or in the specification. Where an application needs correction of inventorship under § 1.48 and a paper is

submitted with a title that does not set forth the paper as a request under § 1.48, but it is clear from the papers submitted that an inventorship correction is desired, a request for a correction of inventorship under § 1.48 will be inferred from the papers submitted and will be treated under § 1.48.

A request for a corrected filing receipt correcting a typing or office error in the names of the inventors will not ordinarily be treated under § 1.48. Any request to correct inventorship should be presented as a separate paper. For example, placing a request under § 1.48(b) to correct the inventorship in the remarks section of an amendment may cause the Office to overlook the request and not act on it.

Paragraph (f)(1) of § 1.48 is proposed to be clarified to recite that its provision for changing the inventorship only applies if an oath or declaration under § 1.63 has not been submitted by any of the inventors, and that submission of an oath or declaration under § 1.63 by any of the inventors is sufficient to correct an earlier identification of the inventorship.

Example 1: An unexecuted application is filed identifying A, B, and C as the inventors. A § 1.63 declaration is also submitted signed only by A and naming A, B, and C as the inventors. To complete the application (§ 1.53(f)) a § 1.63 oath or declaration by B and C is needed. In attempting to reply to a Notice to File Missing Parts of Application requiring the missing oath or declaration by B and C it is discovered that D is also an inventor. A declaration by A, B, C, and D if submitted without a petition under § 1.48(a) to correct the inventorship to A–D from A–C will not be accepted as a reply to the Notice to File Missing Parts of Application.

Thus, it should be clear that a first oath or declaration under § 1.63 completed by less than all the inventors initially identified, when the oath or declaration is submitted when the application is filed (or after), will under § 1.48(f)(1) lock in the inventorship, and the later filing of another declaration by a different but complete inventive entity will not be effective under § 1.48(f)(1) to correct the inventorship.

Example 2: An application is filed identifying A, B, and C as the inventors in the application transmittal letter, and a § 1.63 declaration is concomitantly submitted only by A naming only A as the sole inventor. The inventorship of the application is A (because of the declaration of A). A later submitted § 1.63 declaration by A, B, and C would require a petition under § 1.48(a) to correct the inventorship to A, B, and C before the declaration by A, B, and C could be accepted.

Paragraph (f)(1) of § 1.48 is proposed to be amended to reference § 1.497(d) for submission of an executed oath or declaration naming an inventive entity different from the inventive entity set forth in the international stage when entering the national stage under 35 U.S.C. 371 and §§ 1.494 or 1.495.

Section 1.48(h) is proposed to be added to indicate that the provisions of this section do not apply to reissue applications, and referencing §§ 1.171 and 1.175 for correction of inventorship in reissue applications.

Section 1.48(i) is proposed to be added to reference §§ 1.324 and 1.634 for corrections of inventorship in patents and interference proceedings, respectively.

Section 1.48 paragraphs (a) through (i) are proposed to have titles added to make locating the appropriate paragraph easier.

Section 1.51: Section 1.51(b) is proposed to be amended to include a reference to § 1.53(d), as a proper continued prosecution application under § 1.53(d) in which the basic filing fee has been paid is a complete application under § 1.51(b).

Section 1.52: Section 1.52(a) and (b) are proposed to be amended to clarify the paper standard requirements for papers submitted as part of the record of a patent application. Section 1.52(a) sets forth the paper standard requirements for all papers which are to become a part of the permanent records of the Office, and § 1.52(b) sets forth the paper standard requirements for the application (specification, including the claims, drawings, and oath or declaration) and any amendments or corrections to the application. Papers making up the application or an amendment or correction to the application must meet the requirements of § 1.52 (a) and (b), but papers submitted for the record that do not make up the application (*e.g.*, a declaration under § 1.132) need not meet the requirements of § 1.52(b).

The Office is proposing in § 1.52(b)(6) an optional procedure for numbering the paragraphs of the specification, but not including the claims or the abstract. Although not required to do so, applicants would be strongly encouraged to present, at the time of filing, each paragraph of the specification as individually and consecutively numbered. The presentation of numbered paragraphs at the time of filing would facilitate the entry of amendments (in compliance with proposed § 1.121) during the prosecution of the application. If the paragraphs of the specification are not numbered at the time of filing, applicants would be urged, when the first response to an Office action is submitted, to supply a substitute specification including numbered paragraphs, consistent with the requirement of § 1.121 for amending the specification. Thereafter, amendments would be made through the use of numbered paragraph replacement.

The proposal to include paragraph numbering is to provide a consistent and uniform basis for the amendment practice being proposed in § 1.121 and as an aid to transitioning into total electronic filing. The proposed rule language establishes a procedure for numbering the paragraphs of the specification at the time of filing. This procedure would facilitate the entry of amendments by providing a uniform method for identifying paragraphs in the specification, thus overcoming any differences created by word processor formatting and pagination variations. Concurrently proposed changes to § 1.121 for amendment practice would additionally require the submission of clean copies of numbered replacement paragraphs, which would eliminate much of the red ink associated with hand entry of amendments and expedite the Optical Character Recognition (OCR) scanning and reading employed in the patent printing process, ultimately resulting in patents containing fewer errors.

The Office will neither number the paragraphs or sections of the specification, nor accept any instructions from applicants to do the same.

The proposed procedure for paragraph numbering, in the interest of uniformity, encourages applicants to use four digit Arabic numerals enclosed within square brackets and including leading zeroes as the first element of the paragraph. The numbers and brackets should be highlighted in bold (*e.g.*, [0001], [0002]), and should appear as the first part of the paragraph immediately to the right of the left margin. Approximately four character spaces should follow the bracketed number before the beginning of the actual text of the paragraph. Paragraph (or section) headers, such as ''Description of the Invention'' or ''Example 3,'' are not considered part of any paragraph and should not be numbered. Nontext elements, such as tables, mathematical formulae, etc., are considered part of the paragraph around or above the element, and should not be numbered separately. All portions of any nontext elements should be kept from extending to the left margin.

Response to Comments: Although paragraph numbering (as it appears in proposed § 1.52) was not an independent topic in the Advance Notice, the proposal did appear in conjunction with the replacement

paragraph concept as part of Topic 13. While there was some opposition to paragraph numbering in the comments received relative to Topic 13 as being burdensome and inconsistent with the requirements of other countries, the Office proposes to move forward with this concept as the most effective plan currently under consideration for identifying paragraphs of the specification. The JPO and EPO have already begun to use paragraph numbering in their application and publication processing.

Some of the comments received in response to Topic 13 suggested identification of paragraphs by page and line number. Inasmuch as the Office proposal must be consistent with future electronic requirements, this suggestion of identification by page and line number could not be adopted in that fixed pages do not exist in documents created on a computer. Page and line numbering are affected by font size, line spacing and formatting and can vary between different hardware and software components. Once each paragraph has been individually identified and tagged with a number, however, all future processing of the application, whether by paper or electronic version, may be done uniformly and accurately by both the Office and the applicant.

Section 1.52(b)(7) is proposed to be added to provide that if papers submitted as part of the application do not comply with § 1.52 (b)(1) through (b)(5), the Office may require the applicant to provide substitute papers that comply with § 1.52(b)(1) through (b)(5), or the Office may convert the papers submitted by applicant into papers that do comply with § 1.52(b)(1) through (b)(5) and charge the applicant for the costs incurred by the Office in doing so (§ 1.21(j)).

Section 1.52(c) is proposed to be amended to provide that: (1) Alterations to the application papers must (rather than ''should'') be made before the oath or declaration is signed; (2) a substitute specification (§ 1.125) is required if the application papers do not comply with § 1.52(a) and (b) due to interlineations, erasures, cancellations or other alterations of the application papers; and (3) if an oath or declaration is a copy of the oath or declaration from a prior application, the application for which such copy is submitted may contain alterations that do not introduce matter that would have been new matter in the prior application.

Section 1.52(d) is proposed to be amended to provide separately for nonprovisional applications and provisional applications filed in a language other than English. Section 1.52(d)(1) is proposed to be added to provide that: (1) If a nonprovisional application is filed in a language other than English, an English language translation of the non-English-language application, a statement that the translation is accurate, and the processing fee set forth in § 1.17(i) are required; and (2) if these items are not filed with the application, applicant will be notified and given a period of time within which they must be filed in order to avoid abandonment. Section 1.52(d)(2) is proposed to be added to provide that: (1) If a provisional application is filed in a language other than English, an English language translation of the non-English-language provisional application will not be required in the provisional application; but (2) if a nonprovisional application claims the benefit of such provisional application, an English-language translation of the non-English-language provisional application and a statement that the translation is accurate must be supplied if the nonprovisional application is involved in an interference (§ 1.630), or when specifically required by the examiner.

Section 1.53: Section 1.53(c)(1) is proposed to be amended to clearly provide that the cover sheet required by § 1.51(c)(1) may be an application data sheet (§ 1.76).

Section 1.53(c)(2) is proposed to be amended for clarity and to refer to ''the processing fee set forth in § 1.17(q)'' for consistency with the proposed amendment to § 1.17(q).

Section 1.53(d)(4) is proposed to be amended to eliminate the reference to a petition under § 1.48 for consistency with the proposed amendment to § 1.48. Section 1.53(d) is also proposed to be amended to add a new § 1.53(d)(10) to provide a reference to § 1.103(b) for requesting a limited suspension of action in a continued prosecution application (CPA) under § 1.53(d).

Section 1.53(e)(2) is proposed to be amended to require that a petition under § 1.53(e) be accompanied by the fee set forth in § 1.17(h), regardless of whether the application is filed under § 1.53(b), § 1.53(c), or § 1.53(d). While provisional applications filed under § 1.53(c) are not subject to examination under 35 U.S.C. 131 (35 U.S.C. 111(b)(8)), petitions under § 1.53(e) in provisional applications under § 1.53(c) are as burdensome as petitions under § 1.53(e) in nonprovisional applications under § 1.53(b) or § 1.53(d). Therefore, it is appropriate to charge the petition fee set forth in § 1.17(h) for petitions under § 1.53(e) in applications filed under § 1.53(b), § 1.53(c), or § 1.53(d).

Section 1.53(f) and (g) are proposed to be amended for clarity and to include a reference to ''or reissue'' in the paragraph heading to clarify that the provisions of § 1.53(f) apply to all nonprovisional applications, which include continuation, divisional, and continuation-in-part applications, as well as reissue applications and continued prosecution applications. Section 1.53(f) is also proposed to be amended to provide that if applicant does not pay one of either the basic filing fee or the processing and retention fee set forth in § 1.21(l) during the pendency of the application (rather than within one year of the mailing of a Notice to File Missing Parts of Application), the Office may dispose of the application.

Section 1.55: Section 1.55(a) is proposed to be amended to refer to ''the processing fee set forth in § 1.17(i)'' for consistency with the proposed amendment to § 1.17(h) and (i). See discussion of the proposed amendment to § 1.17.

Section 1.55(a)(2)(i) through (iii) is proposed to clarify the current Office practice concerning when the claim for priority and the certified copy of the foreign application specified in 35 U.S.C. 119(b) must be filed. Specifically § 1.55(a)(2)(i) clarifies current Office practice that in an application filed under 35 U.S.C. 111(a) that the Office requires the claim for priority and the certified copy of the foreign application be filed before a patent is granted. Section 1.55(a)(2)(ii) clarifies current Office practice that in an application that entered the national stage of an international application after compliance with 35 U.S.C. 371, the time limits set in the PCT and the Regulations under the PCT control the time limit for making the claim for priority, while the certified copy of the foreign application must be filed before the patent is granted if the certified copy was not filed in accordance with the PCT and the Regulation under the PCT. Section 1.55(a)(2)(iii) clarifies current Office practice that the Office may require both the claim for priority and certified copy of the foreign application be filed at an earlier time than in §§ 1.55(a)(2)(i) or 1.55(a)(2)(ii) under certain circumstances.

Section 1.55(a)(2)(iv) is also proposed to provide that priority claims and documents may be submitted after payment of the issue fee but with no further review by the Office other than placement in the application file. Changes to the patent printing process will dramatically reduce the period between the date of issue fee payment and the date a patent is issued. See

Filing of Continuing Applications, Amendments, or Petitions after Payment of Issue Fee, Notice, 1221 Off. Gaz. Pat. Office 14 (April 6, 1999); and Patents to Issue More Quickly After Issue Fee Payment, Notice, 1220 Off. Gaz. Pat. Office 42 (March 9, 1999). Thus, it is now difficult for the Office to match a petition containing a priority claim or certified priority document filed after payment of the issue fee with an application file, and determine whether the applicant has met the conditions of 35 U.S.C. 119(a)–(d) to make the priority claim, before the date the application will issue as a patent. Nevertheless, it is also undesirable to prohibit applicants from filing a priority claim or certified priority document between the date the issue fee is paid and the date a patent is issued. Therefore, the Office will permit applicants to file a priority claim or certified priority document (with the processing fee set forth in § 1.17(i)) between the date the issue fee is paid and the date a patent is issued. The Office will, however, merely place such submission in the application file but will not attempt to determine whether the applicant has met the conditions of 35 U.S.C. 119(a)–(d) to make the priority claim nor include the priority claim information in the text of the patent. In such a situation (as is currently the situation when a petition under § 1.55 is granted), the patent will not contain the priority claim information, and the patentee may request a certificate of correction under 35 U.S.C. 255 and § 1.323 at which point a determination of entitlement for such priority will be made.

Section 1.56: Section 1.56 is proposed to be amended to add a new § 1.56(e) to provide that in any continuation-in-part application, the duty under § 1.56 includes the duty to disclose to the Office all information known to the person to be material to patentability which became available between the filing date of the prior application and the national or PCT international filing date of the continuation-in-part application. Section 1.63(e) currently requires that the oath or declaration in a continuation-in-part application acknowledge that the duty under § 1.56 includes the duty to disclose to the Office all information known to the person to be material to patentability (as defined in § 1.56(b)) which became available between the filing date of the prior application and the national or PCT international filing date of the continuation-in-part application. Thus, the examiner must object to an oath or declaration in a continuation-in-part that does not contain this statement. By amending § 1.56 to expressly provide that the duty under § 1.56 includes this duty, an acknowledgment of the duty of disclosure under § 1.56 is an acknowledgment of this duty in a continuation-in-part application, and an express statement to that effect in the oath or declaration will no longer be required.

Section 1.59: Section 1.59 is proposed to be amended to refer ''the fee set forth in § 1.17(h)'' for consistency with the proposed amendment to § 1.17(h) and (i). See discussion of the proposed amendment to § 1.17.

Section 1.63: Section 1.63 is proposed to be amended for clarity and simplicity. Section 1.63(a) is proposed to be amended to set forth the oath or declaration requirements that are requirements of 35 U.S.C. 115 (and thus cannot be waived by the Office pursuant to § 1.183). Specifically, § 1.63(a) is proposed to be amended to provide that an oath or declaration filed under § 1.51(b)(2) as a part of a nonprovisional application must: (1) Be executed (*i.e.*, signed) in accordance with either § 1.66 or § 1.68; (2) identify each inventor and country of citizenship of each inventor; and (3) state that the person making the oath or declaration believes the named inventor or inventors to be the original and first inventor or inventors of the subject matter which is claimed and for which a patent is sought.

Section 1.63(b) is proposed to be amended to provide that in addition to meeting the requirements of § 1.63(a), the oath or declaration must also: (1) Identify the application to which it is directed; (2) state that the person making the oath or declaration has reviewed and understands the contents of the application, including the claims, as amended by any amendment specifically referred to in the oath or declaration; and (3) state that the person making the oath or declaration acknowledges the duty to disclose to the Office all information known to the person to be material to patentability as defined in § 1.56. These requirements are currently located at § 1.63(a)(2), (b)(1), and (b)(3).

Section 1.63(c) is proposed to provide that an applicant may provide identifying information either in an application data sheet (§ 1.76) or in the oath or declaration. Permitting applicants to provide such identifying information in an application data sheet (rather than in the oath or declaration) should result in: (1) An increase in the use of application data sheets; and (2) a decrease in the need for supplemental oaths or declarations (providing omitted information) for applications in which an application data sheet was submitted.

Section 1.63(e) is proposed to be amended to eliminate the requirement that an oath or declaration in a continuation-in-part application state that the person making the oath or declaration also acknowledge that the duty under § 1.56 includes the duty to disclose to the Office all information known to the person to be material to patentability (as defined in § 1.56(b)) which became available between the filing date of the prior application and the national or PCT international filing date of the continuation-in-part application. See discussion of the proposed amendment to § 1.56(e).

Section 1.64: Section 1.64 is proposed to be amended to also refer to any supplemental oath or declaration (§ 1.67). In addition, § 1.64(b) is proposed to be amended to provide that if the person making the oath or declaration is the legal representative, the oath or declaration shall state that the person is the legal representative and shall also state the citizenship, residence and mailing address of the legal representative.

Section 1.67: Section 1.67(a) is proposed to be amended to also refer to § 1.162, and to provide that if the earlier-filed oath or declaration complied with § 1.63(a), the Office may permit the supplemental oath or declaration to be made by fewer than all of the inventors or by an applicant other than the inventor.

Section 1.67(c) is proposed to be deleted as unnecessary because it simply reiterates other provisions of the rules of practice. If the application was altered after the oath or declaration was signed (except as permitted by § 1.52(c)), § 1.52(c) requires a supplemental oath or declaration under § 1.67. If the oath or declaration was signed in blank (while incomplete), without review thereof by the person making the oath or declaration, or without review of the specification, including the claims, the oath or declaration does not meet the requirements of § 1.63. In this situation, § 1.67(a) requires a supplemental oath or declaration.

Section 1.72: Section 1.72(a) is proposed to be amended to state ''[u]nless the title is supplied in an application data sheet (§ 1.76)'' to clarify that the title is not requested to be a heading on the first page of the specification if supplied in an application data sheet. Section 1.72(b) is proposed to be amended to provide that ''[t]he abstract in an application filed under 35 U.S.C. 111 may not exceed 150

words in length'' to harmonize with PCT guidelines.

Section 1.76: A new § 1.76 is proposed to be added to provide for the inclusion of an application data sheet in an application. Section 1.76(a) is proposed to: (1) Explain that an application data sheet is a sheet or set of sheets containing bibliographic information concerning the associated patent application, which is arranged in a specified format; and (2) when an application data sheet is provided, the application data sheet becomes part of the application. While the use of an application data sheet is optional, the Office would prefer its use to help facilitate the machine reading of this important information. Entry of the information in this manner is more timely and accurate than the current practice of presenting the information on numerous other documents. Applicants benefit from the use of application data sheets by being provided with more accurate and timely filing receipts, by reducing the time required to collect bibliographic information and by having such information printed on the granted patents. The applicant also benefits by receiving an official notice of the receipt of papers from the Office at an earlier stage of the processing.

Section 1.76(b) is proposed to provide that bibliographic data as used in § 1.76(a) includes: (1) applicant information; (2) correspondence information; (3) specified application information; (4) representative information; (5) domestic priority information; and (6) foreign priority information. Section 1.76(b) as proposed also reminds applicants that the citizenship of each inventor must be provided in the oath or declaration under § 1.63 (as is required by 35 U.S.C. 115) even if this information is provided in the application data sheet.

Applicant information includes the name, residence, mailing address, and citizenship of each applicant (§ 1.41(b)). The name of each applicant must include the family name, and at least one given name without abbreviation together with any other given name or initial. If the applicant is not an inventor, this information also includes the applicant's authority (§§ 1.42, 1.43 and 1.47) to apply for the patent on behalf of the inventor.

Correspondence information includes the correspondence address, which may be indicated by reference to a customer number, to which correspondence is to be directed (*see* § 1.33(a)).

Application information includes the title of the invention, the total number of drawing sheets, whether the drawings are formal, any docket number assigned to the application, the type (*e.g.*, utility, plant, design, reissue utility, provisional) of application. Application information also indicates whether the application discloses any significant part of the subject matter of an application under a secrecy order pursuant to § 5.2 of this chapter (*see* § 5.2(c)).

Representative information includes the registration number of each practitioner, or the customer number, appointed with a power of attorney or authorization of agent in the application. Section 1.76(b)(4) is proposed to state that providing this information in the application data sheet does not constitute a power of attorney or authorization of agent in the application (*see* § 1.34(b)). This is because the Office does not expect the application data sheet to be executed (signed) by the party (applicant or assignee) who may appoint a power of attorney or authorization of agent in the application.

Domestic priority information includes the application number (series code and serial number), the filing date, the status (including patent number if available), and relationship of each application for which a benefit is claimed under 35 U.S.C. 119(e), 120, 121, or 365(c). Providing this information in the application data sheet constitutes the specific reference required by 35 U.S.C. 119(e) or 120. While the rules of practice (§ 1.78(a)(2) or § 1.78(a)(4)) require that this claim or specific reference be in the first line of the specification the patent statute requires that a claim to the benefit of (specific reference to) a provisional (35 U.S.C. 119(e)(1)) or nonprovisional (35 U.S.C. 120) be in the application. Since the application data sheet (if provided) is considered part of the application, the specific reference to an earlier filed provisional or nonprovisional application in the application data sheet meets the ''specific reference'' requirement of 35 U.S.C. 119(e)(1) or 120.

Foreign priority information includes the application number, country, and filing date of each foreign application for which priority is claimed, as well as any foreign application having a filing date before that of the application for which priority is claimed. Providing this information in the application data sheet constitutes the claim for priority as required by 35 U.S.C. 119(b) and § 1.55(a). The patent statute (35 U.S.C. 119(b)) does not require that a claim to the benefit of a prior foreign application take any particular form.

Section 1.76(c) as proposed indicates that inconsistencies between the information in the application data sheet (if provided) and the oath or declaration under § 1.63 will be resolved in favor of the application data sheet. This is because the application data sheet (and not the oath or declaration) is intended as the means by which applicants will provide information to the Office. Section 1.76(c) is also proposed to provide that a supplemental application data sheet may be submitted to correct or update information provided in a previous application data sheet.

Section 1.77: Section 1.77(a) is proposed to be separated into sections 1.77(a) and 1.77(b). New § 1.77(a) would list the order of the papers in a utility patent application, including the proposed application data sheet (*see* § 1.76). New § 1.77(b) would list the order of the sections in the specification of a utility patent application. Current § 1.77(b) is proposed to be redesignated 1.77(c).

Section 1.78: Section 1.78(a)(2) is proposed to be amended to provide that the specification must contain or be amended to contain a specific reference required by 35 U.S.C. 120 in the first sentence following the title, unless the reference is included in an application data sheet. Section 1.78(a)(4) is proposed to be amended to provide that the specification must contain or be amended to contain a specific reference required by 35 U.S.C. 119(e)(1) in the first sentence following the title, unless the reference is included in an application data sheet. See discussion of proposed § 1.76(b)(5).

Section 1.78(c) is proposed to be amended for consistency with § 1.110 and for clarity.

Section 1.84: Section 1.84 is proposed to be amended to delete some requirements that are more stringent than the requirements of the PCT, while retaining the provisions related to acceptance of color drawings/photographs which are, at this time, more lenient.

The Office is proposing to delete the petition requirements in § 1.84(a)(2) and § 1.84(b)(1) and the requirement for three copies of black and white photographs. This change would make § 1.84 consistent with current Office practice. See Interim Waiver of 37 CFR § 1.84(b)(1) for Petitions to Accept Black and White Photographs and Advance Notice of Change to M.P.E.P. § 608.02, Notice, 1213 Off. Gaz. Pat. Office 108 (August 4, 1998); and Interim Waiver of 37 CFR 1.84(b)(1) for Petitions to Accept Black and White Photographs Filed with only One Set of Photographs, Notice,

1211 Off. Gaz. Pat. Office 34 (June 9, 1998). In addition, paragraphs (d), (h), (i), (j), (k)(1) and (3), (m), (n), (p), (r), (s), and (x) of § 1.84 are proposed to be deleted for simplification. These paragraphs describe characteristics of patent drawings which are desirable because they assist in clearly communicating the disclosed invention, but which are not necessary for the reproduction of drawings. The requirements set forth in paragraphs (d), (h), (i), (j), (k)(l) and (3), (m), (n), (p), (r), (s), and (x) of § 1.84 will continue to be described in the MPEP and/or publications such as the Guide for the Preparation of Patent Drawings.

Section 1.84(g) is proposed to be changed to 1.84(f). In addition, the dimensions of sight on 21.6 cm by 27.9 cm (8½ by 11 inch) drawing sheets are proposed to be changed 17.0 cm by 24.4 cm (6¾ by 9⅝ inches) to standardize the sight with that for A4 paper.

In Topic 5 of the Advance Notice the Office proposed to harmonize patent drawing standards with those of the PCT. The Office received a number of comments. The majority of the comments welcomed a single standard for patent drawings in PCT and United States patent applications so long as applicants do not lose their ability to file color drawings/photographs or to use 8½ by 11 paper. Some expressed confusion about the exact requirements of the PCT and its regulations. Furthermore, many commented that drawing standards should be enforced in the same manner, and that drawings should not be objected to in the national stage if they were not objected to in the international stage. In this vein, several argued that only the patent examiners should be allowed to review the patent drawings. If the examiners could understand the invention from the drawings, no draftsperson should be permitted to make ''petty objections'' unrelated to how well the invention is disclosed in the drawings. On the other hand, several people commented that the standards for PCT applications are too low, since many PCT applications are published with illegible drawings or drawings that do not adequately communicate the invention. Several observed that the PCT rules do not permit color drawings or photographs and stated that the requirements of the two systems should be the same. Others observed that the PCT rules essentially require formal drawings on filing, which is contrary to U.S. practice, and argued that such a policy would be unnecessarily expensive to applicants.

Careful consideration of the comments and the business practice of drawing review has led the Office to conclude that, in general, drawings should only be objected to by the Office if they cannot be reproduced or there is an error in the drawings. The Office should accept drawings that would be acceptable under the PCT rules, but should not copy PCT rules solely for the sake of uniformity. A proper application of a low standard for drawing review will result in fewer drawings being objected to and fewer corrected or formal drawings being filed after allowance of a patent application. This should reduce delays during the printing cycle (during which time the Office waits for corrected or formal drawings to be filed). Applicants who submit informal drawings on filing will be unlikely to encounter a draftsperson's objection because few drawings will fail to meet the reduced standards. Any formal drawings filed after allowance which were not required by the Office, however, are unlikely to be included in the printed patent because the printing process will have begun before payment of the issue fee and the formal drawings are unlikely to catch up to the application file in time to be included in the printed patent.

Patents printed with high quality drawings look better and should be easier to understand. Applicants interested in having their patents printed with good quality drawings should be motivated by their own interests to submit good quality drawings. However, the Office should not spend resources to insist upon high-quality drawings when lesser quality drawings would suffice to communicate the invention and to meet the printer's requirements. Accordingly, if applicants submit drawings which are of inferior quality, but acceptable to the Office, applicants should not be surprised when a patent issues with those very same drawings.

Section 1.84 is also proposed to provide for a fee for processing and printing patents with color drawings or photographs in color rather than in black and white. The petition fee set forth in § 1.84(a)(2)(i) is proposed to be deleted and a fee commensurate with the Office costs of handling and printing color photographs will be charged instead.

Many comments were received welcoming printing of patents in color, and stating that applicants would be willing to pay any required fees for their patent to be printed in color.

When filing international applications under the PCT, applicants must remember to consult the PCT and its regulations regarding requirements of drawings, especially the provisions related to amendment or correction of drawings. While color drawings are permitted in U.S. patent applications, submission of color drawings in international applications is not permitted and may cause difficulties in international processing which cannot be overcome. Black and white drawings submitted after the international filing date to overcome objections to color drawings may be refused if they do not comply with the requirements of PCT Rule 91.1, which could result in significant loss to applicants.

Section 1.85: Section 1.85 is proposed to be amended to make the period for filing corrected or formal drawings in response to a Notice of Allowability a non-extendable period.

In Topic 7 of the Advance Notice the Office proposed to reduce the time for filing corrected or formal drawings after the mailing date of the ''Notice of Allowability'' from three months to one month. In response, many comments were received which explained that one month was too short of a period of time in which to make the necessary changes to the drawings. In addition, many stated that having two different time periods running against the applicant makes docketing of the required replies too complicated. Several comments received indicated that corrected or formal drawings should be required at the same time as the issue fee, with no opportunity for the drawings to be filed later. Others indicated that, while one month was too short of a period of time, two months would be adequate.

After consideration of the comments and the Office's business goal of decreasing cycle time for all inventions, the Office is proposing to amend § 1.85(c) to provide that corrected or formal drawings must be filed within three months of the date of mailing of the ''Notice of Allowability'' requiring such drawings, and that no extensions of time under § 1.136(a) or (b) will be permitted. Refusing to permit an extension of time when formal or corrected drawings cannot be filed within the three-month period and sufficient cause exists for an extension may appear to be harsh. A strong policy is considered necessary, however, to ensure that the drawings are filed within the set period. The Office has also considered that many applicants are in the habit of filing formal or corrected drawings with an extension of time and may, out of habit and ignorance of the rule change, continue to do so. These applicants will have to file a petition to revive under § 1.137(b) as the failure to timely file any formal drawings that were required will cause the application to go abandoned.

The Office is taking positive steps to make it easier for applicants to submit drawings which will be approved. See the changes proposed in § 1.84. Thus, the instances where formal drawings will be required when the case is allowable will be reduced as more drawings will be approved as submitted.

If the amendment to § 1.85 is adopted, the time period for filing any required supplemental oath or declaration in compliance with § 1.63 will be set to be the same non-extendable time period of three months from the date of mailing of the Notice of Allowability requiring the supplemental oath or declaration.

Section 1.91: Section 1.91(a)(3)(i) is proposed to be amended to refer to ''[t]he fee set forth in § 1.17(h)'' for consistency with the changes to § 1.17(h) and § 1.17(i). See discussion of changes to § 1.17(h) and § 1.17(i).

Section 1.96: The Office indicated in the Advance Notice that the submission of computer program listings on microfiche placed a burden on applicants and the Office, and that it was considering changes to § 1.96 to permit machine readable computer program listings to be submitted on electronic media in lieu of microfiche. See Changes to Implement the Patent Business Goals, 63 FR at 53510–12, 1215 Off. Gaz. Pat. Office at 99–100.

Section 1.96 is proposed to be amended to provide for voluminous program listings to be submitted on archival electronic media instead of microfiche. Section 1.96(b) is proposed to be amended to limit computer program listings that may be submitted as drawings or part of the specification to computer program listings that are contained on one sheet.

Under § 1.96 as proposed, any computer program listing may, and any computer program listing that would be contained on more than one sheet must, be submitted as a computer program listing appendix pursuant to § 1.96(c) (subject to the ''transitional'' practice discussed below).

Section 1.96(c) is specifically proposed to provide that a ''computer program listing appendix'' be submitted on a Compact Disk-Read Only Memory (CD–ROM) or Compact Disk-Recordable (CD–R). A CD–ROM is the only practical electronic medium of archival quality under the current standards of the National Archives and Records Administration (NARA). *See* 36 CFR 1228.188(c) and (d) and 1234.30. The Office considers CD–R to be an electronic medium having an archival quality equivalent to the archival quality of CD–ROM. The information so submitted will be considered a ''computer program listing appendix'' (rather than a microfiche appendix). Section 1.96(c) will continue to require a reference at the beginning of the specification as itemized in § 1.77(b)(4). As with a microfiche appendix, the contents of the ''computer program listing appendix'' on a CD–ROM or CD–R will not be printed with the published patent, but will be available at the Office on a medium to be specified by the Office. The contents of a ''computer program listing appendix'' on a CD–ROM or CD–R may not be amended pursuant to § 1.121, but must be submitted on a substitute CD–ROM or CD–R. Section 1.96(c) does not apply to international applications filed in the United States Receiving Office.

Section 1.96(c)(1) is proposed to provide that the availability of the computer program will be directly analogous to that of the microfiche. The Office will make the contents available for inspection, for example at electronic workstations in the Public Search Room. If needed, multiple CD–ROMs or CD–Rs may be used for the submissions pertaining to a single patent application, but each application with an electronic medium appendix must be supplied with its own copy of the medium or media. Section 1.96(c)(2) is proposed to provide submission requirements that refer to the relevant NARA standards in 36 CFR Part 1228 for submissions of Government electronic records to NARA. Section 1.96(c)(2) is also proposed to provide that a CD–ROM or CD–R ''computer program listing appendix'' must be labeled with the following information: (1) The name of each inventor (if known); (2) title of the invention; and (3) the docket number used by the person filing the application to identify the application (if applicable).

Even after adoption of this proposed change to § 1.96, the Office will continue to accept a computer program listing that complies with current § 1.96 (*i.e.*, a computer program listing contained on ten or fewer sheets as drawings or part of the specification, or a ''computer program listing appendix'' on microfiche) for some period of time (*e.g.*, two years) that will be specified in any final rule notice adopting this proposed change to § 1.96. Should these provisions be adopted, conforming changes may be made in the regulations to accommodate international applications in the national stage.

Comments: The comments (almost without exception) were supportive of this proposal. Comments specifically indicated that this proposal was ''long overdue,'' and that the proposal should include provisional applications and other technologies including chemical and manufacturing processes requiring precise computer control. The comments provided advice including the concepts of safeguarding the information from alteration, of making the public access and examiner access easy, and of assuring the submissions are readable. The only negative comment was an expression of disbelief that the Office was equipped to handle electronic media submissions.

Response: The Office is proposing changes to § 1.96 to provide for voluminous program listings to be submitted on archival electronic media instead of microfiche. The effective date of the proposed change will be linked to the development and deployment of electronic systems at the Office to capture, store and retrieve information submitted on archival electronic media in a manner to assure the integrity and authenticity of the information, and provide its display as needed for the Office, the patentee (and applicants), and the public.

The proposed change to § 1.96 and § 1.821 *et seq.* (discussed below) contemplated for computer program listings and sequence listings would eliminate the need for submissions of hard to handle and reproduce microfiche computer program listings and voluminous paper sequence listings. To focus specifically on the Office's difficult paper handling problem, and to simplify this project so it can be deployed in a short time span, only the computer program listings and the nucleotide and/or amino acid sequences would be accepted in machine readable format.

Relationship to Office automation plans: These changes being proposed are understood to be the initial steps towards solutions to difficult Office paper-handling problems. The Office is planning for full electronic submission of applications and related documents by fiscal year 2003. The changes proposed in this notice are an initial step in that direction, permitting certain application and related material to be submitted on an acceptable archival medium.

Sections 1.97 and 1.98: The Office proposes to go forward, at the present time, with only one aspect of the plan for information disclosure statement (IDS) revision that was set forth in the Advance Notice: the proposal to require that an IDS include a legible copy of each cited pending U.S. application. The proposed IDS rules are also being revised for consistency and grammar, and to tie up a number of loose ends, as will be discussed below.

Other than the proposed requirement for a copy of each cited U.S. application,

the IDS proposals as set forth in Topics 9 and 10 of the Advance Notice have been withdrawn. Accordingly, there is no proposal at this time for a statement of personal review nor for a unique description as were called for in the Advance Notice, and the amount of citations that may be submitted is not presently proposed to be limited. The Office issued a notice of hearing and request for public comments to obtain views of the public on issues associated with the identification and consideration of prior art during patentability determinations. See Notice of Public Hearing and Request for Comments on Issues Related to the Identification of Prior Art During the Examination of a Patent Application, Notice of Hearing and Request for Public Comments, 64 FR 28803 (May 27, 1999), 1223 Off. Gaz. Pat. Office 91 (June 15, 1999). Pursuant to that notice, the Office held public hearings on June 28th and July 14th of 1999 on the issues. These prior art issues are related to the changes presently being considered by the Office to impose requirements/limits on IDS submissions. Thus, it would be premature to go forward with a comprehensive new IDS alternative until the results of the hearings and comments submitted in response to the notice have been appropriately evaluated. It is contemplated that any new IDS alternatives will be advanced in any rulemaking notice which may result from the evaluation of the results of the public hearings and comments submitted in response to the notice.

The Office recently issued guidelines for reviewing requests for reexaminations and ongoing reexaminations for compliance with *In re Portola Packaging, Inc.*, 110 F.3d 786, 42 USPQ2d 1295 (Fed. Cir. 1997). See Guidelines for Reexamination of Cases in View of In re Portola Packaging, Inc., 110 F.3d 786, 42 USPQ2d 1295 (Fed. Cir. 1997), Notice, 64 FR 15346 (March 31, 1999), 1223 Off. Gaz. Pat. Office 124 (June 22, 1999). These guidelines are pertinent to the consideration given IDS citations, stating:

> Where the IDS citations are submitted but not described, the examiner is only responsible for cursorily reviewing the references. The initials of the examiner on the PTOL–1449 indicate only that degree of review unless the reference is either applied against the claims, or discussed by the examiner as pertinent art of interest, in a subsequent office action.

See Guidelines for Reexamination of Cases in View of In re Portola Packaging, Inc., 110 F.3d 786, 42 USPQ2d 1295 (Fed. Cir. 1997), 64 FR at 15347, 1223 Off. Gaz. Pat. Office at 125 (response to comment 6).

The public should thus be aware that full consideration of all citations submitted in compliance with §§ 1.97 and 1.98 is *not* required on the part of the examiner. The examiner performs a *cursory* review of each IDS citation to the extent that he/she needs in order to determine whether he/she will evaluate the citation further. If the cursory review reveals the citation not to be useful, the examiner will simply stop looking at it. The examiner will be understood to have provided full consideration only where the examiner applies the IDS citation as a reference against the claims in the application being examined, or otherwise deems the citation useful to the examination and discusses that use. Further, the applying of the IDS citation as a reference, or the discussion of the use of the citation (where the citation is *not* applied as a reference), must be in writing:

> [T]he Office cannot presume that a prior art reference was previously relied upon to reject or discussed in a prior PTO proceeding if there is no basis in the written record to so conclude other than the examiner's initials or a check mark on a PTO 1449 form, or equivalent, submitted with an information disclosure statement. Thus, any discussion of prior art must appear on the record of a prior related PTO proceeding.

See Guidelines for Reexamination of Cases in View of In re Portola Packaging, Inc., 110 F.3d 786, 42 USPQ2d 1295 (Fed. Cir. 1997), 64 FR at 15349, 1223 Off. Gaz. Pat. Office at 127 (endnote 7).

It is also noted that the Office intends to issue a notice dealing with printing of IDS citations on the face of the patent. Currently, all IDS citations which are listed on a PTO–1449 form, or an equivalent of the PTO–1449, and are initialed by the examiner, are printed on the face of the patent together with art cited by the examiner. In the notice, the public would be informed that IDS citations printed on the face of the patent will be distinguished from citations made by the examiner, using a separate printing field, markings, or some other means.

Specifics of the contemplated IDS revisions: The specifics of the contemplated revisions to § 1.97 and § 1.98 will now be discussed as to the one Advance Notice proposed change that is being retained, as to newly advanced changes, and as to Advance Notice proposed changes that are being dropped. The discussion is presented in the following twelve parts which separately address identifiable portions of the subject matter: (1) Deletion of unassociated text; (2) items cited in continued prosecution applications (CPAs); (3) filing the IDS before the mail date of final Office actions; (4) required fee and statement for IDS submission made after close of prosecution; (5) newly cited item in foreign office must be cited for the *first* time; (6) IDS that does not comply with either § 1.97 or § 1.98; (7) copies of cited U.S. applications required; (8) how to identify a cited U.S. application; (9) citation was previously made in parent application; (10) grammar and consistency; (11) aspects of Topic 9 in the Advance Notice not being pursued in this notice; and (12) comments generally directed at revision of the IDS rules.

Part (1) Deletion of Unassociated Text

The phrase ''whichever event occurs last'' appears at the end of paragraph (b)(3) of § 1.97, and thus it physically appears to apply only to paragraph (b)(3). In reality, ''whichever event occurs last'' should be associated with each of paragraphs (b)(1), (b)(2) and (b)(3). Accordingly, it is proposed to delete ''whichever event occurs last'' from paragraph (b)(3), and to insert ''within any one of the following time periods'' in paragraph (b). This would eliminate the unassociated text ''whichever event occurs last'' from paragraph (b)(3), while, at the same time, making it clear that the IDS will be entered if it is filed within any of the time periods of paragraphs (b)(1), (b)(2) or (b)(3). Additionally, paragraph (c) of § 1.97 is proposed to be revised, in conformance with paragraph (b), to delete ''whichever occurs first.''

Part (2) Items Cited in Continued Prosecution Applications (CPAs)

Section 1.97(b)(1) is proposed to be amended to insert ''other than an application under § 1.53(d)'' to eliminate the three-month window for filing an IDS in a CPA. Because of the streamlined processing for CPAs, it is expected that the examiner will issue an action on the merits before three months from the filing date. Under the current rule, should an examiner issue an action on the merits prior to three months from the filing date and an IDS is submitted after the Office action is mailed but within the three-month window, the examiner must redo the action to consider the IDS. A CPA is a continuing application, and, thus, applicant should have had ample opportunity to file an IDS. In addition, as pointed out below, it is being proposed to revise § 1.103 to provide for a request of a three-month suspension of action upon filing of a CPA; thus, in an unusual instance where a need to file an IDS newly arises, applicant can request the three-month suspension based upon that need. In

view of the above, it is deemed appropriate to require that any IDS be filed before filing the CPA, or concurrently with the filing of the CPA.

Part (3) Filing the IDS Before the Mail Date of Final Office Actions

Paragraph (c) of § 1.97 would be revised to include, in addition to a final action under § 1.113 and a notice of allowance under § 1.311, other Office actions which close prosecution in the application. This would typically occur when an Office action under *Ex parte Quayle,* 1935 Dec. Comm'r Pat. 11 (1935), is issued. No reason is seen for including only two of the types of actions which close prosecution (that under § 1.113, and that under § 1.311), while not including other types.

Part (4) Required Fee and Statement for IDS Submission Made After Close of Prosecution:

Paragraph(d)(3) of § 1.97 would be revised to delete reference to the fee as a petition fee under § 1.17(i) and instead make reference to the fee as an IDS fee under § 1.17(p). There is no reason for the reduced fee of $130 that is currently recited by paragraph (d), as opposed to the larger $240 IDS fee set forth in paragraph (c). On the contrary, the paragraph (d) submission is made *later in the prosecution* than that of paragraph (c), and thus interrupts the process at least as much as the paragraph (c) submission. Therefore, the fee for the paragraph (d) submission should be at least as much the $240 IDS fee required for the paragraph (c) submission.

In addition, paragraph(d)(2) of § 1.97 has been deleted in its entirety, to remove all reference to the filing of a petition. A petition unduly complicates the matter, while there is really no issue to be decided other than the entry of the IDS, which issue is ordinarily decided by the patent examiner. As it is contemplated to be amended, paragraph (d) of § 1.97 would simply require (for an IDS submitted *after* the close of prosecution and before payment of the issue fee) the combination of the IDS fee and a statement as is specified in paragraph (e) of § 1.97.

Part (5) Newly Cited Item in Foreign office Must Be Cited for the First Time

Section 1.97(e)(1) is proposed to be amended to specify that an item *first* cited in a communication from a foreign patent office in a counterpart foreign application not more than three months prior to the filing of the statement is entitled to special consideration for entry into the record. An item *first cited* by a foreign patent office (for example) a year before in a communication from that foreign patent office, which item is *once again cited* by another foreign patent office within three months prior to the filing of the statement in the Office, is not entitled to special consideration for entry, since applicant was aware of the item a year ago, yet did not submit that item.

Part (6) IDS That Does Not Comply With Either § 1.97 or § 1.98

Paragraph (i) of § 1.97 is proposed for revision to delete ''filed before the grant of a patent.'' This phrase is surplusage since there can be no information disclosure statement after the grant of the patent. A submission of information items after the patent grant is a ''prior art citation'' which is made, and treated, under § 501.

Paragraph (i) of § 1.97 would also be revised to make it a little clearer as to what sections must be complied with, and to change the paragraph (i) plural recitation of information disclosure statements to a singular recitation, which would be in conformance with the rest of § 1.97.

Part (7) Copies of Cited U.S. Applications Required

The Office proposes to go forward, at the present time, with one aspect of the Advance Notice IDS proposal. Section 1.98(a)(2) would be revised to require that an IDS include a legible copy of each cited pending U.S. application. Thus, the current exception to the requirement for supplying citation copies set forth in § 1.98(a)(2)(ii) for pending U.S. applications would be eliminated.

The Office noted, in the Advance Notice, its concern that current § 1.98 does not require applicant to supply copies of U.S. *application* citations. It was pointed out that there is a real burden on the examiner to locate and copy one or more pending applications, thus delaying the examination of the application being examined (in which the U.S. application citation is made). Further, copying a cited application has the potential for interfering with the processing and examination of the cited application itself. Accordingly, § 1.98(a)(2) is proposed for revision to require, for each U.S. application citation listed, that applicant submit either a copy of the application specification, including the claims, and any drawing of the application, or as a minimum, the portion of the application which caused it to be listed, including any claims directed to the portion which caused it to be listed. This proposed revision would, additionally, be a benefit to the public since the copy of the application would be readily available upon issuance of the application as a patent.

Comments Received in Response to the Advance Notice: In response to the Advance Notice, a significant number of comments were in favor of adopting the requirement for copies of U.S. applications, and indicated that there should be no problem with requiring submission of copies. Comments noted that the submission of copies of cited applications will speed up the application process. It will decrease the time burden on examiners in obtaining and copying such applications. It will also avoid interruption of the examination of the application being cited, as otherwise, papers in the original file of the cited application must be removed and copied in order to be reviewed. Even further, it was noted that this revision of the rule should reduce risks of application papers in the cited cases being misplaced or lost.

A number of comments were concerned that submission of copies of multiple U.S. patent applications in an IDS will overwhelm the Office with an increased volume of paper. Some comments opposed the requirement for copies of U.S. patent applications on the grounds that it will place a difficult burden on counsel/applicants to provide the Office with a copy of each cited U.S. application. An example was given, where the client has an extensive patent portfolio distributed among several patent firms (*e.g.,* the result of licensing agreements or other conflicts of interest which require different counsel to be responsible for different cases in a portfolio). In such a scenario, counsel may not be able to receive/view copies of related applications due to constraints imposed by applicable ethical rules and thus may not be able to supply copies. Another example was given, where a practitioner may be aware that a pending application is relevant and may not have access to that pending application, since it is that of another party.

With respect to these grounds for opposition to the requirement, it should initially be noted that citation of another application in an IDS is relatively rare and, as such, should not significantly increase the volume of paper the Office must deal with. Also, in those few situations where U.S. applications are cited and counsel cannot provide copies of the applications, a petition could be submitted for waiver of the rules, and the petition would be decided on a case-by-case basis. In addition, if a practitioner is not permitted, due to ethical considerations, to review material that may be of significance in

the prosecution of a particular application, it is not clear why the practitioner would be involved in the prosecution of that application. As to the comment relating to lack of access by practitioner, such lack of access may result from the fact that the application to be cited is that of a third party and is not available to the public, which includes the practitioner or the practitioner's client; the patent rules should not be a means whereby the Office will provide practitioner with a copy of a pending U.S. application merely because the practitioner or the client thereof has come across the application number.

It was suggested in the comments that review of the Office file is better than review of a supplied copy; *i.e.,* it is more useful for the examiner to review the Office file, which is more comprehensive, than to review the copies that applicant would send. As to this concern, the benefits of eliminating the Office's burden of obtaining and copying such applications, as well as avoiding interruption of examination of the cases being cited, are deemed to be greater than the possible benefit associated with the review of the Office file. If the submitted copy of a cited U.S. patent application is found by the examiner to be of sufficient relevance for further review of the application, at that point in time, the examiner can expend the extra effort to obtain and review the file. On the other hand, for the majority of the cited applications that are not worthy of looking into further, this extra expenditure of time and effort will be saved.

The comments further urged that if a cited U.S. application supplied with an IDS is later abandoned, a petition to expunge the copy of the cited application must be submitted to remove the application from the file, and the Office would then need to consider if the U.S. application is immaterial to patentability of the invention such that it can be expunged (*see* MPEP 724.05). This concern is noted; however, it should be the exception rather than the rule. The time expended in deciding the relatively few petitions to expunge that are filed should more than be counterbalanced by the reduction of the burden to obtain and copy applications and the avoidance of interruption of examination of the application being cited. In addition, even under the current system where application-citation copies are not required, a petition to expunge is still needed to expunge the listed application number, in cases where the content of that application citation is sufficiently identified in the record. Thus, the increase in petitions to expunge (generated by the proposal) should be very small indeed.

It was suggested that the examiner's time in obtaining U.S. application files could be saved by providing clerical support in the groups, which would function to assist the examiner with obtaining the cited application files. This, however, would be a large drain on Office resources, which are limited, and would still result in undesirable interruptions of examination of the application being cited.

It was suggested that, instead of requiring copies of all cited applications with the IDS, the Office should reserve the right to later request copies from applicant where specific application files are not easily available. As to this suggestion, it is first noted that it would not at all reduce the time that the cited application would be away from the examiner of the cited application, and thus does not deal with the problem of interruption of the examination of the application being cited. In addition, making a requirement from applicant for the application after the IDS is received (for difficult-to-obtain cases) slows the examination process since the examiner must wait for the copy, while if the copy were submitted with the IDS, the examiner could immediately begin the examination. Furthermore, a large expenditure of time would have been made in finding out that the application file is not easily available. Even after the application is obtained and reviewed, it is, at times, found that some portion is missing. At that time, the effort would already have been expended, and only then would the copy of the application first be required from applicant.

Part (8) How To Identify a Cited U.S. Application

Section 1.98(b) is proposed to be amended to require that each listed U.S. application to be identified by the inventors, application number and filing date.

Part (9) Citation Was Previously Made in Parent Application

Paragraph (d) of § 1.98 is proposed to be revised to make it clear that the mere submission of the citation in the parent application (by applicant) is not enough to take advantage of paragraph (d) when submitting the citation in the ''child'' application. A copy of the citation must have been submitted in the parent, and the submission of the citation made in the parent must have complied with § 1.97, except for an application filed under § 1.53(d).

A situation might arise where applicant would establish continuity with an existing application having listed U.S. applications for which copies were not supplied (under the current practice, *i.e.,* before the changes proposed in this notice would go into effect), and applicant would thereby take advantage of paragraph (d) of § 1.98 to have the cited applications reviewed in the newly filed ''continuation'' (*i.e.,* filed after the changes proposed in this notice would go into effect) without submitting copies. To deal with this possibility, paragraph (d) of § 1.98 would be revised to require that where the cited U.S. application (the listed information) was not cited ''by * * * the Office'' (*i.e.,* not cited by the examiner in the parent), the information submission made in the prior application must have been in compliance with paragraphs (a) through (c) of § 1.98 as they are drafted in this notice. In other words, if the copy of the application papers (for the cited application) was not present in the parent, it must now be submitted in the continuation.

It might be argued that because a copy of the citation was submitted in the parent, paragraph (d) is satisfied even though the submission of the citation made in the parent did not comply with § 1.97. Paragraph (d) of § 1.98 as proposed for revision deals with this argument.

Part (10) Grammar and Consistency

All changes which are proposed in §§ 1.97 and 1.98 other than those explicitly identified above would be made for grammar and consistency within the sections. This includes, for example, deleting the last sentence of § 1.98(c) and inserting it as the last sentence of § 1.98(a)(3) where it more appropriately belongs.

Part (11) Aspects of Topic 9 in the Advance Notice Not Being Pursued Further

Statement of Personal Review: In the Advance Notice, it was proposed that the IDS submitter be required to state that he/she personally reviewed each submitted IDS citation to determine whether or not that citation is relevant to the claimed invention(s) and is appropriate to cite to the Office in the IDS. This statement of personal review would have to be made by a registered practitioner (where applicant is represented by a practitioner), or by at least one of the inventors (where applicant is not represented).

A large majority of the comments (in response to the Advance Notice) opposed requiring the statement of

personal review as proposed in the Advance Notice. Opposition was based upon the following: (1) The required statement of personal review as proposed in the Advance Notice would greatly increase prosecution costs; (2) the impact of the cost burden imposed would be extremely hard on small entities and independent inventors, and may be contrary to the Office's Independent Inventor Initiative; (3) the proposed review by the practitioner (where applicant is represented) will result in a duplication of the prior efforts of inventors, in-house counsel (not representing the inventor before the Office), or foreign associates who initially provided the information (the practitioner must ''second guess'' the inventor, *etc.* as to whether the citation is relevant and how it is relevant; (4) the proposed practitioner review would provide new grounds for allegations of inequitable conduct (whether the subjective requirements of the personal review statement were complied with), and the possibility of malpractice as to the review conducted; (5) the statement of review is already inherent in any IDS (§ 10.18(b)(2), § 1.56), and an explicit statement is not needed; (6) the proposed practitioner review would raise problems as to attorney-client relations, *e.g.*, conflict of interest, and potentially a breach of attorney-client privilege as to the review of the documents made; and (7) the statement of personal review would not be effective (it will not prevent marginally related and unrelated citations from being submitted), since one could make a cursory personal review of a citation, reach no decision, and simply submit the citation, with minimal comment.

There was some limited support for adoption of the proposal requiring a statement of personal review (at least in part); however, a substantial majority of the comments expressed opposition to the statement of personal review. The Office has taken note of the duplication of review effort, the potential increased costs, the subjectivity of the statement, the resulting potential for charges of inequitable conduct, and the conflict-of-interest problems that could be brought about by going forward with the proposed requirement for a statement of personal review. Accordingly, a decision has been made to not go forward with the requirement for a statement of personal review at this time.

Citations To Be Uniquely Described: The Advance Notice proposed that applicant be required to compare each of the citations to each of the independent claims, or specific dependent claim(s), in a meaningful way unique to each citation. The description of each citation would have to point out why applicant believes the citation to be unique in its teaching/showing relative to the claimed invention(s). Description would not be required for any ten citations, and for citations in a corresponding application by a foreign patent office, PCT international searching authority, or PCT international preliminary examining authority, provided the search report or office action in the English language is also submitted.

The comments in opposition to the unique description proposal were both numerous and varied as to the reasons for opposition. Reasons for opposition are summarized: (1) A potential for adverse future litigation implications, and for admissions which otherwise need not be made, would result from the proposal; (2) the proposal would impose an unreasonable cost and time burden upon the public; (3) the impact of the burden imposed would be extremely hard on small entities and independent inventors, and may be contrary to the Office's Independent Inventor Initiative; (4) the proposed description of the citations is unduly burdensome, and the many possible description permutations impose an impossible task (description would be needed to cover all claim meanings, art settings and potential art combinations, and would need to be updated each time the claims are amended); (5) reasonable minds will differ on which portions of a citation are significant, which citations are cumulative, and the relevant teachings of any particular citation; (6) the appropriate standard for determining if an item should be considered is whether the item is material, not whether it is cumulative (so, explanation of why the citation is not cumulative should not be imposed); (7) the description proposal discriminates against foreign applications and U.S. practitioners representing foreign applicants, since the U.S. practitioner, who is not the author of the case, is not completely familiar with the technology; (8) the proposed unique description requirement is not fair since examiners do not have this burden; (9) experience has shown that the submitted description may not be a useful tool to the examiner, and some examiners do/did not even read the descriptions; (10) the description proposal would provide a ''role reversal'' where applicant does the examiner's job of evaluating the citations but not as well, *i.e.*, the proposal appears to force applicant's representative to ''play'' examiner, review each of the citations, and essentially make a rejection for the examiner in an IDS; (11) there is no statute or case law that requires the applicant to comment on citations submitted to satisfy the duty to disclose (thus, applicant should not be charged with that responsibility); (12) it should take no longer for the examiner to evaluate IDS art than the time it takes him/her to review art when searching through shoes of patents; (13) no data/facts have been presented to show a need for the description of the citations; (14) the pre-set number of ten ''free'' citations (without description) proposed in the Advance Notice is an artificial and arbitrary number, and it would be difficult to decide which ten to choose (it encourages gamesmanship and planning in selecting which citations to describe); (15) the proposed selection of an arbitrary ten free citations opens up a ''Pandora's Box'' regarding inferences as to the particular ten citations selected; and (16) the number ''ten'' for the free citations is too small, and the number actually needed depends upon many factors surrounding the application such as complexity, technology, and number of claims.

Conclusion: The overwhelming majority of the comments expressed opposition to the unique description proposal of the Advance Notice. The Office has taken note of the large burden that would be imposed on applicants and attorneys by the description proposal of the Advance Notice, the potential for future adverse consequences stemming from doing the description or the choice not to describe, and the applicant's role reversal that would be imposed by the description proposal. Accordingly, a decision has been made to not go forward with the unique description proposal at this time.

Suggestions Regarding Topic 9: A substantial number of suggestions were submitted for modification of the Advance Notice Topic 9 proposal as to the required statement of personal review and the unique description requirement and its exceptions. It was also widely suggested that the Office charge fees for consideration and evaluation of an excessive number of submitted citations. These suggestions have not been accepted in view of the decision not to go forward with the Topic 9 proposal other than the requirement for copies of applications (as discussed above).

Part (12) Comments Generally Directed at Revision of the IDS Rules

Some comments on the Advance Notice IDS proposals were not directed to specific aspects of Topics 9 and 10,

but commented on the IDS proposals on the whole. Those comments noted: (1) No reason nor incentive has been provided to the public to give up the current IDS system; (2) the proposed Advance Notice IDS changes do not serve the public nor applicant's interest, and would eliminate a significant number of application filings each year; (3) the current IDS submission rules work well and should not be changed (the Office should not over-react by adopting a drastic cure that would be more harmful than the disease); (4) it is not an excessive burden on the Office to review large numbers of submitted documents, but actually helps the process (this issue was previously visited during the promulgation of the current § 1.98, and the Office found that examiners' review of all submitted documents would not constitute an excessive burden); (5) the IDS proposals set forth in the Advance Notice will not be effective to discourage submissions to the point that the Office problem is solved since the duty of disclosure remains in effect, and on the other hand, the proposals will discourage pre-searches and other mechanisms for disclosure that strengthen patents; (6) the proposal imposes significant new limitations on the practitioner's ability to freely disclose information to the Office due to cost accountability to clients and potential adverse litigation consequences; (7) the Office desire to reduce application processing time via the IDS proposals would be expected to reduce the quality of examination, and that is an undesirable trade-off; (8) the IDS proposals conflict with world patent harmonization (the U.S. is the only patent-granting body in the world that requires citations of relevant art, and it runs counter to world patent harmonization that applicant's burden in this regard should now be increased by the proposals to further impose requirements on applicant not required by other patent granting bodies); (9) the IDS proposals are complicated; and (10) the Office's IDS problem is at least partly generated by MPEP 2004 which calls for citation of even questionable or marginal items.

Summary: The overall support for the IDS proposals as set forth in the Advance Notice was relatively limited, and, for the most part, where support was advanced, it was advanced as a qualified support. On the other hand, a large majority of the comments opposed the Advance Notice IDS proposals, often stating their objection to the proposals using strong language. Accordingly, the IDS proposals as set forth in Topics 9 and 10 of the Advance Notice have been withdrawn at this time (with the exception of the proposed requirement for a copy of each cited U.S. application, which did have some support and is being retained for reasons discussed both below and above).

The present IDS proposal addresses the major concerns of the comments in that it does not call for a statement of personal review, nor a unique description, as were called for in the Advance Notice. It also does not propose to limit the number of citations that may be submitted. As noted, the present IDS proposal does in fact retain one aspect of the Advance Notice IDS proposal—applicant would be required to provide a copy of the specification including the claims (and any drawing) of each U.S. application cited in the IDS, or the portion of the application which caused it to be listed, including any claims directed to that portion of the application. Any increase in applicant's burden due to this one retained aspect should be minor since: (1) The citation of U.S. applications represents a very small minority of documents cited, and (2) the original of the application is usually readily available to the applicant as a related application (and where not so, a petition can be filed requesting that a copy not be required in that isolated and rare case). The need for any such minor increase in burden is, however, heavily outweighed by the many benefits obtained. As pointed out above, the presence of the application copies with the IDS will (1) decrease the time burden on examiners in obtaining and copying the applications, (2) avoid interruption of examination of the cited cases, (3) reduce risks of application papers in the actual file of the cited applications being misplaced or lost, and (4) be advantageous to the public as such copies being in the application file would be readily available to the public upon issuance of the application as a patent.

The presently proposed IDS rules also include a number of revisions for consistency and grammar, and to tie up a number of loose ends as discussed above. These proposed revisions should not, however, represent any significant burden on the public.

Section 1.102: Section 1.102(d) is proposed to be amended to refer to ''the fee set forth in § 1.17(h)'' for consistency with the changes to § 1.17(h) and § 1.17(i). See discussion of changes to § 1.17(h) and § 1.17(i).

Section 1.103: Section 1.103 is proposed to be revised for clarity and to provide a procedure for obtaining a limited suspension of action in a continued prosecution application (CPA) under § 1.53(d). The heading of § 1.103 is proposed to be amended to add the phrase ''by the Office'' to clarify that this section does not apply to requests for suspension of action (or reply) by the applicant.

Section 1.103(a) is proposed to provide for suspension of action for cause. Specifically, § 1.103(a) is proposed to provide that on request of the applicant, the Office may grant a suspension of action under this paragraph for good and sufficient cause. Section 1.103(a) is also proposed to provide that: (1) The Office will not suspend action if reply by applicant to an Office action is outstanding; and (2) any petition for suspension of action under § 1.103(a) must specify a period of suspension not exceeding six months. Section 1.103(a) is proposed to specifically provide that any petition for suspension of action under § 1.103(a) must also include: (1) A showing of good and sufficient cause for suspension of action; and (2) the fee set forth in § 1.17(h), unless such cause is the fault of the Office. If an additional suspension period is desired applicant may submit another petition under § 1.103(a) requesting same.

Section 1.103(b) is proposed to provide for a limited suspension of action in a continued prosecution application (CPA) under § 1.53(d). Section 1.103(b) is specifically proposed to provide that on request of the applicant, the Office may grant a suspension of action under § 1.103(b) in a CPA for a period not exceeding three months. Section 1.103(b) is proposed to specifically provide that any request for suspension of action under § 1.103(b) must be filed with the request for a CPA and include the processing fee set forth in § 1.17(i).

Section 1.103(c) is proposed to provide that the Office will notify applicant if the Office suspends action on an application on its own initiative.

Section 1.103(d) is proposed to provide for suspension of action for public safety or defense. Section 1.103(b) is specifically proposed to provide that the Office may suspend action by order of the Commissioner if the following conditions are met: (1) The application is owned by the United States; (2) publication of the invention may be detrimental to the public safety or defense; and (3) the appropriate department or agency requests such suspension.

Section 1.103(e) is proposed to provide that the Office will suspend action for the entire pendency of an application if the Office has accepted a request to publish a statutory invention registration in the application, except

for purposes relating to patent interference proceedings under Subpart E.

Section 1.105: Section 1.105 would be a new section containing paragraphs (a) through (c), relating to requirements by the Office that certain information be supplied.

Paragraph (a)(1) of § 1.105 would provide examiners or other Office employees explicit authority to require submission of such information as may be reasonably necessary for the Office to properly examine or treat a matter being addressed in an application under 35 U.S.C. 111 or 371, in a patent, or in a reexamination proceeding. Abandoned applications would also fall within the scope of the rule to provide for handling of petition matters. New § 1.105 is simply an explicit recitation of inherent authority that exists pursuant to 35 U.S.C. 131 and 132, and continues the practice of providing explicit authority to Office employees as was done with the Board of Patent Appeals and Interferences under § 1.196(d) and with trademark examiners under § 2.61.

The use of the authority under proposed paragraph (a)(1) of § 1.105 would be encouraged so that the Office can perform the best quality examination possible. The authority is not intended to be used by examiners without a reasonable basis, but to address legitimate concerns that may arise during the examination of an application or consideration of some matter. Any abuse in implementation of the authority, such as a requirement for information that is not in fact reasonably necessary to properly examine the application, would be addressed by way of petition under § 1.181. For example, the Office may, under appropriate circumstances, desire the authority to ask for:

1. The existence of any particularly relevant commercial data base that could be searched for a particular aspect of an invention, in certain technologies where pertinent prior art is highly likely to be found in a commercial data base.

2. Information that may not be required to be submitted by § 1.56, but that the examiner would deem useful on an application-by-application basis (which could be done prior to the application being taken up for examination, such as when the application is assigned to an examiner): (a) Submission of any published articles, authored by any of the inventors, that relate to a claimed invention, and (b) any non-patent literature or patents that were used to draft the application or in the invention process, such as where the invention is an improvement over the prior information.

3. A reply to a matter raised in a protest under § 1.291.

4. An explanation of technical material in a publication, such as one of the inventors' publications.

5. The identification of changes made in a reformatted continuing application filed under § 1.53(b).

6. A mark-up for a continuation-in-part application showing the new matter where there is an intervening reference.

7. Comments on a new Federal Circuit decision that appears on point.

The proposed § 1.105 is not intended to change current Office practice in regard to questions of fraud under § 1.56, and inquiries relating thereto would not be authorized. *See* MPEP 2010.

Paragraph (a)(2) of § 1.105 would provide a safety net by specifically recognizing that where the information required to be submitted is unknown and/or is not available, a complete response to the requirement for information would be a statement to that effect. There would be no requirement for a showing that in fact the information was unknown or not available such as by way of disclosing what was done to attempt to satisfy the requirement for information. Nonetheless, it should be understood that a good faith attempt must be made to obtain the information and a reasonable inquiry made once the information is requested even though the Office will not look behind the answer given. An Office employee should not continue to question the scope of a specific answer merely because it is not as complete as the Office employee desires.

Example: In a first action on the merits of an application with an effective filing date of May 1, 1999, the examiner notes the submission of a protest under § 1.291 relating to a public sale of the subject matter of the invention and requests a date of publication for a business circular authored by the assignee of the invention, which circular was submitted with the protest. It is expected that the attempt to respond to the requirement for information would involve contacting the assignee who would then make a good faith attempt to determine the publication date of the circular. The response to the requirement states that the publication date of the circular is ''around May 1, 1998.'' As ''around May 1, 1998'' covers dates both prior and subsequent to May 1, 1998, a *prima facie* case under 35 U.S.C. 102(b) would not exist. The examiner cannot require that the response be more specific or hold the response to be incomplete based on such reply. The examiner can, however, in the next Office action seek confirmation that this is the most specific date that was obtained or can be obtained based on a reasonable inquiry being made if that is not already clear from the response to the initial requirement for information.

Paragraph (b) of § 1.105 would provide that the requirement for information may be included in an Office action, which would include a restriction requirement if appropriate, or can be sent as a separate letter independent of an Office action on the merits such as when the information required is critical to an issue or issues that need to be addressed in a subsequent Office action. It is expected that due to cycle time concerns the use of a requirement for information independent of an Office action on the merits would be limited.

Paragraph (c) of § 1.105 would provide that a response to a requirement for information or failure to respond thereto would be governed by §§ 1.135 and 1.136. Note the Example provided in the discussion of paragraph (a)(2) of § 1.105.

Section 1.111: The heading of § 1.111 is proposed to be amended to clarify that it applies to a reply by the applicant or patent owner to a non-final Office action. Section 1.111 is proposed to be amended to: (1) Provide a reference to § 1.104 concerning the first examination of an application; (2) change the reference to § 1.135 and § 1.136 (for time for reply to avoid abandonment) from paragraph (c) to paragraph (a); and (3) add the sentence ''[a] second or subsequent supplemental reply will be entered unless disapproved by the Commissioner.''

The Office indicated in the Advance Notice that it was considering charging a handling fee for all supplemental replies. The Office was specifically considering replacing the current practice of allowing unlimited supplemental replies to be filed without requiring any fee with a new practice in which a handling fee would be charged for each supplemental reply that is filed after the initial reply to an Office action has been filed.

While some comments supported this proposed change, a majority of comments opposed charging a handling fee for supplemental replies. The reasons given for opposition to the proposal included arguments that: (1) The proposal was simply a revenue-raising proposition; (2) the primary cause of supplemental replies crossing with an Office action is Office mail room delay and paper processing

delays; (3) applicants may need to file a supplemental amendment due to later-discovered prior art. The comments also suggested that: (1) The PALM system be enhanced to flag supplemental replies to avoid issuing an Office action until any supplemental reply is matched with the application; and (2) examiners call applicants two weeks prior to acting on an application to determine whether a supplemental reply has been filed.

This notice does not propose changing the rules of practice to charge a handling fee for supplemental replies. Based upon the comments and its own evaluation, the Office has concluded that the proposed handling charge would not discourage the filing of supplemental replies, but would only result in such replies being filed with the handling fee.

The Office, however, is proposing a change to the rules of practice to provide that the entry of second or subsequent supplemental replies may be disapproved by the Commissioner. It is expected that disapproval of a second or subsequent supplemental amendment will be delegated to the appropriate Technology Center Group Director under MPEP 1002.02(c). As most supplemental replies cause only a minor inconvenience to the Office, the Office is not inclined to propose a change that would affect the ability to file a supplemental reply when such is warranted. There are, however, some applicants who routinely file preliminary or supplemental amendments that place a significant burden on the Office by: (1) Canceling the pending claims and adding many new claims; (2) adding numerous new claims; (3) being filed approximately two months from the date the original reply was filed (*i.e.,* when the examiner is likely to be preparing an Office action responsive to the original reply). These applicants also tend to be those having many applications simultaneously on file in the Office.

The provision that the entry of a second or subsequent supplemental reply may be disapproved by the Commissioner would give the Office the latitude to permit entry of those supplemental replies that do not unduly interfere with the preparation of an Office action, but would also give the Office the latitude to refuse entry of those supplemental replies that do unduly interfere with the preparation of an Office action. The factors that would be taken into consideration when deciding whether to disapprove entry of such a supplemental reply are: (1) The state of preparation of an Office action responsive to the initial reply; and (2) the nature of the change to the pending claims that would result from entry of the supplemental reply. That is, if the examiner has devoted a significant amount of time to preparing an Office action before such a supplemental amendment is matched with the application, it would be appropriate for the Office to disapprove entry of the supplemental amendment. If, however, such a supplemental amendment merely cancels claims (as opposed to canceling claims and adding claims, or simply adding claims), it would not be appropriate to disapprove entry of such a supplemental amendment even if the examiner has devoted a significant amount of time to preparing an Office action before such a supplemental amendment is matched with the application.

Obviously, if a supplemental reply is received in the Office (§ 1.6) after the mail date of the Office action responsive to the original reply and is not responsive to that Office action, the Office will continue the current practice of not mailing a new Office action responsive to that supplemental reply, but simply advising the applicant that the supplemental reply is non-responsive to such Office action and that a responsive reply (under § 1.111 or 1.113 as the situation may be) must be timely filed to avoid abandonment. Put simply, the mailing of an Office action responsive to the original reply will continue to cut off the applicant's right to have any later-filed supplemental reply considered by the Office.

The proposed change to § 1.111(a) in this notice: (1) Is not a revenue-raising proposition; and (2) will not affect the vast majority of supplemental replies. It will only apply to a supplemental reply if: (1) the applicant has already filed one (a first) supplemental reply; and (2) the supplemental reply is not matched with the application until after the examiner has devoted a significant amount of time to preparing an Office action.

The suggestion regarding enhancement to the PALM system is being taken under advisement. Such an enhancement, however, would not discourage the filing of the supplemental replies that place a burden on the Office, but would only inform the examiner that such a reply has not yet been matched with the application. In the absence of a procedure for disapproving the entry of such burdensome replies, the so-enhanced PALM system would simply advise the Office not to act on the affected application for extended periods of time, which would have an adverse effect on the Office's efforts to reduce cycle time.

The suggestion that examiners call applicants two weeks prior to acting on an application to determine whether a supplemental reply has been filed is not practicable. The Office issues hundreds of thousands of Office actions each year. Thus, implementing this suggestion would require the Office (examiners) to make hundreds of thousands of additional telephone calls to applicants each year.

Section 1.112: Section 1.112 is proposed to be amended to provide a reference to § 1.104 concerning the first examination of an application. Section 1.112 is proposed to be amended to add the phrase ''or an appeal (§ 1.191) has been taken'' to the last sentence. This addition is to clarify that once an appeal has been taken in an application, any amendment is subject to the provisions of § 1.116 (b) and (c), even if the appeal is in reply to a non-final Office action.

Section 1.115: A new § 1.115 is proposed to be added to provide for preliminary amendments. The Office indicated in the Advance Notice that it was considering charging a handling fee for certain preliminary amendments. The Office was specifically considering replacing the current practice of allowing unlimited preliminary amendments to be filed without requiring any fee with a new practice in which a handling fee would be charged for each preliminary amendment filed later than a specified time period (one month) after the filing date of the application.

While some comments supported this proposed change, a majority of comments opposed charging a handling fee for certain preliminary amendments. The reasons given for opposition to the proposal included arguments that: (1) The proposal was simply a revenue-raising proposition; (2) the primary cause of preliminary amendments crossing with an Office action is Office mail room delay and paper processing delays; (3) applicants should not be forced to file preliminary amendments and other papers until after receiving a filing receipt and application number; and (4) applicants may need to file a preliminary amendment due to later-discovered prior art. The comments also suggested that: (1) The PALM system be enhanced to flag preliminary amendments to avoid issuing an Office action until the preliminary amendment is matched with the application; (2) examiners call applicants two weeks prior to acting on an application to determine whether a preliminary amendment has been filed; and (3) applicants filing a continued prosecution application under § 1.53(d)

(CPA) be given a few weeks to file any necessary preliminary amendment.

The Office is not proposing a change to the rules of practice to charge a handling fee for certain preliminary amendments. Based upon the comments and its own evaluation, the Office has concluded the proposed handling charge would not discourage the filing of preliminary amendments, but would only result in such amendments being filed with the handling fee. The Office, however, is proposing a change to the rules of practice to provide that the entry of certain preliminary amendments may be disapproved by the Commissioner. See the discussion of § 1.111 for an explanation of the need for this change to the rules of practice.

Section 1.115(a) as proposed provides that a preliminary amendment is an amendment that is received in the Office (§ 1.6) on or before the mail date of the first Office action under § 1.104. That is, an amendment received in the Office (§ 1.6) after the mail date of the first Office action is not a preliminary amendment, even if it is non-responsive to the first Office action and seeks to amend the application prior to the first examination.

Section 1.115(b) is proposed to provide that a preliminary amendment will be entered unless disapproved by the Commissioner, and also provide that a preliminary amendment will not be disapproved if it is filed no later than: (1) Three months from the filing date of an application under § 1.53(b); (2) the filing date of a continued prosecution application under § 1.53(d); or (3) three months from the date the national stage is entered as set forth in § 1.491 in an international application. Thus, the entry of a preliminary amendment will not be disapproved under § 1.115(b) if it is filed within one of the periods specified in § 1.115(b)(1) through (b)(3). Nevertheless, if a ''preliminary'' amendment is filed after the mail date of the first Office action, it is not a preliminary amendment under § 1.115(a). If a (''preliminary'') amendment is received in the Office (§ 1.6) after the mail date of the first Office action and is not responsive to the first Office action, the Office will continue the current practice of not mailing a new Office action responsive to that amendment, but simply advising the applicant that the amendment is non-responsive to first Office action and that a responsive reply must be timely filed to avoid abandonment. Put simply, the mailing of the first Office action will continue to cut off the applicant's right to have any later-filed preliminary amendment considered by the Office, even if that amendment is filed within the time periods specified in proposed § 1.115(b).

Section 1.115(c) is proposed to provide that the time periods specified in § 1.115(b) are not extendable.

It is expected that disapproval of a preliminary amendment filed outside the period specified in § 1.115(b) will be delegated to the appropriate Technology Center Group Director under MPEP 1002.02(c). The provision that the entry of a preliminary amendment filed outside the period specified in § 1.115(b) may be disapproved by the Commissioner would give the Office the latitude to permit entry of those preliminary amendments filed outside the period specified in § 1.115(b) that do not unduly interfere with the preparation of an Office action, but would also give the Office the latitude to refuse entry of those preliminary amendments filed outside the period specified in § 1.115(b) that do unduly interfere with the preparation of an Office action. As with the proposed change to § 1.111(a), the factors that would be taken into consideration when deciding whether to disapprove entry of such a preliminary amendment are: (1) The state of preparation of the first Office action; and (2) the nature of the change to the pending claims that would result from entry of the preliminary amendment.

The proposed change to § 1.115 in this notice: (1) Is not a revenue-raising proposition; and (2) will not affect the vast majority of preliminary amendments. It will only apply to a preliminary amendment if: (1) The preliminary amendment is filed outside the time periods specified in § 1.115(b)(1) through (b)(3); and (2) the preliminary amendment is not matched with the application until after the examiner has devoted a significant amount of time to preparing an Office action. The suggestions that the PALM system be enhanced and that examiners call applicants two weeks prior to acting on an application are addressed above in the discussion of § 1.111(a).

In an application filed under 35 U.S.C. 111(a) and § 1.53(b) or a PCT international application entering the national stage under § 1.491, the time periods specified in § 1.115(b) should give the applicant time between the mailing of a filing receipt and the mailing of a first Office action to file any necessary preliminary amendment. CPA practice under § 1.53(d), however, is designed to provide a first Office action sooner than if the application had been filed as a continuation under § 1.53(b) (or under former §§ 1.60 or 1.62). *See* Continued Prosecution Application (CPA) Practice, Notice, 1214 Off. Gaz. Pat. Office 32, 32 (September 8, 1998). An applicant filing a CPA under § 1.53(d) who needs time to prepare a preliminary amendment should file a request for suspension of action under § 1.103(b) with the CPA request. See discussion of § 1.103(b).

Section 1.121: Section 1.121 is proposed to be amended to change the manner of making amendments in non-reissue applications. The proposed practice to amend the specification by replacement of a section or paragraph (or claim) would eliminate the need for the Office to enter changes by handwriting in red ink. This change would result in a specification (including claims) in clean-copy form that can be Optical Character Recognition (OCR) scanned during the patent publishing process. The proposed practice also requires the applicant to provide a marked-up copy of the changed section or paragraphs (or claims), using the applicant's choice of marking system, which will aid the examiner in ascertaining the changes to the specification.

The proposed change to § 1.121 involves concurrent changes to § 1.52(b) (see discussion of § 1.52(b)(6)) to provide for numbering of the paragraphs of the specification, except for the claims. If the paragraphs of the specification are numbered as proposed in § 1.52, the applicant will be able to amend the specification by merely submitting a replacement paragraph (with the same number) with the desired changes made in the replacement paragraph.

As discussed above, the adoption of the proposed changes to § 1.121 will result in relatively clean (*e.g.*, without underlining, bracketing, or red ink) application specifications that can be OCR scanned as part of the printing process in the Office of Patent Publications, which will result in a higher quality of printed patents. Complete OCR scanning of the amended portions of the specification and claims is not possible today because insertions of words, phrases or sentences made by handwriting in red ink and deletions made by words which have been lined through with red ink are ignored by the scanner. Further, while text marked with underlining and bracketing can be scanned, extra processing is required to delete the brackets and the text within the brackets and to correct misreading of letters caused by the underlining. Thus, using clean replacement sections or paragraphs and claims will permit complete OCR scanning which is a faster and more accurate method of capturing the application for printing while eliminating an extensive amount

of key-entry of subject matter. This should result in patents with fewer errors in need of correction by certificate of correction, which will be a clear benefit to the patentees and conserve Office resources.

In addition to submitting a replacement section or paragraph/claim to make an amendment, applicant would also be required to submit a marked-up copy of the section or paragraph/claim to show the differences between the original and the replacement. The marked-up copy may be created by any method applicant chooses, such as underlining and bracketing, redlining, or by any system designed to provide text comparison.

The proposed change to § 1.121 will make the amendment process simpler, reduce processing time and operating costs, and reduce the opportunity for error associated with amendment entry. In addition, it is consistent with standardizing processing of amendments in both paper and electronic format in anticipation of a total Electronic File Wrapper (EFW) environment, which is currently under development. Further, the changes being proposed are consistent with the Office's efforts to harmonize with PCT practice and any changes being contemplated for that system.

Section 1.121(a) is specifically proposed to be amended by replacing paragraphs (a)(1) through (a)(6) with new paragraphs (a)(1) through (a)(5), which treat the manner of making amendments in nonprovisional applications other than reissue applications. Section 1.121(b) relates to amendments in reissue applications and § 1.121(c) relates to amendments in reexamination proceedings.

Section 1.121(a)(1)(i) is proposed to provide procedures to delete, replace or add a paragraph to the specification of an application by requiring instructions for such accompanied by the replacement or added paragraph(s). By following the four-digit numbering system concurrently proposed in § 1.52(b)(6), applicants can easily refer to a specific paragraph by number and present an amendment thereto. Proposed § 1.121(a) requires that the replacement or added paragraph(s) not include any markings to indicate the changes that have been made. A copy of the replacement or added paragraph(s) marked-up to show the changes would be required to accompany the amendment as an aid to the examiner.

If a numbered paragraph is to be replaced by a single paragraph, the added replacement paragraph bearing the same number as the paragraph being replaced should be submitted. If more than one paragraph is to replace a single paragraph, the numbering of the added replacement paragraphs must begin first with the number of the paragraph being replaced, then subsequently by the number of the replaced paragraph together with a single decimal and sequential integers (*e.g.*, paragraph [0071] is replaced by [0071], [0071.1] and [0071.2]). Any paragraphs being added between existing paragraphs must take the number of the preceding paragraph followed by a decimal and sequential integers (*e.g.*, [0071.1] and [0071.2] are being inserted between paragraphs [0071] and [0072]). Unaffected paragraphs would retain their original numbers. Once an amendment is entered, subsequent amendments would be made *vis-a-vis* the numbering created by the previous amendment. Amendments to titles or headers, which are not considered paragraphs and thus not numbered, would be identified by reference to their location relative to a numbered paragraph (*e.g.*, ''the title appearing after paragraph [0062]'').

Section 1.121(a)(1)(ii) as proposed also permits applicants to amend the specification by replacement sections (*e.g.*, as provided in §§ 1.77(a), 1.154(a) or 1.163(c)). As with replacement paragraphs, the amended version of a replacement section would be required to be provided in clean form and not include any markings to show the changes which have been made. A marked-up version showing the changes must accompany the actual amendment as an aid to the examiner.

Section 1.121(a)(1)(ii) as proposed also permits applicants to amend the specification by submitting a substitute specification. Sections 1.52, 1.77, 1.154, 1.163 and 1.121(a) as proposed do not require applicants to number the paragraphs of the specification (§ 1.52(b)(6)) or provide section headings (§§ 1.77, 1.154, 1.163). Without numbered paragraphs of the specification or section headings, however, an applicant will be limited to amending the application by submitting a substitute specification. Thus, applicants submitting a substitute specification as a means of amending the application (including ''transition applications'' filed before but amended after this proposed change to § 1.121(a) is adopted) are urged to include numbered paragraphs in the substitute specification (in the manner proposed in § 1.52(b)(6)), so that further amendments may be made by replacement paragraphs in accordance with § 1.121(a)(1)(i). An accompanying marked-up copy showing amended portions of the specification would be required. The addition of paragraph numbers in a substitute specification, however, need not be considered as an amendment to the specification requiring a marked-up showing.

Further, in applications not having numbered paragraphs, even if no amendments to the specification are being made, applicants are urged to supply a substitute specification including numbered paragraphs (consistent with § 1.52 (b)(6)) as part of the response to the first Office action, so that any future amendments to the specification may be made by numbered paragraph replacement. As stated immediately above, a marked-up copy, showing paragraph numbers as the only change, is not required.

The Office will not, upon request of applicants, number the paragraphs or sections of the specification, or accept any instructions to do the same. The Office reserves the right, however, to number or renumber the paragraphs in the printed patent as part of the publication process.

Section 1.121(a)(1)(iv) as proposed requires that matter deleted by amendment pursuant to any of the earlier paragraphs of § 1.121 could only be reinstated by a subsequent amendment presenting the previously deleted subject matter. No unentering of previously entered amendments will be permitted.

Section 1.121(a)(2) as proposed requires that all amendments to the claims be presented as totally rewritten claims. Any rewriting of a claim will be construed as a direction to cancel the previous version of the claim. *See In re Byers*, 230 F.2d 451, 455, 109 USPQ 53, 55 (CCPA 1956) (amendment of a claim by inclusion of an additional limitation had exactly the same effect as if the claim as originally presented had been canceled and replaced by a new claim). The new (or rewritten) claim must be submitted in clean form with no markings showing the changes which have been made. A marked-up version of any amended claim must be submitted on pages separate from the amendment showing the changes which have been made by way of brackets (for deleted matter) and underlining (for added matter), or by any other suitable method of comparison, in order to clearly indicate the changes made by the amendment in a form that will assist the examiner in the examination process.

Section 1.121(a)(3) is proposed to be amended to clarify the requirements for amending figures of drawing in an application. A sketch showing changes in red must be filed for approval by the examiner before new drawings in compliance with § 1.84 can be filed.

Sections 1.121(a)(5) and (a)(6) will be redesignated without change as new § 1.121(a)(4) and (a)(5).

Section 1.121(b) is proposed to be amended to transfer the provisions for amending reissue applications to § 1.173 (see discussion of § 1.173). Section 1.121(b) is specifically proposed to simply include a reference to § 1.173 for amendment of reissue applications.

Most of the comments received were in support of the proposed change to amendment practice. Some criticisms and suggestions are addressed below.

Comment: A concern was raised by a number of commenters that replacement paragraphs would make the identification of changes more obscure than the present system of using bracketing and underlining, would place an extra burden on practitioners and their staffs, and would work against reducing paper submissions if applicants were required to submit marked-up copies of the desired changes.

Response: The proposed replacement paragraph requirement is necessary to facilitate the publication of patents more expeditiously and with fewer errors. The Office's goal is to eliminate the use of red ink and bracketing/underlining in the amendment of patent applications, since OCR techniques now employed in the preparation of patents for publication can best accommodate ''clean copy'' insertions of amended subject matter.

The submission of marked-up copies would, for a time, increase file size but would provide the examiner with an easy way to compare the most recent amendments with earlier versions in the application files. While it may be possible for examiners to compare the clean copy with the previous version in order to detect changes, in the interest of reduced cycle time, a review of a marked-up copy of an amendment has been determined to be most effective in the examination process. The proposed requirements would provide the needed comparative basis (for paper copies) during the transition phase into an EFW environment.

Comment: A number of comments were received which expressed concern about the harmonization of the Office's amendment requirements with those of PCT and/or other foreign countries.

Response: While PCT practice currently provides for the use of replacement pages, it appears that paragraph or section replacement is being considered worldwide as electronic filing requirements are being developed. Both the JPO and the EPO currently employ paragraph numbering in their application requirements and publication procedures. No other patent examining authority has yet developed procedures for transitioning into electronic filing and practice.

Comment: Several comments received questioned the ability of word processing software to handle paragraph numbering and renumbering without extensive clerical intervention.

Response: The objective of the proposed amendment practice and the concept of paragraph numbering is to easily identify a paragraph in the specification and to not disturb the numbering of the paragraphs preceding and following the amendments/insertions. It is being concurrently proposed that § 1.52 provide for paragraph numbering according to a four digit Arabic numeral arrangement enclosed in bold brackets to be placed at the beginning of each paragraph immediately to the right of the left margin, and followed by approximately four spaces, before beginning the paragraph text (*e.g.*, [0071]). If, according to the proposed changes to § 1.121, for example, paragraph [0071] is to be replaced, another paragraph of the same number should be inserted in its place. If several paragraphs are to replace a single deleted paragraph, [0071] should, for example, be replaced by [0071], [0071.1], and [0071.2]. The ability of word processing software to renumber the remaining paragraphs should not be necessary.

Comment: Several comments suggested identifying the replacement paragraphs by page number and line number, or through the use of replacement pages.

Response: The proposed changes to § 1.121 are intended, in part, to serve the Office and its customers during a transition into an EFW environment. Accordingly, paragraph replacement via paragraph numbering will most effectively achieve the desired results. Identification of paragraphs by page and line number does not consistently and uniformly refer to the same section of the specification due to formatting and pagination differences among various word processing programs.

Comment: Several comments received suggested that the Office more aggressively pursue total electronic filing.

Response: A total EFW environment is still several years away. The proposed changes must be workable during a transition into electronic filing, and, at the same time, serve all customers adequately, including those not yet able to adapt to word processing and advanced computer techniques.

Section 1.125: Section 1.125(b)(2) is proposed to be amended to require that all the changes to the specification (rather than simply all additions and deletions) be shown in a marked-up copy. Section 1.125(b)(2) is also proposed to be amended to provide that numbering the paragraphs of the specification of record is not considered a change that must be shown. Thus, the marked-up copy of the substitute specification need not show the numbering the paragraphs of the specification of record, and no marked-up copy of the substitute specification is required if the only change is numbering of the paragraph of the specification of record. Section 1.125(c) is proposed to be amended to encourage that the paragraphs of any substitute specification be numbered in a manner consistent with § 1.52(b)(6).

Section 1.131: The heading of § 1.131 is proposed to be amended to clarify that it applies to overcoming other activities in addition to cited patents or publication. Section 1.131(a) is proposed to be amended for simplicity.

Section 1.131(a) is specifically proposed to be amended to provide that when any claim of an application or a patent under reexamination is rejected, the inventor of the subject matter of the rejected claim, the owner of the patent under reexamination, or the party qualified under §§ 1.42, 1.43, or 1.47, may submit an appropriate oath or declaration to establish invention of the subject matter of the rejected claim prior to the effective date of the reference or activity on which the rejection is based. Section 1.131(a) as proposed would eliminate the provisions that specify which bases for rejection must be applicable for § 1.131 to apply. Instead, the approach would be that § 1.131 is applicable unless the rejection is based upon a U.S. patent to another or others which claims the same patentable invention as defined in § 1.601(n) or a statutory bar. This avoids the situation in which the basis for rejection is not a statutory bar (under 35 U.S.C. 102(a) based upon prior use by others in the United States) and should be capable of being antedated, but the rejection is not specified as a basis for rejection that must be applicable for § 1.131 to apply.

Section 1.131(a) is also proposed to be amended to provide that the effective date of a U.S. patent is the date that such U.S. patent is effective as a reference under 35 U.S.C. 102(e). MPEP 2136.03 provides a general discussion of the date a U.S. patent is effective as a reference under 35 U.S.C. 102(e). Finally, § 1.131(a) is proposed to be amended to provide that prior invention may not be established under § 1.131 if either: (1) The rejection is based upon a U.S. patent to another or others which

claims the same patentable invention as defined in § 1.601(n); or (2) the rejection is based upon a statutory bar.

Section 1.132: Section 1.132 is proposed to be amended to eliminate the provisions that specify which bases for rejection must be applicable for § 1.132 to apply. Instead, the approach would be that § 1.132 is applicable unless the rejection is based upon a U.S. patent to another or others which claims the same patentable invention as defined in § 1.601(n). Section 1.132 is specifically proposed to be amended to state that: (1) when any claim of an application or a patent under reexamination is rejected or objected to, an oath or declaration may be submitted to traverse the rejection or objection; and (2) an oath or declaration may not be submitted under this section to traverse a rejection if the rejection is based upon a U.S. patent to another or others which claims the same patentable invention as defined in § 1.601(n).

Sections 1.131 and 1.132 are procedural in nature that they provide mechanisms for the submission of evidence to antedate or otherwise traverse a rejection; however, they do not address the substantive effect of the submission of such evidence on the objection or rejection at issue. *See, e.g., In re Zletz*, 893 F.2d 319, 322–33, 13 USPQ2d 1320, 1322–23 (Fed. Cir. 1990)(§ 1.131 provides an *ex parte* mechanism whereby a patent applicant may antedate subject matter in a reference); *Newell Cos.* v. *Kenney Mfg.*, 864 F.2d 757, 768–69, 9 USPQ2d 1417, 1426–27 (Fed. Cir. 1988)(the mere submission of evidence under § 1.132 does not mandate a conclusion of patentability). An applicant's compliance with §§ 1.131 or 1.132 means that the applicant is entitled to have the evidence considered in determining the patentability of the claim(s) at issue. It does not mean that the applicant is entitled as a matter of right to have the rejection or objection of the claim(s) withdrawn.

Section 1.133: Section 1.133(a) is proposed to be amended to provide that interviews must be conducted on ''Office premises'' (rather than ''in the examiner's rooms''). The purpose of this proposed change is to account for interviews conducted in conference rooms or by video conference.

Section 1.136: Section 1.136(c) is proposed to be added to provide that if an applicant is notified in a ''Notice of Allowability'' that an application is otherwise in condition for allowance, the following time periods are not extendable if set in the ''Notice of Allowability'' or in an Office action having a mail date on or after the mail date of the ''Notice of Allowability'': (1) The period for submitting an oath or declaration in compliance with § 1.63; (2) the period for submitting formal drawings set under § 1.85(c); and (3) the period for making a deposit set under § 1.809(c). See discussion of the change to § 1.85(c).

Section 1.137: Section 1.137(c) is proposed to be amended to provide that any petition under § 1.137 in either a utility or plant application filed before June 8, 1995, must be accompanied by a terminal disclaimer and fee as set forth in § 1.321 dedicating to the public a terminal part of the term of any patent granted thereon equivalent to the lesser of: (1) The period of abandonment of the application; or (2) the period extending beyond twenty years from the date on which the application for the patent was filed in the United States or, if the application contains a specific reference to an earlier filed application(s) under 35 U.S.C. 120, 121, or 365(c), from the date on which the earliest such application was filed. This proposed change will further harmonize effective treatment under the patent term provisions of 35 U.S.C. 154(b) and (c) of utility and plant applications filed before June 8, 1995, with utility and plant applications filed on or after June 8, 1995. Section 1.137(c) is also proposed to provide that its terminal disclaimer requirement does not apply to applications for which revival is sought solely for purposes of copendency with a utility or plant application filed on or after June 8, 1995, or to lapsed patents.

Section 1.138: Section 1.138 is proposed to be amended to clarify the signature requirement for a letter (or written declaration) of express abandonment. Section 1.138(a) is proposed to provide that: (1) An application may be expressly abandoned by filing in the Patent and Trademark Office a written declaration of abandonment identifying the application; and (2) express abandonment of the application may not be recognized by the Office unless it is actually received by appropriate officials in time to act thereon before the date of issue. Section 1.138(b) is proposed to provide that a written declaration of abandonment must be signed by a party authorized under § 1.33(b)(1), (b)(3), or (b)(4) to sign a paper in the application, except that a registered attorney or agent not of record who acts in a representative capacity under the provisions of § 1.34(a) when filing a continuing application may expressly abandon the prior application as of the filing date granted to the continuing application.

Section 1.152: Section 1.152 is proposed to be revised to be consistent with the proposed changes to § 1.84 (deletion of the petition requirement for color photographs and color drawings). Section 1.152 was amended in 1997 to clarify Office practice that details disclosed in the drawings or photographs filed with a design application are considered to be an integral part of the disclosed and claimed design, unless disclaimed. See Changes to Patent Practice and Procedure, Final Rule Notice, 62 FR 53131, 53164 (October 10, 1997), 1203 Off. Gaz. Pat. Office 63, 91 (October 21, 1997). A recent decision by the Federal Circuit, however, has called this practice into question. *See In re Daniels*, 144 F.3d 1452, 46 USPQ2d 1788 (Fed. Cir. 1998), *rev'g*, *Ex parte Daniels*, 40 USPQ2d 1394 (BPAI 1996). Accordingly, the Office is proposing to amend § 1.152 to eliminate these provisions. See Removal of Surface Treatment From Design Drawings Permitted, Notice, 1217 Off. Gaz. Pat. Office 19 (December 1, 1998).

Section 1.154: Section 1.154(a) is proposed to be separated into §§ 1.154(a) and 1.154(b) and the material clarified. The order of the papers in a design patent application, including the proposed application data sheet (*see* § 1.76), is proposed to be listed in § 1.154(a). The order of the sections in the specification of a design patent application is proposed to be listed in § 1.154(b). New § 1.154(c) corresponds to § 1.77(c) and provides that the section heading should be in uppercase letters without underlining or bold type.

Section 1.155: Current § 1.155 is proposed to be eliminated as being unnecessarily duplicative of the provisions of §§ 1.311(a) and 1.316, which apply to the issuance of all patents, including designs. In its place, proposed § 1.155 is proposed to be redrafted to establish a procedure to create a ''rocket docket'' for design applications. The procedure will be available to all design applicants who first conduct a preliminary examination search and file a request for expedited treatment accompanied by a fee commensurate with the Office cost of the expedited treatment and handling (§ 1.17(t)). The Office will require a statement that a preexamination search was conducted which must also indicate the field of search and include an information disclosure statement in compliance with § 1.98. Formal drawings in compliance with § 1.84 are required. The applications will be individually examined with priority and the clerical processing will be conducted and/or monitored by

specially designated personnel to achieve expeditious processing through initial application processing and the Design Examining Group. The Office will not examine an application that is not in condition for examination even if the applicant files a request for expedited examination under this section. The requirements announced in the Advance Notice relating to constructive election of the first presented invention have been dropped.

General Comments

Of the comments received in response to the proposal to creating a ''Rocket Docket'' for design applications, most of the comments generally favored the proposal, by roughly a two-to-one margin.

Comment: One commenter opined that the ''ultra expedited'' procedure is a much needed avenue for patentees concerned with the design and marketing of seasonal, high volume consumer goods and that the procedure would attract new customers and fulfill a critical need in many industries for patent protection to stop infringement and to deter would-be infringers. Moreover, the commenter opined that recent court interpretations of the marking provisions require patented products to be marked with the patent number no matter what monetary remedy the patentee pursues and that having all of the products marked with the patent number will maximize a patentee's protection by synchronizing protection with the retail market launch.

Response: The Office envisions that these provisions will fulfill a particular need by affording rapid design protection on an expedited basis so that designs may be readily patented and marked with a patent number before marketing. At the same time, a fee will be charged to recoup estimated expected costs incurred by the Office.

Comment: Two comments opposed the idea of giving one applicant priority over others based on a fee, or the opportunity to ''buy a place in line,'' further reasoning that the granting of priority should be based on need.

Response: The applicant is not buying a place in line, but instead is merely compensating for the extra costs for expediting the examination of the design applications. Also, if priority were to be granted based upon need, a petition would be required to determine whether the standards for awarding priority had been met. By eliminating the determination of a petition (which is required to determine need or compliance in Petitions to Make Special), the significant time required to make the determination is eliminated.

Comment: Another comment stated that the fee was unjustified in view of the fact that the current ''Petition to Make Special'' is available at a reduced fee.

Response: Although the current system of making cases special by petition fulfills the needs of some applicants, an additional expedited process is necessary for a quicker, streamlined filing-to-issuance procedure that does not involve the lengthy process of deciding a petition based upon need or some other type of showing. Moreover, the Petition to Make Special procedure requires a petition to be decided once the application reaches the Design Group, whereas the expedited procedure is instituted once the fee is paid and the application is ready for examination. Further, the ''Petition to Make Special'' will continue to be made available. Although the § 1.155 expedited examination is more costly, the cost is warranted due to more comprehensive expedited procedures to reduce processing time.

Comment: One commenter also suggested that if the Office procedure for dealing with a petition to make special is too complex, then the answer should be to simplify the Petition to Make Special procedure.

Response: The Petition to Make Special procedures are adopted for treating a variety of types of cases for which a determination must be made as to whether the subject matter qualifies under the procedure; *e.g.*, whether ''the invention will materially enhance the quality of the environment.'' On the other hand, the expedited procedure of § 1.155 is an entirely different rule which is fee-based and which may be readily decided as part of a clerical function, thereby reducing processing time and costs since the application does not need to be reviewed by a high level official.

Comment: Two comments were directed to the amount of time the examiners spend on the searching of design applications. One commenter was alarmed by the belief that design applications were examined in groups of ten or twenty and questioned the fairness of not examining the application in the order of filing and of delaying examination until a group is filled. The same commenter reasoned that design applications are easy to search and therefore hiring additional design applications examiners should allow each design application to be examined in the order of filing. The same commenter postulated that applicants should not have to pay a surcharge and perform their own search in order to obtain the examination for which they have already paid. Another commenter stated that the examiners will require additional time for searching expedited cases.

Response: Only the search phase of the examination of design applications is conducted in groups. Generally, the remainder of the examination process is done individually, unless the subject matter is so close as to involve double patenting. However, the most time consuming part of the design patent application examination is the search for prior art. Unlike the utility patent examiner, the design examiner is not concerned about claim language, but is focusing on visual characteristics that can be readily evaluated and searched. To employ economies of scale, searching is best done in groups. Generally, the size of group depends on the clustering of filing dates and similarities in subject matter. Cases are not delayed since design examiners are required to work on the ''oldest-date'' case. Moreover, even though a group search may be conducted, the examination is done in order of filing and the cases are not delayed to fill a group. Typically, the examiner picks the oldest date case for examination and then tries to create a group of design applications with similar subject matter for efficiency in searching. As to the comment directed to increasing the number of examiners, to dramatically increase the number of examiners might result in less efficiency due to overlapping subject matter and is not necessarily an option available based on Office priorities and budget. As to the comment regarding the payment of a ''surcharge,'' this is to cover the costs associated with expediting the search. It is recognized that more time is required to search cases individually than that required if the searching is done in groups. As to the requirement of a search performed by the applicant, this will not only enhance the quality of the search but also ensure that applicant is prudently filing for expedited status and making an informed choice. As to the impact of the processing time for expedited cases on those regularly filed, enough resources are being provided so that the handling of expedited cases will not influence the examination of other cases.

Comment: Two comments suggested that the concept be extended to both utility and design applications.

Response: This suggestion is not being adopted at this time, since due to limited resources, the idea is best limited to design applications where due to the relative ease of copying, there is often a need for rapid patent protection.

Comment: One comment supported the measure but asked for a *quid-pro-quo* short time goal of four months.

Response: The Design Group has indicated that they will set as an objective three months cycle-time for examination and one month cycle-time for printing and guidelines for the program shall be explained to the public in the MPEP.

Comment: One comment stated there was no need for an expedited procedure since design applications ''are being examined as of late relatively quickly.''

Response: Nonetheless, the proposal is responsive to public need for those applicants who are willing to pay an increased, cost-offsetting fee in view of the benefits arising from further decreases in patent prosecution time.

Comment: A few comments stated in opposition to the proposal that the best solution is to hire more examiners.

Response: Although additional manpower conceivably would reduce cycle time, the Office faces certain constraints on its ability to hire more examiners and it must utilize its resources as best it can in order to meet all of the Office's goals.

Comment: Several comments supportive in concept also had specific recommendations for streamlining the application process, including prepayment or preauthorization of the issue fee, and faxing and/or telephoning all communications.

Response: As to the prepayment or preauthorization of the issue fee, this suggestion is not being adopted for reasons similar to those presented in conjunction with the proposal to eliminate preauthorization of payment of the issue fee (§ 1.311). As to making all communications by facsimile or phone, this will be encouraged where practicable and when the applicant's representative supplies a facsimile number. Multiple references, however, may prove too cumbersome for transmission by facsimile.

Comment: One comment suggested that automatic refunds be given if short time goals were not met and that a ''Public Advisory Committee'' be established to monitor progress and to be a point of contact for suggestions from the public.

Response: The suggestion as to automatic refunds is not being adopted in view of the unpredictability of unforeseen circumstances which might justify the failure to achieve the goal as well as lack of statutory authority to give a refund because a processing goal is not met in time. As to the ''Public Advisory Committee,'' the Office does not foresee the need for such a committee, and the most practical point of contact would be with the design group itself, which is always open to suggestions from the public.

Section 1.163: Section 1.163(b) is proposed to be eliminated to delete the requirement for two copies of the specification for consistency with the current Office practice. *See* Interim Waiver of 37 C.F.R. § 1.163(b) for Two Copies of a Specification of an Application for a Plant Patent, Notice, 1213 Off. Gaz. Pat. Office 109 (August 4, 1998). Section 1.163(c) is proposed to be separated into §§ 1.163(b) and 1.163(c). The order of the papers in a plant patent application, including the proposed application data sheet (*see* § 1.76) is proposed to be listed in § 1.163(b). The order of the sections in the specification of a plant patent application is proposed to be listed in § 1.163(c). New § 1.163(d) corresponds to § 1.77(c) and provides that the section headings should be in uppercase letters without underlining or bold type.

New sections 1.163(c)(4) and 1.163(c)(5) require the plant patent applicant to state the Latin name and the variety denomination for the plant claimed. The Latin name and the variety denomination of the claimed plant are usually included in the specification of the plant patent application. The Office, pursuant to the ''International Convention for the Protection of New Varieties of Plants'' (generally known by its French acronym as the UPOV convention), has been asked to compile a database of the plants patented and the database must include the Latin name and the variety denomination of each patented plant. Having this information in separate sections of the plant patent application will make the process of compiling this database more efficient.

Current §§ 1.163(c)(5) through 1.163(c)(10) are proposed to be redesignated §§ 1.163(c)(6) through 1.163 (c)(11), respectfully.

Section 1.163(c)(14) and 1.163(d) are proposed to be eliminated to delete the reference to a plant patent color coding sheet. The color codes and the color coding system are generally included in the specification. Repeating the color coding information in a color coding sheet increases the risk of error and inconsistencies.

Section 1.173: The proposed changes to § 1.173 regarding identifying all occurrences of claim broadening in a reissue application, which were published in the Advance Notice (Topic 16), have been dropped in view of comments received. A number of comments were directed to the undue burden which the rule change would place on applicants and the potential for future issues in litigation re § 1.56 violations.

It is now being proposed that § 1.173 be amended to consolidate the requirements for the filing of reissue applications currently in § 1.173, the requirements for amending reissue applications currently in § 1.121, and the requirements for reissue drawings, currently in § 1.174. It is proposed that § 1.174 be eliminated as the requirements for filing drawings would be moved to § 1.173. The proposed language consolidates many procedural and formal requirements for reissue applications into a single section. Paragraphs for separate items within this section have been proposed, in order to set forth the requirements for the specification, claims and drawings in a format which is clearer and easier to understand.

The title § 1.173 is proposed to be changed to ''Reissue specification, drawings, and amendments'' to more aptly describe the inclusion of all filing and amendment requirements for the specification, including the claims, and the drawings of reissue applications in a single section.

Section 1.173(a), as proposed, sets forth the current requirements for the contents of a reissue application at filing, and the existing prohibition against new matter in a reissue application.

It is proposed in § 1.173(a)(1) to now require that the specification, including the claims, be furnished in the form of a copy of the printed patent with a single column of the patent appearing on each individual page of the specification of the reissue application. This format for submitting a reissue application is currently set out in MPEP 1411. Paragraph (a)(1) would also provide that amendments made to the specification at filing must be made according to paragraph (b) of this section.

Proposed paragraph (a)(2) of § 1.173 sets forth the requirements for the drawings at the time the reissue application is filed. If clean copies (*i.e.*, good quality photocopies free of any extraneous markings) of the drawings from the original patent are supplied by applicant at the time of filing the application and the copies meet the requirements of § 1.84, no further (formal) drawings would be required. The current provision of § 1.174 requiring temporary drawings would be eliminated in view of this proposed change to § 1.173. The Office will be able to print a reissue patent using clean copies of the patent drawings. How changes to the patent drawings may be made at the time of filing of the reissue

application, or during the prosecution, would now be specifically set forth and must be made in accordance with the requirements of proposed paragraph (b)(3) of this section (which are essentially the requirements of current § 1.121(b)(3)(i) and (ii)). If applicant has failed to provide clean copies of the patent drawings, or if changes are made to the drawings during the reissue prosecution, drawings in compliance with § 1.84 would continue to be required at the time of allowance. It is also proposed to eliminate the practice of transferring drawings from the patent file since clean copies of patent drawings will be acceptable for use in the printing of the reissue patent.

Section 1.173(b), as proposed, now sets out that amendments in a reissue application made at the time of filing may be made either by physically incorporating the amendments within the body of the specification (including the claims) as filed, or by a preliminary amendment (separate paper).

Paragraphs (b)(1) and (b)(2) of § 1.173 incorporate the provisions of current § 1.121(b)(1) and (b)(2) as to the manner of amending the specification and claims, respectively.

Proposed § 1.173(b)(3) would incorporate the provisions currently set forth in § 1.121(b)(3) as to amending reissue drawings.

Paragraph (c) of § 1.173, as proposed, would now require, that whenever an amendment is made to the claims, either at the time of filing or during the prosecution, the amendment must be accompanied by a statement as to the status of all patent claims and all added claims, and an explanation as to the support in the disclosure for any concurrently made changes to the claims.

Paragraph (d), as proposed, would incorporate the provisions currently set forth in § 1.121(b)(1)(iii) and (b)(2)(i)(C) as to how changes in reissue applications are shown in the specification and claims, respectively.

Paragraphs (e), (f) and (g), as proposed, merely reiterate requirements for retaining original claim numbering, amending the disclosure when required, and making amendments relative to the original patent, as are set out currently in § 1.121(b)(2)(B), (b)(4), and (b)(6), respectively.

The current requirement of § 1.121(b)(5) prohibiting enlarging the scope of the claims more than two years after the patent grant has been eliminated from proposed § 1.173 as being redundant to existing statutory language in 35 U.S.C. 251.

Section 1.174: It is proposed that § 1.174 be eliminated (and reserved) in view of the inclusion of all filing and amendment requirements for reissue drawings into proposed § 1.173. Thus, in addition to the reissue filing requirements of current § 1.173, the reissue amendment requirements of current § 1.121(b) and the reissue drawing requirements of current § 1.174 would all be included in a single rule, proposed § 1.173. The proposed changes consolidating several current rules into a single section should make all reissue filing and amendment requirements quicker to locate and easier to understand.

Section 1.176: Section 1.176 is proposed to be amended to eliminate the prohibition against requiring division in a reissue application. The Federal Circuit has indicated that 35 U.S.C. 251 does not, under certain circumstances, prohibit an applicant in a reissue application from adding claims directed to an invention which is separate and distinct from the invention defined by the original patent claims. *See In re Amos*, 953 F.2d 613, 21 USPQ2d 1271 (Fed. Cir. 1991). Section 1.176, however, presently prohibits the Office from making a restriction requirement in a reissue application. This prohibition in § 1.176, in combination with the Federal Circuit's decision in *Amos*, frequently places an unreasonable burden on the Office in requiring the examination of multiple inventions in a single reissue application.

Section 1.176 as proposed would allow the Office to make a restriction requirement in a reissue application between claims added in a reissue application and the original patent claims, where the added claims are directed to an invention which is separate and distinct from the invention(s) defined by the original patent claims. The criteria for making a restriction requirement in a reissue application between added claims and original claims would be the same as that applied in an original application. *See* MPEP 806 through 806.05(i). *See* the discussion of § 1.177 concerning the proposed treatment of multiple reissue applications and procedures following a restriction requirement in a reissue.

The Office would continue to not require restriction among original claims of the patent (*i.e.*, among claims that were in the patent prior to filing the reissue application). In order for restriction to be required between the original patent claims and added claims, the added claims must be directed toward inventions which are separate and distinct from the invention(s) defined by the original patent claims. Restriction between multiple inventions in the added claims would also be possible provided the added claims are drawn to several separate and distinct inventions.

The changes being considered are not intended to affect the type of errors that are or are not appropriate for correction under 35 U.S.C. 251 (*e.g.*, applicant's failure to timely file a divisional application is not considered to be the type of error that can be corrected by a reissue). *See In re Watkinson*, 900 F.2d 230, 14 USPQ2d 1407 (Fed. Cir. 1990); *In re Mead*, 581 F.2d 251, 198 USPQ 412 (CCPA 1978); *and In re Orita*, 550 F.2d 1277, 193 USPQ 145 (CCPA 1977).

Section 1.11(b) currently exempts reissue continued prosecution applications (CPAs) under § 1.53(d) from the announcement of reissue filing in the *Official Gazette*. The proposed language of § 1.176(b) further clarifies that the examination of a CPA reissue is not subject to a two-month examination delay following its filing.

Section 1.177: It is proposed that § 1.177 be modified to eliminate current requirements that divisional reissues be limited to separate and distinct parts of the thing patented, and that they be issued simultaneously unless ordered by the Commissioner. It is proposed that the rule be expanded to include continuations of reissues as well as divisionals. As a result of comments received following publication in the Advance Notice (Topic 17), none of which were opposed to the proposed changes to § 1.177, the Office is moving forward with the changes proposed.

The Federal Circuit has indicated that 35 U.S.C. 251, ¶ 2, does not place stricter limitations on the filing of continuation or divisional reissue applications than is placed by 35 U.S.C. 120 and 121 on the filing of continuation or divisional non-reissue applications. *See In re Graff*, 111 F.3d 874, 876, 42 USPQ2d 1471, 1473 (Fed. Cir. 1997). The Federal Circuit specifically stated:

> * * * [35 U.S.C. 251, ¶ 3,] provides that the general rules for patent applications apply also to reissue applications, and [35 U.S.C. 251, ¶ 2,] expressly recognizes that there may be more than one reissue patent for distinct and separate parts of the thing patented. [35 U.S.C. 251] does not prohibit divisional or continuation reissue applications, and does not place stricter limitations on such applications when they are presented by reissue, provided of course that the statutory requirements specific to reissue applications are met. *See* [35 U.S.C. 251, ¶ 3].
> * * * [35 U.S.C. 251, ¶ 2,] is plainly intended as enabling, not limiting. [35 U.S.C. 251, ¶ 2,] has the effect of assuring that a different burden is not placed on divisional or continuation reissue applications, compared with divisions and continuations

of original applications, by codifying [*The Corn-Planter Patent,* 90 U.S. 181 (1874),] which recognized that more than one patent can result from a reissue proceeding. Thus, [35 U.S.C. 251, ¶ 2,] places no greater burden on [a] continuation reissue application than upon a continuation of an original application; [35 U.S.C. 251, ¶ 2,] neither overrides, enlarges, nor limits the statement in [35 U.S.C. 251, ¶ 3,] that the provisions of Title 35 apply to reissues.

Graff, 111 F.3d at 876–77, 42 USPQ2d at 1473. Thus, the Federal Circuit has indicated that a continuation or divisional reissue application is not subject to any greater burden other than the burden imposed by 35 U.S.C. 120 and 121 on a continuation or divisional non-reissue application, except that a continuation or divisional reissue application must also comply with the statutory requirements specific to reissue applications (*e.g.,* the ''error without any deceptive intention'' requirement of 35 U.S.C. 251, ¶ 1).

Following *Graff,* the Office has adopted a policy of treating continuations/divisionals of reissue applications in much the same manner as continuations/divisionals of non-reissue applications. Accordingly, it is proposed that the current requirements of § 1.177 as to petitioning for non-simultaneous issuance of multiple reissues, suspending prosecution in an allowable reissue while the other is prosecuted, and limiting the content of each reissue to separate and distinct parts of the thing patented, all be eliminated. These requirements are considered unique to reissue continuations/divisionals, impose additional burdens on reissue applicants, and are not consistent with the Federal Circuit's discussion of 35 U.S.C. 251, ¶ 2, in *Graff.*

It is proposed that § 1.177(a) be changed to require that all multiple reissue applications from a single patent include as the first line of the respective specifications a cross reference to the other reissue application(s). The statement would provide the public with notice that more than one reissue application has been filed to correct an error (or errors) in a single patent. If one reissue has already issued without the appropriate cross reference, a certificate of correction would be issued to provide the cross reference in the issued reissue.

In § 1.177(b), it is proposed that all of the claims of the patent be presented in each application as amended, unamended or canceled, and that the same claim not be presented for examination in more than one application in its original unamended version. Any added claims would have to be numbered beginning with the next highest number following the last patent claim.

If the same or similar claims were presented in more than one of the multiple reissue applications, statutory double patenting (35 U.S.C. 101) or non-statutory (judicially created doctrine) double patenting considerations would be given by the examiner during examination, and appropriate rejections made. If needed to overcome the rejections, terminal disclaimers would be required in order to ensure common ownership of any non-distinct claims throughout each of the patents' lifetimes.

It is also being proposed concurrently that restriction between the original patent claims and any added claims to separate and distinct subject matter be permitted in reissue applications (see the proposed change to § 1.176). If one or more divisional applications are filed after such a restriction requirement, it is proposed in § 1.177(c) that the resulting multiple reissue applications would be issued alone or together, but each of the reissue applications would be required to include changes which correct an error in the original patent before it can be issued as a reissue patent. If one of the applications resulting from the restriction requirement was found to be allowable without any changes relative to the patent (*i.e.,* it includes only all the original patent claims), further action would be suspended until one other reissue application was allowable; then, the two would be recombined and issued as a single reissue patent. If the several reissue applications resulting from the restriction each included changes correcting some error in the original patent, the reissue applications could be issued separately, with an appropriate cross-reference to the other(s) in each of the respective specifications.

Section 1.178: Section 1.178 is proposed to be amended to no longer require an offer to surrender the original patent at the time of filing as part of the reissue application filing requirements. The inclusion of a sentence regarding the ''offer'' is frequently overlooked by reissue applicants at the time of filing and results in the Office sending out a Notice to File Missing Parts of Application (Missing Parts Notice). The time spent by the Office in preparing the Missing Parts Notice, the time needed by applicant to reply, and the further time needed by the Office to process applicant's ''offer'' reply, can all be saved by the proposed change. The requirement for actual surrender of the original patent (or a ''statement'' of its loss, as set out below) before the reissue application is allowed, however, is retained.

It is also proposed that § 1.178 be amended to change ''affidavit or declaration'' (attesting to the loss or inaccessibility of the original patent) to ''statement.'' This proposed change would eliminate the verification requirements of the current rule, which are formalities covered by §§ 1.4 and 10.18. This change is in conformance with other similar changes to the patent rules which were effective on December 1, 1997, to ease the verification requirements of applicants. See Changes to Patent Practice and Procedure, 62 FR at 53175–78, 1203 Off. Gaz. Pat. Office at 100–03.

Section 1.193: Section 1.193(b)(1) is proposed to be amended to provide that appellant may file a reply brief to an examiner's answer ''or a supplemental examiner's answer.'' The purpose of this proposed amendment is to clarify the current practice that the appellant may file a (or another) reply brief within two months of a supplemental examiner's answer (§ 1.193), but the appellant must file any request for an oral hearing within two months of the examiner's answer (§ 1.194).

Section 1.303: Section 1.303(a) is proposed to be amended to add the phrase ''to an interference'' between ''any party'' and ''dissatisfied with the decision of the Board of Patent Appeals and Interferences'' to correct an inadvertent omission.

Section 1.311: Section 1.311(b) is proposed to be amended to provide that an authorization to charge the issue fee (§ 1.18) to a deposit account may be filed in an individual application only after mailing of the notice of allowance (PTOL–85).

The suggestion of eliminating preauthorization of payment of the issue fee was discussed in Topic 19 of the Advance Notice and received a generally favorable response. Many patent attorneys stated that they considered preauthorization a dangerous practice that they would not use. Others thought that preauthorization was an important safety feature, and that the Office should fix the internal clerical problems which were motivating the change.

After considering all of the comments, the Office has decided to go forward with the proposal to eliminate the ability of applicants to preauthorize payment of the issue fee. Section 1.311(b), as currently written, causes problems for the Office that tend to increase Office processing time. The language used by applicants to authorize that fees be charged to a deposit account often varies from one

application to another. As a result, conflicts arise between the Office and applicants as to the proper interpretation of authorizing language found in their applications. For example, some applicants are not aware that it is current Office policy to interpret broad language to ''charge any additional fees which may be required at any time during the prosecution of the application'' as authorization to charge the issue fee on applications filed on or after October 1, 1982. *See* Deposit Account Authorization to Charge Issue Fee, Notice 1095 Off. Gaz. Pat. Office 44 (October 25, 1988), *reprinted at* 1206 Off. Gaz. Pat. Office 95 (January 6, 1998).

Even when the language preauthorizing payment of the issue fee is clear, the preauthorization can present problems for both the Office and practitioners. One problem is because it may not be clear to the Office whether a preauthorization is still valid after the practitioner withdraws or the practitioner's authority to act as a representative is revoked. If the Office charges the issue fee to the practitioner's deposit account, the practitioner may have difficulty getting reimbursement from the practitioner's former client. Another problem is that when the issue fee is actually charged at the time the notice of allowance is mailed, a notice to that effect is printed on the notice of allowance (PTOL–85) and applicant is given one month to submit/return the PTOL–85B with information to be printed on the patent. Applicants are sometimes confused, however, by the usual three-month time period provided for paying the issue fee and do not, therefore, return the PTOL–85B until the end of the normal three-month period. As the Office does not wait for the PTOL–85B to be returned to begin electronic capture of the data to be printed as a patent, any PTOL–85B received more than a month after the issue fee has been paid may not be matched with the application file in time for the information thereon to be included on the patent.

Clerical problems are not the main reason for proposing to eliminate the practice. The Office would like all of the information necessary for printing a patent to be in the application when the issue fee is paid. Thus, the Office is proposing to eliminate petitions under § 3.81(b), see below, and intends to no longer print any assignee data that is submitted after payment of the issue fee. As explained in the Advance Notice, it is not generally in applicant's best interest to pay the issue fee at the time the notice of allowance is mailed, since it is much easier to have a necessary amendment or an information disclosure statement considered if filed before the issue fee is paid rather than after the issue fee is paid. See current § § 1.97 and 1.312(b). Also, once the issue fee has been paid, applicant's window of opportunity for filing a continuing application is reduced and the applicant no longer has the option of filing a continuation or divisional application as a continued prosecution application (CPA) under § 1.53(d). *See* Patents to Issue More Quickly After Issue Fee Payment, 1220 Off. Gaz. Pat. Office at 42, and Filing of Continuing Applications, Amendments, or Petitions after Payment of Issue Fee, 1221 Off. Gaz. Pat. Office at 14. Many applicants find the time period between the mailing date of the notice of allowance and the due date for paying the issue fee useful for re-evaluating the scope of protection afforded by the allowed claim(s) and for deciding whether to pay the issue fee and/or to file one or more continuing applications.

If prompt issuance of the patent is a high priority, after receipt of the notice of allowance applicant may promptly return the PTOL–85B (supplying any desired assignee and attorney information) and pay the issue fee. In this way, the Office will be able to process the payment of the issue fee and the information on the PTOL–85B as a part of a single processing step. Further, no time would be saved even if the issue fee was preauthorized for payment as the Office would still not have the assignee and attorney data which is taken from the PTOL–85B. Thus, it is not seen that the proposal to eliminate the preauthorization to pay the issue fee would have any adverse effects on our customers.

Section 1.312: Section 1.312(a) is proposed to be amended to change ''case'' to ''application'' for clarity. Section 1.312(b) is proposed to be amended to replace the required showing of good and sufficient reason of why the amendment is needed and was not earlier presented, to provide that any amendment pursuant to § 1.312 filed after the date the issue fee is paid must be accompanied by: (1) A petition under § 1.313(c)(1) to withdraw the application from issue; (2) an unequivocal statement that one or more claims are unpatentable; and (3) an explanation as to how the amendment is necessary to render such claim or claims patentable. The proposed change to § 1.312(b) is necessary because the change in the patent printing process (discussed above with respect to § 1.55) will dramatically reduce the period between the date of issue fee payment and the date a patent is issued. In view of the brief period between the date of issue fee payment and the date a patent is issued, the Office must limit amendments under § 1.312 to those necessary to avoid the issuance of a patent containing an unpatentable claim or claims. Other amendments must be filed prior to payment of the issue fee (preferably within one month of the mailing of a notice of allowance), or be sought in a continuing application (*see* § 1.313(c)(2)) or by certificate of correction under 35 U.S.C. 255 and § 1.323.

Section 1.313: Section 1.313(a) is proposed to be amended to provide that: (1) Applications may be withdrawn from issue for further action at the initiative of the Office or upon petition by the applicant; (2) to request that the Office withdraw an application from issue, the applicant must file a petition under this section including the fee set forth in § 1.17(h) and a showing of good and sufficient reasons why withdrawal of the application is necessary; and (3) if the Office withdraws the application from issue, the Office will issue a new notice of allowance if the Office again allows the application. The changes proposed to separate the language directed to actions by applicants and those actions by the Office are also proposed to increase the clarity of the section.

Section 1.313(b) is proposed to be amended to provide that once the issue fee has been paid, the Office will not withdraw the application from issue at its own initiative for any reason except: (1) a mistake on the part of the Office; (2) a violation of § 1.56 or illegality in the application; (3) unpatentability of one or more claims; or (4) for interference. Section 1.313(c) is proposed to provide that once the issue fee has been paid, the application will not be withdrawn from issue upon petition by the applicant for any reason except: (1) Unpatentability of one or more claims (*see* § 1.312(b)); or (2) for express abandonment (which express abandonment may be in favor of a continuing application). As discussed above, changes in the patent printing process will dramatically reduce the period between the date of issue fee payment and the date a patent is issued. The Office must streamline the provisions of current § 1.313(b) or the Office will not be able to render decisions on such petitions before the application is issued as a patent.

It is the Office's experience that petitions under current § 1.313(b) are rarely filed (and even more rarely granted) on the basis of: (1) A mistake on the part of the Office; (2) a violation of § 1.56 or illegality in the application;

(3) unpatentability of one or more claims; or (4) for interference. Therefore, the Office is proposing to provide that the Office may withdraw applications from issue after payment of the issue fee at its own initiative for these bases, but limit petitions under current § 1.313(b) (§ 1.313(c) as proposed) to: (1) unpatentability of one or more claims; or (2) for express abandonment, (which express abandonment may be in favor of a continuing application). If a petition under § 1.313(c) filed on the basis of unpatentability of one or more claims (§ 1.313(c)(1)), that petition must (in addition to meeting the requirements of § 1.313(a)) be accompanied by an amendment (pursuant to § 1.312), an unequivocal statement that one or more claims are unpatentable, and an explanation as to how the amendment is necessary to render such claim or claims patentable. See discussion of § 1.312(b).

Obviously, if an applicant believes that an application should be withdrawn from issue (after payment of the issue fee) on the basis of a mistake on the part of the Office, a violation of § 1.56 or illegality in the application, or for interference, the applicant may contact the examiner and suggest that the examiner request the Group Director to withdraw the application from issue at the initiative of the Office. The applicant, however, cannot insist that the Office withdraw an application from issue (after payment of the issue fee) for these reasons.

Section 1.313(d) is proposed to provide that a petition under § 1.313 will not be effective to withdraw the application from issue unless it is actually received and granted by the appropriate officials before the date of issue. Section 1.313(d) is also proposed to advise applicants that withdrawal of an application from issue after payment of the issue fee may not be effective to avoid publication of application information. While the Office takes reasonable steps to stop the publication and dissemination of application information (*e.g.*, the patent document) once an application has been withdrawn from issue, withdrawal from issue after payment of the issue fee often occurs too late in the patent printing process to completely maintain the application in confidence. How much of the application information is actually disseminated depends upon how close to the issue date the application is withdrawn from issue. The change in the patent printing process (discussed above with respect to § 1.55) will make it less likely that the Office can completely stop the publication and dissemination of application information in an application withdrawn from issue under § 1.313 after payment of the issue fee.

Section 1.314: Section 1.314 is proposed to be amended to change the reference to the fee set forth in ''§ 1.17(i)'' to the fee set forth in ''§ 1.17(h).'' This change is for consistency with the changes to § 1.17(h) and § 1.17(i). See discussion of changes to § 1.17(h) and § 1.17(i).

Section 1.322: Section 1.322(a) is proposed to be amended to provide that: (1) The Office may issue a certificate of correction under the conditions specified in 35 U.S.C. 254 at the request of the patentee or the patentee's assignee or at its own initiative; and (2) the Office will not issue such a certificate at its own initiative without first notifying the patentee (including any assignee of record) at the correspondence address of record and affording the patentee an opportunity to be heard. Section 1.322 as proposed would continue to provide that if the request relates to a patent involved in an interference, the request must comply with the requirements of this section and be accompanied by a motion under § 1.635. The current language of § 1.322(a) permits a third party request for a certificate for correction (a party ''not owning an interest in the patent''), which has led third parties to conclude that they have standing to demand that the Office issue, or refuse to issue, a certificate of correction. Third parties do not have standing to demand that the Office issue, or refuse to issue, a certificate of correction. *See Hallmark Cards, Inc.* v. *Lehman,* 959 F. Supp. 539, 543–44, 42 USPQ2d 1134, 1138 (D.D.C. 1997). Since the burden on the Office caused by such third-party requests now outweighs the benefit such information provides to the Office, the Office is proposing to amend § 1.322 such that a certificate of correction will be issued only at the request of the patentee or at the initiative of the Office.

Section 1.323: Section 1.323 is proposed to be amended to provide that the Office may issue a certificate of correction under the conditions specified in 35 U.S.C. 255 at the request of the patentee or the patentee's assignee, upon payment of the fee set forth in § 1.20(a). The language from 35 U.S.C. 255 currently in § 1.323 that provides the specific conditions under which a certificate of correction under § 1.323 will be issued is proposed to be eliminated for consistency with § 1.322 and because it is redundant to repeat the language of the statute in the rule. Section 1.323 as proposed would continue to provide that if the request relates to a patent involved in an interference, the request must comply with the requirements of this section and be accompanied by a motion under § 1.635.

Section 1.324: Section 1.324 would have the title revised to reference the statutory basis for the rule, 35 U.S.C. 256. It is particularly important to recognize that 35 U.S.C. 256, the statutory basis for corrections of inventorship in patents under § 1.324, is stricter than 35 U.S.C. 116, the statutory basis for corrections of inventorship in applications under § 1.48. 35 U.S.C. 256 requires ''on application of all the parties and assignees,'' while 35 U.S.C. 116 does not have the same requirement. Thus, the flexibility under 35 U.S.C. 116, and § 1.48, wherein waiver requests under § 1.183 may be submitted (*e.g.*, MPEP 201.03, page 200–6, Statement of Lack of Deceptive Intention), is not possible under 35 U.S.C. 256, and § 1.324.

Section 1.324(b)(1) would be revised to eliminate the requirement for a statement from an inventor being deleted stating that the inventorship error occurred without deceptive intent. The revision would be made to conform Office practice to judicial practice as enunciated in *Stark* v. *Advanced Magnetics, Inc.*, 119 F.3d 1551, 43 USPQ2d 1321 (Fed. Cir. 1997), which held that 35 U.S.C. 256 only requires an inquiry into the intent of a nonjoined inventor. The clause stating ''such error arose without deceptive intent on his part'' was interpreted by the court as being applicable only when there is an error where an inventor is not named, and not when there is an error where a person is named as an inventor. While the decision recognized that the Office's additional inquiry as to inventors named in error was appropriate under 35 U.S.C. 256 when read in conjunction with inequitable conduct standards, the Office no longer wishes to conduct an inquiry broader in scope than what would be conducted had the matter been raised in a court proceeding rather than under § 1.324.

Section 1.324(b)(2), which requires a statement from the current named inventors either agreeing to the requested change or stating that they have no disagreement to the requested change, would not be revised. Paragraph (b)(2) in combination with paragraph (b)(1) ensures compliance with the requirement of the statute for application by all the parties, which requirement is separate from the requirement that certain parties address the lack of deceptive intent in the inventorship error.

Section 1.324(c) would be a newly added paragraph to reference §§ 1.48, 1.497 and 1.634 for corrections of

inventorship in national applications, international applications and interferences, respectively.

Section 1.366: Section 1.366(c) is proposed to be amended to continue to provide that a maintenance fee payment must include the patent number and the application number of the United States application for the patent on which the maintenance fee is being paid, but to further provide that if the payment includes identification of only the patent number (*i.e.,* does not identify the application number for the patent on which the maintenance fee is being paid), the Office may apply the payment to the patent identified by patent number in the payment or may return the payment. The Office requires the application number to detect situations in which a maintenance payment is submitted for the incorrect patent (*e.g.,* due to a transposition error in the patent number). Nevertheless, a significant number of maintenance fee payments contain only the patent number and not the application number for the patent on which the maintenance fee is being paid.

The proposed change to § 1.366(c) will permit the Office to streamline processing of maintenance fee payments that lack the application number for the patent on which the maintenance fee is being paid. The Office intends to treat payments that do not contain both a patent number and application number as follows: *First,* a reasonable attempt will be made to contact the person who submitted the payment (patentee or agent) by telephone to confirm the patent number and application number of the patent for which the maintenance fee is being paid. *Second,* if such an attempt is not successful but the payment includes at least a patent number, the payment will be processed as a maintenance fee paid for the patent number provided, and the person who submitted the payment will be sent a letter informing him or her of the patent number and application number of the patent to which the maintenance fee was posted and given a period of time within which to file a petition under § 1.377 (and $130) if the maintenance fee was not posted to the patent for which the payment was intended. If the payment does not include a patent number (*e.g.,* includes only an application number), the payment will be returned to the person who submitted the payment.

Section 1.446: Section 1.446 is proposed to be amended in such that its refund provisions are consistent with the refund provisions of § 1.26. See discussion of § 1.26.

Section 1.497: Section 1.497(b)(2) has been proposed to be amended in a manner consistent with § 1.64(b). Therefore, § 1.497(b)(2) is proposed to be amended to refer to any supplemental oath or declaration and to provide that if the person making the oath or declaration is the legal representative, the oath or declaration shall state that the person is the legal representative and shall state the citizenship, residence, and mailing address of the legal representative. In addition, § 1.497(b)(2) is proposed to be amended to clarify that facts submitted under §§ 1.42, 1.43, and 1.47 are not required to be in the § 1.497 oath or declaration. Section 1.497(d) is proposed to provide for the situation in which an oath or declaration filed pursuant to 35 U.S.C. 371(c)(4) and § 1.497 names an inventive entity different from the inventive entity set forth in the international stage. Section 1.497(d) is proposed to be added to provide that such an oath or declaration must be accompanied by: (1) A statement from each person being added as an inventor and from each person being deleted as an inventor that any error in inventorship in the international stage occurred without deceptive intention on his or her part; (2) the processing fee set forth in § 1.17(i); and (3) if an assignment has been executed by any of the original named inventors, the written consent of the assignee (*see* § 3.73(b)). Thus, naming a different inventive entity in an oath or declaration filed to enter the national stage under 35 U.S.C. 371 in an international application is not analogous to the filing of an oath or declaration to complete an application under 35 U.S.C. 111(a) (which operates itself to name the new inventive entity under §§ 1.41(a)(1) and 1.48(f)(1)), but is analogous to correction of inventorship under § 1.48(a).

Section 1.510: Paragraph (b)(4) of § 1.510 is proposed to be revised to correspond to paragraph (a) of § 1.173 as revised by the present notice, see the discussion as to the revision of § 1.173. It is considered advantageous for the reexamination and reissue provisions to correspond with each other to the maximum extent possible, in order to eliminate confusion.

Section 1.530: Paragraph (d) of § 1.530 is proposed to be revised, and paragraphs (e)–(i) are proposed to be added, to correspond to paragraph (b) *et seq.* of § 1.173 as revised by the present notice, see the discussion as to the revision of § 1.173. It is considered advantageous for the reexamination and reissue provisions to correspond with each other to the maximum extent possible, in order to eliminate confusion. Paragraphs (d)(3) and (d)(4) of § 1.530 are proposed to be redesignated as paragraphs (j) and (k) of § 1.530.

Section 1.530(l) is proposed to be added to make it clear that where the inventorship of a patent being reexamined is to be corrected, a petition for correction of inventorship which complies with § 1.324 must be submitted during the prosecution of the reexamination proceeding. If the petition under § 1.324 is granted, a certificate of correction indicating the change of inventorship will not be issued, because the reexamination certificate that will ultimately issue will contain the appropriate change-of-inventorship information (*i.e.,* the certificate of correction is in effect merged with the reexamination certificate). In the rare instances where the reexamination proceeding terminates but does not result in a reexamination certificate under § 1.570 (reexamination is vacated or the order for reexamination is denied), patentee may then request that the inventorship be corrected by a certificate of correction indicating the change of inventorship.

Section 1.550: Where an application has become abandoned for failure to timely respond, the application can be revived under 35 U.S.C. 133 upon an appropriate showing of unavoidable delay via petition for revival and a petition fee. Analogously, where a reexamination proceeding becomes terminated for failure to timely respond, the proceeding can be restored to pendency under 35 U.S.C. 133 upon an appropriate showing of unavoidable delay, again via a petition and fee. *See In re Katrapat, AG,* 6 USPQ2d 1863, 1865–66 (Comm'r Pat. 1988).

In a situation where an appropriate showing of unavoidable delay cannot be made, an abandoned application can be revived upon an appropriate showing that the delay was unintentional via a petition and fee. The showing that the delay was unintentional is a lesser standard than that of unavoidable delay; however, the required petition fee for an unintentional delay petition is substantially larger than that of an unavoidable delay petition. This unintentional delay alternative has been found to be highly desirable to deal with situations where the higher standard for revival cannot be met; to eliminate paperwork, time, and effort in making the unavoidable delay showing; and to eliminate the need to request reconsideration if the initial petition for revival is dismissed or denied.

Despite the advantages of relief to petitioners via the unintentional delay alternative, there is no such alternative in reexamination proceedings. *See Katrapat*, 6 USPQ2d at 1866–67. It would be desirable to provide an unintentional delay alternative by rulemaking. Unfortunately, the statute does not provide a basis for unintentional delay relief in reexamination proceedings that is analogous to that for an application. The statutory basis for revival of an application based upon the unintentional delay standard is 35 U.S.C. 41(a)(7). There is no such statutory basis for restoring a reexamination proceeding to pendency based upon the unintentional delay standard.

Section 1.550(c) is proposed to be revised to provide the reexamination patentee with unintentional delay relief for any reply filed within the full statutory time period for submission of the papers that were unintentionally delayed. This relief would be provided in the form of an extension of time under § 1.550(c), which would be granted when unintentional delay is established and the appropriate extension of time fee is paid.

This avenue of unintentional delay relief is expected to deal with the majority of reexamination proceedings terminated for untimely response. The reason for this is as follows. Late responses are most often generated because of one of three reasons: (1) The patentee does not realize that an extension must be requested prior to the response due date and thus, files the response after the due date together with an extension request; (2) the patentee files the extension request shortly prior to the due date but fails to give reasons for the extension, and the time expires before a proper reexamination extension request can subsequently be provided and (3) the patentee is aware of the need for giving reasons and for filing of the request prior to the due date, however, the reminder docket system is not set up for the reexamination type of extension request and the request is not timely or properly made. In all three of these situations, the extension generally reaches the Office prior to the full six-month statutory period for submission of the response, especially given the fact that a one- or two-month shortened statutory period is set for response in reexamination. If there is time remaining in the statutory period, the Office can notify the patentee that an extension in accordance with § 1.550(c)(2) is needed to maintain pendency.

It is understood that the proposed revision will not provide relief to patentees in all cases with an unintentional termination of reexamination proceedings. However, in the absence of a statutory amendment to providing unintentional delay relief analogous to that of 35 U.S.C. 41(a)(7) for an application, the present rule change is believed to be the best avenue available to give patentees unintentional delay relief in reexamination proceedings.

Section 1.666: Section 1.666(b) is proposed to be amended to change the reference to the fee set forth in ''§ 1.17(i)'' to the fee set forth in ''§ 1.17(h).'' This change is for consistency with the changes to § 1.17(h) and § 1.17(i). See discussion of changes to § 1.17(h) and § 1.17(i).

Section 1.720: Section 1.720(b) is proposed to be amended to clarify that a patent extended under § 1.701 or § 1.790 would also be eligible for patent term extension. Section 1.720(g) is proposed to be amended to clarify that an application for patent term extension may be timely filed during the period of an interim extension under § 1.790.

Section 1.730: Section 1.730 is proposed to be amended to add new paragraphs (b), (c) and (d) which state who should sign the patent term extension application and what proof of authority may be required of the person signing the application. 35 U.S.C. 156 provides that an application for patent term extension must be filed by the patent owner of record or an agent of the patent owner. The Office interprets an agent of a patent owner to be either a licensee of the patent owner (for example, the party that sought permission from the Food and Drug Administration for permission to commercially use or sell a product, *i.e.*, the marketing applicant), or a registered attorney or agent. Proposed § 1.730(b) explains that, if the application is submitted by the patent owner, the correspondence must be signed by the patent owner or a registered practitioner. Proposed § 1.730(c) states that, if the application is submitted by an agent of the patent owner, the correspondence must be signed by a registered practitioner, and that the Office may require proof that the agent is authorized to act on behalf of the patent owner. Lastly, proposed § 1.730(d) states that the Office may require proof of authority of a registered practitioner who signs the application for patent term extension on behalf of the patent owner or the agent of the patent owner.

Section 1.740: Currently, for each product claim, method of use claim, and method of manufacturing claim which reads on the approved product, a showing is required demonstrating the manner in which each applicable claim reads on the approved product. Section 1.740(a)(9) is proposed to be amended to provide that the application for patent term extension only needs to explain how *one* product claim claims the approved product, if there is a claim to the product. In addition, the application would only need to explain how one method of use claim claims the method of use of the approved product, if there is a claim to the method of use of the product. Lastly, the application would only need to explain how one claim claims the method of manufacturing the approved product, if there is a claim to the method of manufacturing the approved product. With this proposed change, applicants for patent term extension should be able to reduce the time required to prepare the application since at the most only three claims would have to be addressed rather than all the claims that read on the three categories. Each claim that claims the approved product, the method of use of the approved product, or the method of manufacturing the approved product would still be required to be listed. *See* 35 U.S.C. 156(d)(1)(B).

Section 1.740(a)(10) is proposed to be amended to separate the text into paragraphs (A), (B) and (C) to aid in comprehension of the text.

Section 1.740(a)(14) is proposed to be amended to add ''and'' after the semicolon since the paragraph is now the next to last paragraph.

Section 1.740(a)(15) is proposed to be amended to change the semicolon to a period.

Section 1.740(a)(16) is proposed to be moved to § 1.740(b), the number of copies changed from two to three, and to eliminate the express ''certification'' requirement.

Section 1.740(a)(17) is proposed to be deleted as the requirement for an oath or declaration is being deleted in § 1.740(b).

Section 1.740(b) is proposed to be amended to delete the requirement for an oath or declaration since the averments set forth in § 1.740(b) are implicit in the submission of an application for patent term extension and the signature to the application.

Section 1.740(c) is proposed to be amended to increase the time period for response to a notice of informality for an application for patent term extension from one month to two months, where the notice of informality does not set a time period.

Section 1.741: Section 1.741(a) is proposed to be amended to clarify the

language to reference §§ 1.8 and 1.10 instead of referencing the rules and the titles of the rules. Section 1.741(a)(5) is proposed to be amended to correct the format of the citation of the statute. Section 1.741(b) is proposed to be amended to provide that requests for review of a decision that the application for patent term extension is incomplete, or review of the filing date accorded to the application, must be filed as a petition under § 1.741 accompanied by the fee set forth in § 1.17(h), rather than a petition under § 1.181, and that the petition must be filed within two months of the date of the notice, and that the extension of time provisions of § 1.136 apply.

Section 1.780: Section 1.780, including the title, is proposed to be amended to use terminology consistent with current practice by inserting the term ''order.''

Section 1.809: Section 1.809(b) is proposed to be amended to change ''respond'' to ''reply'' (*see* § 1.111), and § 1.809(b)(1) is proposed to be amended to eliminate the language discussing payment of the issue fee. Section 1.809(c) is proposed to be amended to provide that if an application for patent is otherwise in condition for allowance except for a needed deposit and the Office has received a written assurance that an acceptable deposit will be made, applicant will be notified and given a period of time within which the deposit must be made in order to avoid abandonment. Section 1.809(c) is also proposed to be amended to provide that this time period is not extendable under § 1.136 (a) or (b) (*see* § 1.136(c)). Section 1.809(c) is also proposed to be amended to eliminate the language stating that failure to make a needed deposit will result in abandonment for failure to prosecute because abandonment for failure to prosecute occurs by operation of law when an applicant fails to timely comply with such a requirement (*see* 35 U.S.C. 133).

Section 1.821: The Office indicated in the Advance Notice that the submission of sequence listings on paper is a significant burden on the applicants and the Office, and that it was considering changes to § 1.821 *et seq.* to: (1) Permit a machine-readable submission of the nucleotide and/or amino acid sequence listings to be submitted in an appropriate archival medium; and (2) no longer require the voluminous paper submission of nucleotide and/or amino acid sequence listings. *See* Changes to Implement the Patent Business Goals, 63 FR at 53510–12, 1215 Off. Gaz. Pat. Office at 99–100.

Unlike a computer program listing appendix under § 1.96(c), a sequence listing under § 1.821 is part of the disclosure of the application. The Office, however, may accept electronically filed material in a patent application, regardless of whether it is considered ''essential'' or ''nonessential.'' The patent statute requires that ''[a]n application for patent shall be made * * * in writing to the Commissioner.'' 35 U.S.C. 111(a)(1) (emphasis added). With regard to the meaning of the ''in writing'' requirement of 35 U.S.C. 111(a)(1), ''[i]n determining any Act of Congress, unless the context indicates otherwise * * *, ''writing'' includes printing and typewriting and reproduction of visual symbols by photographing, multigraphing, mimeographing, manifolding, or otherwise.'' 1 U.S.C. 1 (emphasis added); *see also* Fed. R. Evid. 1001(1) (writing defined as including magnetic impulse and electronic recording) and title XVII of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105–277, 112 Stat. 2681 (1998) (the Government Paperwork Elimination Act). An electronic document (or an electronic transmission of a document) is a ''reproduction of visual symbols,'' and the ''in writing'' requirement of 35 U.S.C. 111(a)(1) does not preclude the Office from accepting an electronically filed document. Likewise, there is nothing in the patent statute that precludes the Office from designating an ''electronic'' record of an application file as the Office's ''official'' copy of the application.

As discussed with regard to the proposed change to § 1.96, CD–ROM and CD–R are the only practical electronic media of archival quality. The CD–ROM or CD–R sequence listing would serve as the ''original'' of the sequence listing, yet still offer the conveniences of small size and ease in viewing. Thus, the Office is specifically considering revising § 1.821 *et seq.* to permit applicants to submit the official copy of the sequence listing either on paper or on CD–ROM or CD–R.

Section 1.821(c) is proposed to be amended to provide that a ''Sequence Listing'' must be submitted either: (1) on paper in compliance with § 1.823(a)(1) and (b); or (2) as a CD–ROM or CD–R in compliance with § 1.823(a)(2) and (b) that will be retained with the paper file. Section 1.821 is also proposed to be amended to provide that applicant may submit a second copy of the CD–ROM or CD–R ''Sequence Listing'' to satisfy the requirement for a ''Sequence Listing'' in a computer readable format pursuant to § 1.821(e), provided that the CD–ROM or CD–R ''Sequence Listing'' meets the requirements of § 1.824(c)(4). However, in order for a sequence listing to be a part of an international application, it must be filed in paper.

Section 1.821(e) and § 1.821(f) are proposed to be amended for consistency with the provisions in § 1.821(c) that permit the official copy of the ''Sequence Listing'' required by § 1.821(c) to be a paper or a CD–ROM or CD–R copy. Should these provisions be adopted, conforming changes may be made in the regulations to accommodate international applications in the national stage.

Section 1.823: The heading of § 1.823 is proposed to be amended for consistency with the provisions in § 1.821(c) that permit the official copy of the ''Sequence Listing'' required by § 1.821(c) to be a paper or a CD–ROM or CD–R copy. Section 1.823(a) is proposed to be amended to be divided into a paragraph (a)(1) that sets forth its current requirement as applying if the ''Sequence Listing'' submitted pursuant to § 1.821(c) is on paper, and a paragraph (a)(2) setting forth the requirements if the ''Sequence Listing'' submitted pursuant to § 1.821(c) is on a CD–ROM or CD–R. Section 1.823(a)(2) is proposed to provide that: (1) a ''Sequence Listing'' submitted on a CD–ROM or CD–R must be a text file in the American Standard Code for Information Interchange (ASCII) in accordance with the standards for that medium set forth in 36 CFR 1228.188(c)(2)(i) (no other format allowed); (2) the CD–ROM or CD–R ''Sequence Listing'' must be accompanied by documentation on paper that contains the machine format (*e.g.*, IBM–PC, Macintosh (etc.)), the operating system (*e.g.*, MS–DOS, Macintosh, Unix) and any other special information that is necessary to identify, maintain, and interpret the electronic ''Sequence Listings''; and (3) a notation that ''Sequence Listing'' is submitted on a CD–ROM or CD–R must be placed conspicuously in the specification (*see* § 1.77(b)(11)). Section 1.823(a)(2) is also proposed to provide that the CD–ROM or CD–R ''Sequence Listing'' must be labeled with the following information: (1) The name of each inventor (if known); (2) title of the invention; (3) the sequence identifiers of the ''Sequence Listings'' on that CD–ROM or CD–R; and (4) the docket number used by the person filing the application to identify the application (if applicable). Finally, § 1.823(c)(4) is proposed to be amended to refer to CD–R (as well as the CD–ROM currently provided for). Should these provisions be adopted, conforming changes may be made in the regulations to accommodate international applications in the national stage.

Section 1.825: Section 1.825(a) is proposed to be amended to provide that any amendment to the CD–ROM or CD–R copy of the ''Sequence Listing'' submitted pursuant to § 1.821 must be made by submission of a new CD–ROM or CD–R containing a substitute ''Sequence Listing,'' and that such amendments must be accompanied by a statement that indicates support for the amendment in the application-as-filed, and a statement that the new CD–ROM or CD–R includes no new matter. Section 1.825(b) is proposed to be amended to provide that any amendment to the CD–ROM or CD–R copy of the ''Sequence Listing'' pursuant to § 1.825(a) must be accompanied by a substitute copy of the computer readable form of the ''Sequence Listing'' required pursuant to § 1.821(e), including all previously submitted data with the amendment incorporated therein, and accompanied by a statement that the computer readable form copy is the same as the new CD–ROM or CD–R copy of the ''Sequence Listing.'' Should these provisions be adopted, conforming changes may be made in the regulations to accommodate international applications in the national stage.

The comments are addressed above in the discussion of the proposed change to § 1.96. See discussion of § 1.96.

Part 3

Section 3.27: Section 3.27 is proposed to be amended to eliminate the reference to petitions under § 3.81(b) and the reference to a document required by Executive Order 9424 which does not affect title. See discussion of § 3.81(b).

Section 3.71: It is proposed that § 3.71 be revised as discussed immediately below. In conjunction with the proposed revision, the section would be broken into paragraphs (a) through (d), with each paragraph being given a heading, in order to more clearly delineate the topics of the paragraphs.

Proposed paragraph (a) of § 3.71 would clarify that the assignee must be of record in a U.S. national patent application in order to conduct prosecution in place of the inventive entity (the inventors of the application) or any previous assignee that was entitled to conduct prosecution.

Paragraph (b) of § 3.71 has been proposed in order to clarify and define what is meant by the § 3.71(a) assignee which may conduct the prosecution of a U.S. national application for a patent.

A national patent application is owned by the inventor(s), an assignee or assignees of the inventor(s), or some combination of the two. All parties having a portion of the ownership must act together in order to be entitled to conduct the prosecution.

If there is an assignee of the entire right, title and interest in the patent application, § 3.71(b)(1) (as proposed) states that the single assignee may act alone to conduct the prosecution of an application.

If there is no assignee of the entire right, title and interest of the patent application, then two possibilities exist:

(1) The application has not been assigned; thus, ownership resides solely in the inventor(s) (*i.e.*, the applicant(s)). In this situation, § 3.71 does not apply (since there is no assignee), and the single inventor, or the combination of all the joint inventors, is needed to conduct the prosecution of an application.

(2) The application has been assigned; thus, there is at least one ''partial assignee.'' As pointed out in § 3.71(b)(2), a partial assignee is any assignee of record who has less than the entire right, title and interest in the application. The application will be owned by the combination of all partial assignees and all inventors who have not assigned away their right, title and interest in the application. As proposed, § 3.71(b)(2) points out that where at least one inventor retains an ownership interest together with the partial assignee(s), the combination of all partial assignees and inventors retaining ownership interest is needed to conduct the prosecution of an application. Where no inventor retains an ownership interest, the combination of all partial assignees is needed to conduct the prosecution of an application.

To illustrate this, note as follows. Inventors A and B invent a process and file their application. Inventors A and B together may conduct prosecution. Inventor A then assigns his/her rights in the application to Corporation X. As soon as Corporation X (now a partial assignee) is made of record in the application as a partial assignee (by filing a statement pursuant to § 3.73(b) stating fifty percent ownership), Corporation X and Inventor B together may conduct prosecution. Corporation X and Inventor B then both assign their rights in the application to Corporation Y. As soon as Corporation Y (now an assignee of the entire right, title and interest) is made of record in the application as the assignee (by filing a statement pursuant to § 3.73(b) stating one-hundred percent ownership), Corporation Y may, by itself, conduct prosecution.

This definition of the assignee would apply wherever the assignee is permitted to take action in the prosecution of an application for patent.

Proposed paragraph (c) of § 3.71 defines the meaning of the term ''of record'' used in proposed paragraph (b) of § 3.71. An assignee is made of record in an application by filing a statement which is in compliance with § 3.73(b). Note that the assignee being made ''of record'' in an application is different than the recording of an assignment in the assignment records of the Office pursuant to § 3.11.

Proposed paragraphs (a) through (c) of § 3.71 have been drafted to allow for the situation where an assignee takes action in the prosecution of a reexamination proceeding (in addition to that where a patent application is involved). In a reexamination, the assignee has the entire right, title and interest in the patent upon which reexamination is based.

Proposed paragraph (d) of § 3.71, concerning trademarks, expands the list of actions an assignee may take or request. Specifically, an assignee may also rely on its federal trademark application or registration when filing papers against a third party. This subsection also corrects the inappropriate use of the term ''prosecution'' when referring to maintaining a registered trademark.

In various places in proposed § 3.71, ''national'' has been added before ''application.'' Section 3.71 is directed to national applications as defined in § 1.9(a)(1) and not to international (PCT) applications. In an international (PCT) application the assignee is often the applicant for some, or all, of the designated states (except the U.S.) and may control prosecution as the applicant. Section 3.71 would apply to international applications after entry into the U.S. national stage under 35 U.S.C. 371.

Section 3.73: In Paragraph (a) of § 3.73, it is proposed to revise the second sentence to include a trademark registration, in addition to a trademark application which is currently recited. The sentence would read: ''The original applicant is presumed to be the owner of a trademark application or registration, unless there is an assignment.''

Under the proposal, paragraph (b) of § 3.73 would be revised for clarity and paragraph formatting. Additionally, paragraph (b) of § 3.73 is proposed to be revised to clarify that the statement establishing ownership must explicitly identify the assignee (by adding the language ''a signed statement identifying the assignee * * *''). Paragraph (b) of § 3.73 is further proposed to be revised to make it clear

that while the submission establishing ownership is separate from, and in addition to, the specific action taken by the assignee (*e.g.,* appointing a new attorney), the two may be presented together as part of the same paper. This would be done by adding that ''The establishment of ownership by the assignee may be combined with the paper that requests or takes the action.''

Currently, paragraph (b) of § 3.73 requires that the submission (statement) establishing ownership ''must be signed by a party authorized to act on behalf of the assignee.'' Under the proposal, this language would be expanded upon by newly added paragraph (b)(2) of § 3.73 which would clarify what is acceptable to show that the party signing the submission is authorized to act on behalf of the assignee. (1) The submission could include a statement that the party signing the submission is authorized to act on behalf of the assignee. (2) Alternatively, the submission could be signed by a person having apparent authority to sign on behalf of the assignee, *e.g.,* an officer of the assignee.

In the first case, the statement that the party signing the submission is authorized to act on behalf of the assignee could be an actual statement included in the text of the submission that the signing person ''is authorized to act on behalf of the assignee.'' Alternatively, it could be in the form of a resolution by the organization owning the property (*e.g.,* a corporate resolution, a partnership resolution) included with the submission.

In the second case, the title of the person signing must be given in the submission, and it must be one which empowers the person to act on behalf of the assignee. The president, vice-president, secretary, treasurer, and chairman of the board of directors are presumed to have authority to act on behalf of the organization. Modifications of these basic titles are acceptable, such as vice-president for sales, executive vice-president, assistant treasurer, vice-chairman of the board of directors. A title such as manager, director, administrator, or general counsel does not clearly set forth that the person is an officer of the organization, and as such, does not provide a presumption of authority to sign the statement on behalf of the assignee. A power of attorney from the inventors or the assignee to a practitioner to prosecute an application does not make that practitioner an official of an assignee and does not empower the practitioner to sign the statement on behalf of the assignee.

Proposed new paragraph (c)(1) of § 3.73 would require that the submission establishing ownership by the assignee must be submitted prior to, or at the same time, that the paper requesting or taking action is submitted. If the submission establishing ownership is not present, the action sought to be taken will not be given effect.

Proposed new paragraph (c)(2) of § 3.73 would point out that for patents, if an assignee of less than the entire right, title and interest (*i.e.,* a partial assignee) fails to indicate in the submission the extent (*e.g.,* by percentage) of its ownership interest, the Office may refuse to accept the submission.

Section 3.81: Section 3.81 is proposed to be amended to eliminate the provisions of § 3.81(b). As discussed above, changes in the patent printing process will dramatically reduce the period between the date of issue fee payment and the date a patent is issued. This change will eliminate the opportunity for providing an assignee name after the date the issue fee is paid.

Part 5

Section 5.1: Section 5.1 is proposed to be amended to locate its current text in § 5.1(a).

Section 5.1 is also proposed to be amended to add a § 5.1(b) to clarify that application as used in Part 5 includes provisional applications filed under 35 U.S.C. 111(b) (§ 1.9(a)(2)), nonprovisional applications filed under 35 U.S.C. 111(a) or entering the national stage from an international application after compliance with 35 U.S.C. 371 (§ 1.9(a)(3)), or international applications filed under the Patent Cooperation Treaty prior to entering the national stage of processing (§ 1.9(b)).

Section 5.1 is also proposed to be amended to add a § 5.1(c) to state current practice that: (1) Patent applications and documents relating thereto that are national security classified (*see* § 1.9(i)) and contain authorized national security markings (*e.g.,* ''Confidential,'' ''Secret'' or ''Top Secret'') are accepted by the Office; and (2) national security classified documents filed in the Office must be either hand-carried to Licensing and Review or mailed to the Office in compliance with § 5.1(a).

Section 5.1 is also proposed to be amended to add a § 5.1(d) to provide that: (1) The applicant in a national security classified patent application must obtain a secrecy order pursuant to § 5.2(a); (2) if a national security classified patent application is filed without a notification pursuant to § 5.2(a), the Office will set a time period within which either the application must be declassified, or the application must be placed under a secrecy order pursuant to § 5.2(a), or the applicant must submit evidence of a good faith effort to obtain a secrecy order pursuant to § 5.2(a) from the relevant department or agency in order to prevent abandonment of the application; and (3) if evidence of a good faith effort to obtain a secrecy order pursuant to § 5.2(a) from the relevant department or agency is submitted by the applicant within the time period set by the Office, but the application has not been declassified or placed under a secrecy order pursuant to § 5.2(a), the Office will again set a time period within which either the application must be declassified, or the application must be placed under a secrecy order pursuant to § 5.2(a), or the applicant must submit evidence of a good faith effort to again obtain a secrecy order pursuant to § 5.2(a) from the relevant department or agency in order to prevent abandonment of the application. Section 5.1(d) as proposed sets forth the treatment of national security classified applications that is currently set forth in MPEP 130.

Section 5.1 is also proposed to be amended to add a § 5.1(e) to provide that a national security classified patent application will not be allowed pursuant to § 1.311 of this chapter until the application is declassified and any secrecy order pursuant to § 5.2(a) has been rescinded.

Section 5.1 is also proposed to be amended to add a § 5.1(f) to clarify that applications on inventions not made in the United States and on inventions in which a U.S. Government defense agency has a property interest will not be made available to defense agencies.

Section 5.2: Section 5.2(c) is proposed to be added to provide that: (1) An application disclosing any significant part of the subject matter of an application under a secrecy order pursuant to § 5.2(a) also falls within the scope of such secrecy order; (2) any such application that is pending before the Office must be promptly brought to the attention of Licensing and Review, unless such application is itself under a secrecy order pursuant to § 5.2(a); and (3) any subsequently filed application containing any significant part of the subject matter of an application under a secrecy order pursuant to § 5.2(a) must either be hand-carried to Licensing and Review or mailed to the Office in compliance with § 5.1(a).

Section 5.12: Section 5.12(b) is proposed to be amended to require that the fee set forth in § 1.17(h) is required for any petition under § 5.12 for a foreign filing license. As a practical matter, all petitions under § 5.12 are

treated on an expedited basis. Therefore, it is appropriate to require the fee set forth in § 1.17(h) for all petitions under § 5.12.

Part 10

Section 10.23: Section 10.23(c)(11) is proposed to be amended to add the phrase ''[e]xcept as permitted by § 1.52(c)'' for consistency with the proposed amendment to § 1.52(c).

Review Under the Paperwork Reduction Act of 1995 and Other Considerations

This notice is in conformity with the requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), Executive Order 12612 (October 26, 1987), and the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). It has been determined that this rulemaking is not significant for the purposes of Executive Order 12866 (September 30, 1993).

This notice involves information collection requirements which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The collections of information involved in this notice have been reviewed and previously approved by OMB under the following control numbers: 0651–0016, 0651–0020, 0651–0021, 0651–0022, 0651–0024, 0651–0027, 0651–0031, 0651–0032, 0651–0033, 0651–0034, 0651–0035, and 0651–0037.

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Patent and Trademark Office has submitted an information collection package to OMB for its review and approval of the proposed information collections under OMB control numbers 0651–0031, 0651–0032, and 0651–0035. The Patent and Trademark Office is submitting information collection packages to OMB for its review and approval of these information collections because the following changes proposed in this notice do affect the information collection requirements associated with the information collections under OMB control numbers 0651–0031, 0651–0032, and 0651–0035: (1) The proposed change to §§ 1.27 and 1.28 will permit an applicant to establish small entity status in an application by a simple assertion of entitlement to small entity status (without a statement having a formalistic reference to § 1.9 or a standard form (PTO/SB/09/10/11/12)); (2) the proposed change to §§ 1.55, 1.63 and 1.78 would eliminate the need for an applicant using the application data sheet (§ 1.76) to provide priority claims in the oath or declaration or specification; (3) the proposed change to § 1.96 would require applicants to submit lengthy computer listings on a CD–ROM or CD–R (rather than microfiche); (4) the proposed change to §§ 1.821, 1.823, and 1.825 would permit applicants to submit sequence listings on a CD–ROM or CD–R (rather than paper); and (5) the proposed change to § 1.155 would allow an applicant to seek expedited examination of a design application by filing a request for expedited examination.

As discussed above, the notice also involves currently approved information collections under OMB control numbers: 0651–0016, 0651–0020, 0651–0021, 0651–0022, 0651–0024, 0651–0027, 0651–0033, 0651–0034, and 0651–0037. The Patent and Trademark Office is not resubmitting information collection packages to OMB for its review and approval of these information collections because the changes proposed in this notice do not affect the information collection requirements associated with the information collections under these OMB control numbers.

The title, description and respondent description of each of the information collections are shown below with an estimate of each of the annual reporting burdens. Included in each estimate is the time for reviewing instructions, gathering and maintaining the data needed, and completing and reviewing the collection of information. Any collections of information whose requirements will be revised as a result of the proposed rule changes discussed in this notice will be submitted to OMB for approval. The principal impact of the changes under consideration in this notice is to raise the efficiency and effectiveness of the Patent and Trademark Office's business processes to make the Patent and Trademark Office a more business-like agency and increase the level of the Patent and Trademark Office's service to the public.

OMB Number: 0651–0016.

Title: Rules for Patent Maintenance Fees.

Form Numbers: PTO/SB/45/47/65/66.

Type of Review: Approved through July of 1999.

Affected Public: Individuals or Households, Business or Other For-Profit, Not-for-Profit Institutions and Federal Government.

Estimated Number of Respondents: 273,800.

Estimated Time Per Response: 0.08 hour.

Estimated Total Annual Burden Hours: 22,640 hours.

Needs and Uses: Maintenance fees are required to maintain a patent, except for design or plant patents, in force under 35 U.S.C. 41(b). Payment of maintenance fees are required at 3½, 7½ and 11½ years after the grant of the patent. A patent number and application number of the patent on which maintenance fees are paid are required in order to ensure proper crediting of such payments.

OMB Number: 0651–0020.

Title: Patent Term Extension.

Form Numbers: None.

Type of Review: Approved through September of 2001.

Affected Public: Individuals or households, businesses or other for-profit, not-for-profit institutions, farms, Federal Government, and state, local, or tribal governments.

Estimated Number of Respondents: 57.

Estimated Time Per Response: 22.8 hour.

Estimated Total Annual Burden Hours: 1,302 hours.

Needs and Uses: The information supplied to the PTO by an applicant seeking a patent term extension is used by the Patent and Trademark Office, the Department of Health and Human Services, and the Department of Agriculture to determine the eligibility of a patent for extension and to determine the period of any such extension. The applicant can apply for patent term and interim extensions, petition the Patent and Trademark Office to review final eligibility decisions, and withdraw patent term extensions. If there are multiple patents, the applicant can designate which patents should be extended. An applicant can also declare their eligibility to apply for a patent term extension.

OMB Number: 0651–0021.

Title: Patent Cooperation Treaty.

Form Numbers: PCT/RO/101,ANNEX/134/144, PTO–1382, PCT/IPEA/401, PCT/IB/328.

Type of Review: Approved through May of 2000.

Affected Public: Individuals or Households, Business or Other For-Profit, Federal Agencies or Employees, Not-for-Profit Institutions, Small Businesses or Organizations.

Estimated Number of Respondents: 102,950.

Estimated Time Per Response: 0.9538 hour.

Estimated Total Annual Burden Hours: 98,195 hours.

Needs and Uses: The information collected is required by the Patent Cooperation Treaty (PCT). The general

purpose of the PCT is to simplify the filing of patent applications on the same invention in different countries. It provides for a centralized filing procedure and a standardized application format.

OMB Number: 0651–0022.

Title: Deposit of Biological Materials for Patent Purposes.

Form Numbers: None.

Type of Review: Approved through December of 2000.

Affected Public: Individuals or Households, State or Local Governments, Farms, Business or Other For-Profit, Federal Agencies or Employees, Not-for-Profit Institutions, Small Businesses or Organizations.

Estimated Number of Respondents: 3,300.

Estimated Time Per Response: 1.0 hour.

Estimated Total Annual Burden Hours: 3,300 hours.

Needs and Uses: Information on depositing of biological materials in depositories is required for (1) Office determination of compliance with the patent statute where the invention sought to be patented relies on biological material subject to deposit requirement, which includes notifying interested members of the public where to obtain samples of deposits, and (2) depositories desiring to be recognized as suitable by the Office.

OMB Number: 0651–0024.

Title: Requirements for Patent Applications Containing Nucleotide Sequence and/or Amino Acid Sequence Disclosures.

Form Numbers: None.

Type of Review: Approved through November of 1999.

Affected Public: Individuals or households, business or other for-profit institutions, not-for-profit institutions, and Federal Government.

Estimated Number of Respondents: 4,600.

Estimated Time Per Response: 80 minutes.

Estimated Total Annual Burden Hours: 6,133 hours.

Needs and Uses: This information is used by the Office during the examination process, the public and the patent bar. The Patent and Trademark Office also participates with the EPO and JPO in a Trilateral Sequence Exchange project, to facilitate the international exchange of published sequence data.

OMB Number: 0651–0027.

Title: Changes in Patent and Trademark Assignment Practices.

Form Numbers: PTO–1618 and PTO–1619, PTO/SB/15/41.

Type of Review: Approved through May of 2002.

Affected Public: Individuals or Households and Businesses or Other For-Profit.

Estimated Number of Respondents: 209,040.

Estimated Time Per Response: 0.5 hour.

Estimated Total Annual Burden Hours: 104,520 hours.

Needs and Uses: The Office records about 209,040 assignments or documents related to ownership of patent and trademark cases each year. The Office requires a cover sheet to expedite the processing of these documents and to ensure that they are properly recorded.

OMB Number: 0651–0031.

Title: Patent Processing (Updating).

Form Numbers: PTO/SB/08/21–27/31/42/43/61/62/63/64/67/68/91/92/96/97.

Type of Review: Approved through September of 2000.

Affected Public: Individuals or Households, Business or Other For-Profit Institutions, Not-for-Profit Institutions and Federal Government.

Estimated Number of Respondents: 2,040,630.

Estimated Time Per Response: 0.39 hours.

Estimated Total Annual Burden Hours: 788,421 hours.

Needs and Uses: During the processing for an application for a patent, the applicant/agent may be required or desire to submit additional information to the Office concerning the examination of a specific application. The specific information required or which may be submitted includes: Information Disclosure Statements; Terminal Disclaimers; Petitions to Revive; Express Abandonments; Appeal Notices; Petitions for Access; Powers to Inspect; Certificates of Mailing or Transmission; Statements under § 3.73(b); Amendments, Petitions and their Transmittal Letters; and Deposit Account Order Forms.

OMB Number: 0651–0032.

Title: Initial Patent Application.

Form Number: PTO/SB/01–07/13PCT/17–19/29/101–110.

Type of Review: Approved through September of 2000.

Affected Public: Individuals or Households, Business or Other For-Profit, Not-for-Profit Institutions and Federal Government.

Estimated Number of Respondents: 344,100.

Estimated Time Per Response: 8.7 hours.

Estimated Total Annual Burden Hours: 2,994,160 hours.

Needs and Uses: The purpose of this information collection is to permit the Office to determine whether an application meets the criteria set forth in the patent statute and regulations. The standard Fee Transmittal form, New Utility Patent Application Transmittal form, New Design Patent Application Transmittal form, New Plant Patent Application Transmittal form, Declaration, and Plant Patent Application Declaration will assist applicants in complying with the requirements of the patent statute and regulations, and will further assist the Office in processing and examination of the application.

OMB Number: 0651–0033.

Title: Post Allowance and Refiling.

Form Numbers: PTO/SB/13/14/44/50–57; PTOL–85b.

Type of Review: Approved through September of 2000.

Affected Public: Individuals or Households, Business or Other For-Profit, Not-for-Profit Institutions and Federal Government.

Estimated Number of Respondents: 135,250.

Estimated Time Per Response: 0.325 hour.

Estimated Total Annual Burden Hours: 43,893 hours.

Needs and Uses: This collection of information is required to administer the patent laws pursuant to title 35, U.S.C., concerning the issuance of patents and related actions including correcting errors in printed patents, refiling of patent applications, requesting reexamination of a patent, and requesting a reissue patent to correct an error in a patent. The affected public includes any individual or institution whose application for a patent has been allowed or who takes action as covered by the applicable rules.

OMB Number: 0651–0034.

Title: Secrecy/License to Export.

Form Numbers: None.

Type of Review: Approved through January of 2001.

Affected Public: Individuals or Households, Business or Other For-Profit, Not-for-Profit Institutions and Federal Government.

Estimated Number of Respondents: 2,187.

Estimated Time Per Response: 0.67 hour.

Estimated Total Annual Burden Hours: 1,476 hours.

Needs and Uses: In the interest of national security, patent laws and regulations place certain limitations on the disclosure of information contained in patents and patent applications and

on the filing of applications for patent in foreign countries.

OMB Number: 0651–0035.

Title: Address-Affecting Provisions.

Form Numbers: PTO/SB/81–84/121–125.

Type of Review: Approved through June of 1999.

Affected Public: Individuals or Households, Business or Other For-Profit, Not-for-Profit Institutions and Federal Government.

Estimated Number of Respondents: 263,520.

Estimated Time Per Response: 0.05 hour.

Estimated Total Annual Burden Hours: 13,386 hours.

Needs and Uses: Under existing law, a patent applicant or assignee may appoint, revoke or change a representative to act in a representative capacity. Also, an appointed representative may withdraw from acting in a representative capacity. This collection includes the information needed to ensure that Office correspondence reaches the appropriate individual.

OMB Number: 0651–0037.

Title: Provisional Applications.

Form Numbers: PTO/SB/16.

Type of Review: Approved through January of 2001.

Affected Public: Individuals or Households, Business or Other For-Profit, Not-for-Profit Institutions and Federal Government.

Estimated Number of Respondents: 25,000.

Estimated Time Per Response: 8.0 hour.

Estimated Total Annual Burden Hours: 200,000 hours.

Needs and Uses: The information included on the provisional application cover sheet is needed by the Office to identify the submission as a provisional application and not some other kind of submission, to promptly and properly process the provisional application, to prepare the provisional application filing receipt which is sent to the applicant, and to identify those provisional applications which must be reviewed by the Office for foreign filing licenses.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB control number.

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Patent and Trademark Office has submitted an information collection package to OMB for its review and approval of the proposed information collections under OMB control numbers 0651–0031, 0651–0032, and 0651–0035. As discussed above, the notice also involves currently approved information collections under OMB control numbers: 0651–0016, 0651–0020, 0651–0021, 0651–0022, 0651–0024, 0651–0027, 0651–0033, 0651–0034, and 0651–0037. The Patent and Trademark Office is not resubmitting information collection packages to OMB for its review and approval of these information collections because the changes proposed in this notice do not materially affect, or change the burden hours associated with, these information collections.

Interested persons are requested to send comments regarding these information collections, including suggestions for reducing this burden, to Robert J. Spar, Director, Special Program Law Office, Patent and Trademark Office, Washington, D.C. 20231, or to the Office of Information and Regulatory Affairs of OMB, New Executive Office Building, 725 17th Street, NW, room 10235, Washington, DC 20503, Attention: Desk Officer for the Patent and Trademark Office.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy, Small Business Administration, that the changes proposed in this rule, if adopted, would not have a significant impact on a substantial number of small entities (Regulatory Flexibility Act, 5 U.S.C. 605(b)). In furtherance of the Patent Business Goals, the Office is proposing changes to the rules of practice to eliminate unnecessary formal requirements, streamline the patent application process, and simplify and clarify procedures. In streamlining this process, the Office will be able to issue a patent in a shorter time by eliminating formal requirements that must be performed by the applicant, his or her representatives and the Office. All applicants will benefit from a reduced overall cost to them for receiving patent protection and from a faster receipt of their patents. In addition, small entities will benefit from the proposed changes to the requirements for establishing small entity status under § 1.27 for purposes of paying reduced patent fees under 35 U.S.C. 41(h). The currently used small entity statement forms are proposed to be eliminated. Small entity status would be established at any time by a simple assertion of entitlement to small entity status. A simpler procedure to establish small entity status would reduce processing time with the Office and would be a benefit to small entity applicants as it would eliminate the time-consuming and aggravating processing requirements that are mandated by the current rules.

The Patent and Trademark Office has determined that this notice has no Federalism implications affecting the relationship between the National Government and the States as outlined in Executive Order 12612.

List of Subjects

37 CFR Part 1

Administrative practice and procedure, Courts, Freedom of information, Inventions and patents, Reporting and recordkeeping requirements, Small businesses.

37 CFR Part 3

Administrative practice and procedure, Inventions and patents, Reporting and record keeping requirements.

37 CFR Part 5

Classified information, Foreign relations, Inventions and patents.

37 CFR Part 10

Administrative practice and procedure, Inventions and patents, Lawyers, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 37 CFR parts 1, 3, 5, and 10 are proposed to be amended as follows:

PART 1—RULES OF PRACTICE IN PATENT CASES

1. The authority citation for 37 CFR part 1 is revised to read as follows:

Authority: 35 U.S.C. 6, unless otherwise noted.

2. Section 1.4 is proposed to be amended by revising paragraphs (b) and (c) to read as follows:

§ 1.4 Nature of correspondence and signature requirements.

* * * * *

(b) Since each file must be complete in itself, a separate copy of every paper to be filed in a patent or trademark application, patent file, trademark registration file, or other proceeding must be furnished for each file to which the paper pertains, even though the contents of the papers filed in two or more files may be identical. The filing of duplicate copies of correspondence in the file of an application, patent, trademark registration file, or other proceeding should be avoided, except in situations in which the Office requires the filing of duplicate copies. The Office

may dispose of duplicate copies of correspondence in the file of an application, patent, trademark registration file, or other proceeding.

(c) Since different matters may be considered by different branches or sections of the Patent and Trademark Office, each distinct subject, inquiry or order must be contained in a separate paper to avoid confusion and delay in answering papers dealing with different subjects.

* * * * *

3. Section 1.6 is proposed to be amended by revising paragraph (d)(9) to read as follows:

§ 1.6 Receipt of correspondence.

* * * * *

(d) * * *

(9) Correspondence to be filed in an interference proceeding which consists of a preliminary statement under § 1.621; a transcript of a deposition under § 1.676 or of interrogatories, or cross-interrogatories; or an evidentiary record and exhibits under § 1.653.

* * * * *

4. Section 1.9 is proposed to be amended by removing and reserving paragraphs (c), (d) and (e), and revising paragraph (f) and adding a new paragraph (i) to read as follows:

§ 1.9 Definitions.

* * * * *

(f) *Small entities.* A small entity as used in this chapter means any party (person, small business concern, or nonprofit organization) under paragraphs (f)(1) through (f)(3) of this section.

(1) *Person:* A person, as used in § 1.27(b), means any inventor or other individual (*e.g.*, an individual to whom an inventor has transferred some rights in the invention), who *has not* assigned, granted, conveyed, or licensed, and is under no obligation under contract or law to assign, grant, convey, or license, any rights in the invention. An inventor or other individual who *has* transferred some rights, or is under an obligation to transfer some rights in the invention to one or more parties, can also qualify for small entity status if all the parties who have had rights in the invention transferred to them also qualify for small entity status either as a person, small business concern, or nonprofit organization under this section.

(2) *Small business concern:* A small business concern, as used in § 1.27(b), means any business concern that:

(i) Has not assigned, granted, conveyed, or licensed, and is under no obligation under contract or law to assign, grant, convey, or license, any rights in the invention to any person, concern, or organization which would not qualify under this section for small entity status as a person, small business concern, or nonprofit organization.

(ii) Meets the size standards set forth in 13 CFR part 121 to be eligible for reduced patent fees. Questions related to size standards for a small business concern may be directed to: Small Business Administration, Size Standards Staff, 409 Third Street, SW, Washington, DC 20416.

(3) *Nonprofit organization.* A nonprofit organization, as used in § 1.27(b), means any nonprofit organization that:

(i) Has not assigned, granted, conveyed, or licensed, and is under no obligation under contract or law to assign, grant, convey, or license, any rights in the invention to any person who could not qualify for small entity status, or to any concern or organization which would not qualify as a small business concern, or a nonprofit organization under this section, and

(ii) Is either:

(A) A university or other institution of higher education located in any country;

(B) An organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a));

(C) Any nonprofit scientific or educational organization qualified under a nonprofit organization statute of a state of this country (35 U.S.C. 201(i)); or

(D) Any nonprofit organization located in a foreign country which would qualify as a nonprofit organization under paragraphs (f)(3)(ii)(B) or (f)(3)(ii)(C) of this section if it were located in this country.

(4) *License to a Federal Agency.* (i) For persons under paragraph (f)(1) of this section, a license to the Government resulting from a rights determination under Executive Order 10096 does not constitute a license so as to prohibit claiming small entity status.

(ii) For small business concerns and nonprofit organizations under paragraphs (f)(2) and (f)(3) of this section, a license to a Federal agency resulting from a funding agreement with that agency pursuant to 35 U.S.C. 202(c)(4) does not constitute a license.

* * * * *

(i) National security classified as used in this chapter means specifically authorized under criteria established by an Act of Congress or Executive order to be kept secret in the interest of national defense or foreign policy and, in fact, properly classified pursuant to such Act of Congress or Executive order.

5. Section 1.12 is proposed to be amended by revising paragraph (c)(1) to read as follows:

§ 1.12 Assignment records open to public inspection.

* * * * *

(c) * * *

(1) Be in the form of a petition including the fee set forth in § 1.17(h); or

* * * * *

6. Section 1.14 is proposed to be revised to read as follows:

§ 1.14 Patent applications preserved in confidence.

(a) *Confidentiality of patent application information.* Patent applications are generally preserved in confidence pursuant to 35 U.S.C. 122. Information concerning the filing, pendency, or subject matter of an application for patent, including status information, and access to the application, will only be given to the public as set forth in § 1.11 or in this section.

(1) *Status information* is:

(i) Whether the application is pending, abandoned, or patented; and

(ii) The application ''numerical identifier'' which may be:

(A) The eight digit application number (the two digit series code plus the six digit serial number); or

(B) The six digit serial number plus any of the filing date of the national application, the international filing date, or date of entry into the national stage.

(2) *Access* is defined as providing the application file for review and copying of any material.

(b) *When status information may be supplied.* Status information of an application may be supplied by the Office to the public if any of the following apply:

(1) Access to the application is available pursuant to paragraph (e) of this section;

(2) The application is referred to by its numerical identifier in a published patent document (*e.g.*, a U.S. patent or a published international application) or in a U.S. application open to public inspection (§ 1.11(b) or paragraph (e)(2)(i) of this section); or

(3) The application is a published international application in which the United States of America has been indicated as a designated state.

(c) *Copy of application-as-filed.* If a pending or abandoned application is incorporated by reference in a U.S. patent, a copy of that application-as-filed may be provided to any person

upon written request including the fee set forth in § 1.19(b)(1).

(d) *Power to inspect a pending or abandoned application may be granted by a party named in the application file.* Access to an application may be provided to any person if the application file is available, and the application contains written authority (*e.g.*, a power to inspect) in that particular application granting access to such person that is signed by:

(1) An applicant;

(2) An attorney or agent of record;

(3) An authorized official of an assignee of record (made of record pursuant to § 3.71 of this chapter); or

(4) A registered attorney or agent named in papers accompanying the application papers filed under § 1.53 or the national stage documents filed under §§ 1.494 or 1.495, if an executed oath or declaration pursuant to § 1.63 or § 1.497 has not been filed.

(e) *Public access to a pending or abandoned application may be provided.* Access to an application may be provided to any person if a written request for access is submitted, the application file is available, and any of the following apply:

(1) The application is open to public inspection pursuant to § 1.11(b); or

(2) The application is abandoned, it is not within the file jacket of a pending application under § 1.53(d), and it is referred to:

(i) In a U.S. patent; or

(ii) In another U.S. application which is open to public inspection either pursuant to § 1.11(b) or paragraph (e)(2)(i) of this section.

(f) *Applications that may be destroyed.* Applications that are abandoned or for which proceedings are otherwise terminated may be destroyed, and thus may not be available for access as permitted by paragraphs (d) or (e) of this section, after twenty years from their filing or deposit date. Exceptions may be made for applications to which particular attention has been called and which have been marked for preservation.

(g) *Applications reported to Department of Energy.* Applications for patents which appear to disclose, purport to disclose or do disclose inventions or discoveries relating to atomic energy are reported to the Department of Energy, which Department will be given access to the applications. Such reporting does not constitute a determination that the subject matter of each application so reported is in fact useful or is an invention or discovery, or that such application in fact discloses subject matter in categories specified by 42 U.S.C. 2181 (c) and (d).

(h) *Decisions by the Commissioner or the Board of Patent Appeals and Interferences.* Any decision by the Commissioner or the Board of Patent Appeals and Interferences which would not otherwise be open to public inspection may be published or made available for public inspection if:

(1) The Commissioner believes the decision involves an interpretation of patent laws or regulations that would be of precedential value; and

(2) The applicant, or a party involved in an interference for which a decision was rendered, is given notice and an opportunity to object in writing within two months on the ground that the decision discloses a trade secret or other confidential information. Any objection must identify the deletions in the text of the decision considered necessary to protect the information, or explain why the entire decision must be withheld from the public to protect such information. An applicant or party will be given time, not less than twenty days, to request reconsideration and seek court review before any portions of a decision are made public under this paragraph over his or her objection.

(i) *Publication pursuant to § 1.47.* Information as to the filing of an application will be published in the *Official Gazette* in accordance with § 1.47 (a) and (b).

(j) *International applications.* Copies of an application file for which the United States acted as the International Preliminary Examining Authority, or copies of a document in such an application file, will be furnished in accordance with Patent Cooperation Treaty (PCT) Rule 94.2 or 94.3, upon payment of the appropriate fee (§ 1.19(b)(2) or § 1.19(b)(3)).

(k) *Access or copies in other circumstances.* The Office, either *sua sponte* or on petition, may also provide access or copies of an application if necessary to carry out an Act of Congress or if warranted by other special circumstances. Any petition by a member of the public seeking access to, or copies of, any pending or abandoned application preserved in confidence pursuant to paragraph (a) of this section, or any related papers, must include:

(1) The fee set forth in § 1.17(h); and

(2) A showing that access to the application is necessary to carry out an Act of Congress or that special circumstances exist which warrant petitioner being granted access to the application.

7. Section 1.17 is proposed to be amended by revising paragraphs (h), (i), (k), (l), (m), and (q) and adding paragraph (t) to read as follows:

§ 1.17 National application processing fees.

* * * * *

(h) For filing a petition to the Commissioner under a section listed below which refers to this paragraph $130.00

§ 1.12—for access to an assignment record.

§ 1.14—for access to an application.

§ 1.47—for filing by other than all the inventors or a person not the inventor.

§ 1.53(e)—to accord a filing date.

§ 1.59—for expungement and return of information.

§ 1.91—for entry of a model or exhibit.

§ 1.102—to make an application special.

§ 1.103(a)—to suspend action in application.

§ 1.182—for decision on a question not specifically provided for.

§ 1.183—to suspend the rules.

§ 1.295—for review of refusal to publish a statutory invention registration.

§ 1.313—to withdraw an application from issue.

§ 1.314—to defer issuance of a patent.

§ 1.377—for review of decision refusing to accept and record payment of a maintenance fee filed prior to expiration of a patent.

§ 1.378(e)—for reconsideration of decision on petition refusing to accept delayed payment of maintenance fee in an expired patent.

§ 1.550(c)(2)—for a petition for an extension of time to accept an unintentionally delayed response in a reexamination proceeding.

§ 1.644(e)—for petition in an interference.

§ 1.644(f)—for request for reconsideration of a decision on petition in an interference.

§ 1.666(b)—for access to an interference settlement agreement.
§ 1.666(c)—for late filing of interference settlement agreement.
§ 1.741(b)—to accord a filing date to an application for extension of a patent term.
§ 5.12—for expedited handling of a foreign filing license.
§ 5.15—for changing the scope of a license.
§ 5.25—for retroactive license.

(i) Processing fee for taking action under a section listed below which refers to this paragraph 130.00
§ 1.28(c)(3)—for processing a non-itemized fee deficiency based on an error in small entity status.
§ 1.41—for supplying the name or names of the inventor or inventors after the filing date without an oath or declaration as prescribed by § 1.63, except in provisional applications.
§ 1.48—for correcting inventorship, except in provisional applications.
§ 1.52(d)—for processing a nonprovisional application filed with a specification in a language other than English.
§ 1.55—for entry of late priority papers.
§ 1.103(b)—for requesting limited suspension of action in continued prosecution application.
§ 1.497(d)—for filing an oath or declaration pursuant to 35 U.S.C. 371(c)(4) naming an inventive entity different from the inventive entity set forth in the international stage.

* * * * * * *

(k) For accepting color drawings or color photographs (§ 1.84(a)) 200.00
(l) For filing a petition for the revival of an unavoidably abandoned application under 35 U.S.C. 111, 133, 364, or 371, or the unavoidably delayed payment of the issue fee under 35 U.S.C. 151 (§ 1.137(a)):
By a small entity (§ 1.9(f)) 55.00
By other than a small entity 110.00
(m) For filing a petition for the revival of an unintentionally abandoned application or the unintentionally delayed payment of the issue fee under 35 U.S.C. 41(a)(7) (§ 1.137(b)):
By a small entity (§ 1.9(f)) 605.00
By other than a small entity 1,210.00

* * * * * *

(q) Processing fee for taking action under a section listed below which refers to this paragraph 50.00
§ 1.41—to supply the name or names of the inventor or inventors after the filing date without a cover sheet as prescribed by § 1.51(c)(1) in a provisional application.
§ 1.48—for correction of inventorship in a provisional application.
§ 1.53(c)—to convert a nonprovisional application filed under § 1.53(b) to a provisional application under § 1.53(c).

* * * * * *

(t) For filing a request for expedited examination under § 1.155(a) 900.00

8. Section 1.19 is proposed to be amended by revising its introductory text and paragraphs (a) and (b) and removing paragraph (h) to read as follows:

§ 1.19 Document supply fees.

The Patent and Trademark Office will supply copies of the following documents upon payment of the fees indicated. The copies will be in black and white unless the original document is in color, a color copy is requested and the fee for a color copy is paid.

(a) Uncertified copies of patents:
(1) Printed copy of a patent, including a design patent, statutory invention registration, or defensive publication document:
(i) Regular service $3.00
(ii) Overnight delivery to PTO Box or overnight facsimile 6.00
(iii) Expedited service for copy ordered by expedited mail or facsimile delivery service and delivered to the customer within two workdays 25.00
(2) Printed copy of a plant patent in color 15.00
(3) Color copy of a patent (other than a plant patent) or statutory invention registration containing a color drawing 25.00
(b) Certified and uncertified copies of Office documents:
(1) Certified or uncertified copy of patent application as filed:
(i) Regular service 15.00
(ii) Expedited regular service 30.00
(2) Certified or uncertified copy of patent-related file wrapper and contents:
(i) File wrapper and contents of 400 or fewer pages 250.00
(ii) Additional fee for each additional 100 pages or portion thereof 25.00
(3) Certified or uncertified copy of Office records, per document except as otherwise provided in this section 25.00
(4) For assignment records, abstract of title and certification, per patent 25.00

* * * * * *

9. Section 1.22 is proposed to be amended by revising paragraph (b) and adding paragraph (c) to read as follows:

§ 1.22 Fee payable in advance.

* * * * *

(b) All fees paid to the Patent and Trademark Office must be itemized in each individual application, patent, trademark registration file, or other proceeding in such a manner that it is clear for which purpose the fees are paid. The Office may return fees that are not itemized as required by this paragraph. The provisions of § 1.5(a) do not apply to the resubmission of fees returned pursuant to this paragraph.

(c)(1) A fee paid by an authorization to charge such fee to a deposit account containing sufficient funds to cover the

applicable fee amount (§ 1.25) is considered paid:

(i) On the date the paper for which the fee is payable is received in the Office (§ 1.6), if the paper including the deposit account charge authorization was filed prior to or concurrently with such paper;

(ii) On the date the paper including the deposit account charge authorization is received in the Office (§ 1.6), if the paper including the deposit account charge authorization is filed after the filing of the paper for which the fee is payable; and

iii) On the date of the agreement, if the deposit account charge authorization is the result of an agreement between the applicant and an Office employee that is reduced to a writing.

(2) A fee paid other than by an authorization to charge such fee to a deposit account is considered paid on the date the applicable fee amount is received in the Office (§ 1.6).

(3) The applicable fee amount is determined by the fee in effect on the date such fee is paid in full.

10. Section 1.25 is proposed to be amended by revising paragraph (b) to read as follows:

§ 1.25 Deposit accounts.

* * * * *

(b) Filing, issue, appeal, international-type search report, international application processing, petition, and post-issuance fees may be charged against these accounts if sufficient funds are on deposit to cover such fees. A general authorization to charge all fees, or only certain fees, set forth in § 1.16 to § 1.18 to a deposit account containing sufficient funds may be filed in an individual application, either for the entire pendency of the application or with respect to a particular paper filed. An authorization to charge fees under § 1.16 in an application submitted under § 1.494, or § 1.495 will be treated as an authorization to charge fees under § 1.492. An authorization to charge fees set forth in § 1.18 to a deposit account is subject to the provisions of § 1.311(b). An authorization to charge to a deposit account the fee for a request for reexamination pursuant to § 1.510 and any other fees required in a reexamination proceeding in a patent may also be filed with the request for reexamination. An authorization to charge a fee to a deposit account will not be considered payment of the fee on the date the authorization to charge the fee is effective as to the particular fee to be charged unless sufficient funds are present in the account to cover the fee.

11. Section 1.26 is proposed to be amended by revising paragraph (a) and adding paragraph (b) to read as follows:

§ 1.26 Refunds.

(a) The Commissioner may refund a fee paid by mistake or in excess of that required. A change of purpose after the payment of a fee, as when a party desires to withdraw a patent or trademark filing for which the fee was paid, including an application, an appeal, or a request for an oral hearing, will not entitle a party to a refund of such fee. The Office will not refund amounts of twenty-five dollars or less unless a refund is specifically requested, and will not notify the payor of such amounts. If a party paying a fee or requesting a refund does not instruct the Office that refunds are to be credited to a deposit account, and does not provide the banking information necessary for making refunds by electronic funds transfer, the Commissioner may either require such banking information or use the banking information on the payment instrument to make a refund.

(b) Any request for refund must be filed within two years from the date the fee was paid, except as otherwise provided in this paragraph or in § 1.28(a). If the Office charges a deposit account by an amount other than an amount specifically indicated in an authorization (§ 1.25(b)), any request for refund based upon such charge must be filed within two years from the date of the deposit account statement indicating such charge, and include a copy of that deposit account statement. The time periods set forth in this paragraph are not extendable.

* * * * *

12. Section 1.27 is proposed to be revised to read as follows:

§ 1.27 Establishing status as small entity to permit payment of small entity fees; when a determination of entitlement to small entity status and notification of loss of entitlement to small entity status are required; fraud on the Office.

(a) *Establishment of small entity status permits payment of reduced fees.* A small entity, as defined in § 1.9(f), who has properly asserted entitlement to small entity status pursuant to paragraph (b) of this section will be accorded small entity status by the Office in the particular application or patent in which entitlement to small entity status was asserted. Establishment of small entity status allows the payment of certain reduced patent fees pursuant to 35 U.S.C. 41(h).

(b) *Assertion of small entity status.* Any party (person, small business concern or nonprofit organization) who has made a determination, pursuant to paragraph (e) of this section, of entitlement to be accorded small entity status pursuant to § 1.9(f) must, in order to establish small entity status for the purpose of paying small entity fees, make an assertion of entitlement to small entity status, pursuant to paragraph (b)(1) or (b)(3) of this section, in the application or patent in which such small entity fees are to be paid.

(1) *Assertion by writing.* Small entity status may be established by a written assertion of entitlement to small entity status. A written assertion must:

(i) Be clearly identifiable;

(ii) Be signed; and

(iii) Convey the concept of entitlement to small entity status, such as by stating that applicant is a small entity, or that small entity status is entitled to be asserted for the application or patent. While no specific words or wording are required to assert small entity status, the intent to assert small entity status must be clearly indicated in order to comply with the assertion requirement.

(2) *Parties who can sign the written assertion.* The written assertion can be signed by:

(i) One of the parties identified in § 1.33(b) (*e.g.*, an attorney or agent registered with the Office), § 3.73(b) of this chapter notwithstanding;

(ii) At least one of the inventors, § 1.33(b)(4) notwithstanding; or

(iii) An assignee of an undivided part interest, §§ 1.33(b)(3) and 3.73(b) of this chapter notwithstanding.

(3) *Assertion by payment of the small entity basic filing or national fee.* The payment, by any party, of the exact amount of one of the small entity basic filing fees set forth in § 1.16(a), (f), (g), (h), or (k), or one of the small entity national fees set forth in § 1.492(a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), will be treated as a written assertion of entitlement to small entity status even if the type of basic filing or national fee is inadvertently selected in error.

(i) If the Office accords small entity status based on payment of a small entity fee that is not applicable to that application, any balance of the small entity fee that is applicable to that application will be due.

(ii) The payment of any small entity fee other than those set forth in paragraph (b)(3) (whether in the exact fee amount or not) of this section will not be treated as a written assertion of entitlement to small entity status and will not be sufficient to establish small entity status in an application or a patent.

(4) *Assertion required in related, continuing, and reissue applications.*

Status as a small entity must be specifically established by an assertion in each related, continuing and reissue application in which status is appropriate and desired. Status as a small entity in one application or patent does not affect the status of any other application or patent, regardless of the relationship of the applications or patents. The refiling of an application under § 1.53 as a continuation, divisional, or continuation-in-part application (including a continued prosecution application under § 1.53(d)), or the filing of a reissue application, requires a new assertion as to continued entitlement to small entity status for the continuing or reissue application.

(c) *When small entity fees can be paid.* Any fee, other than the small entity basic filing fees and the small entity national fees of paragraph (b)(3) of this section, can be paid in the small entity amount only if it is submitted with, or subsequent to, the submission of a written assertion of entitlement to small entity status, except when refunds are permitted by § 1.28(a).

(d) *Only one assertion required.* (1) An assertion of small entity status need only be filed once in an application or patent. Small entity status, once established, remains in effect until changed pursuant to § 1.28(b) of this part. Where an assignment of rights or an obligation to assign rights to other parties who are small entities occurs subsequent to an assertion of small entity status, a second assertion is not required.

(2) Once small entity status is withdrawn pursuant to paragraph (f)(2) of this section, a new written assertion is required to again obtain small entity status.

(e) *Assertion requires a determination of entitlement to pay small entity fees.* Prior to submitting an assertion of entitlement to small entity status in an application, including a related, continuing, or reissue application, a determination of such entitlement should be made pursuant to the requirements of § 1.9(f). It should be determined that all parties holding rights in the invention qualify for small entity status. The Office will generally not question any assertion of small entity status that is made in accordance with the requirements of this section, but note paragraph (g) of this section.

(f)(1) *New determination of entitlement to small entity status is needed when issue and maintenance fees are due.* Once status as a small entity has been established in an application or patent, fees as a small entity may thereafter be paid in that application or patent without regard to a change in status until the issue fee is due or any maintenance fee is due.

(2) *Notification of loss of entitlement to small entity status is required when issue and maintenance fees are due.* Notification of a loss of entitlement to small entity status must be filed in the application or patent prior to paying, or at the time of paying, the earliest of the issue fee or any maintenance fee due after the date on which status as a small entity as defined in § 1.9(f) is no longer appropriate. The notification that small entity status is no longer appropriate must be signed by a party identified in § 1.33(b). Payment of a fee in other than the small entity amount is not sufficient notification that small entity status is no longer appropriate.

(g) *Fraud attempted or practiced on the Office.* (1) Any attempt to fraudulently establish status as a small entity, or to pay fees as a small entity, shall be considered as a fraud practiced or attempted on the Office.

(2) Improperly, and with intent to deceive, establishing status as a small entity, or paying fees as a small entity, shall be considered as a fraud practiced or attempted on the Office.

13. Section 1.28 is proposed to be revised to read as follows:

§ 1.28 Refunds when small entity status is later established; how errors in small entity status are excused.

(a) *Refunds based on later establishment of small entity status:* A refund pursuant to § 1.26 of this part, based on establishment of small entity status, of a portion of fees timely paid in full prior to establishing status as a small entity may only be obtained if an assertion under § 1.27(b) and a request for a refund of the excess amount are filed within three months of the date of the timely payment of the full fee. The three-month time period is not extendable under § 1.136. Status as a small entity is waived for any fee by the failure to establish the status prior to paying, at the time of paying, or within three months of the date of payment of, the full fee.

(b) *Date of payment.* (1) The three-month period for requesting a refund, pursuant to paragraph (a) of this section, starts on the date that a full fee has been paid as defined in § 1.22(c);

(2) The date when a deficiency payment is paid in full determines the amount of deficiency that is due, pursuant to paragraph (c) of this section, and is defined in § 1.22(c).

(c) *How errors in small entity status are excused.* If status as a small entity is established in good faith, and fees as a small entity are paid in good faith, in any application or patent, and it is later discovered that such status as a small entity was established in error, or that through error the Office was not notified of a loss of entitlement to small entity status as required by § 1.27(f)(2), the error will be excused upon: compliance with the separate submission and itemization requirements of paragraphs (c)(1) and (c)(2) of this section, and the deficiency payment requirement of paragraph (c)(2) of this section:

(1) *Separate submission required for each application or patent.* Any paper submitted under this paragraph must be limited to the deficiency payment (all fees paid in error), required by paragraph (c)(2) of this section, for one application or one patent. Where more than one application or patent is involved, separate submissions of deficiency payments (*e.g.*, checks) and itemizations are required for each application or patent. *See* § 1.4(b).

(2) *Payment of deficiency owed.* The deficiency owed, resulting from the previous erroneous payment of small entity fees, must be paid.

(i) *Calculation of the deficiency owed.* The deficiency owed for each previous fee erroneously paid as a small entity is the difference between the current fee amount (for other than a small entity) on the date the deficiency is paid in full and the amount of the previous erroneous (small entity) fee payment. The total deficiency payment owed is the sum of the individual deficiency owed amounts for each fee amount previously erroneously paid as a small entity;

(ii) *Itemization of the deficiency payment.* An itemization of the total deficiency payment is required. The itemization must include the following information:

(A) Each particular type of fee that was erroneously paid as a small entity, (*e.g.*, basic statutory filing fee, two-month extension of time fee) along with the current fee amount for a non-small entity;

(B) The small entity fee actually paid, and when. This will permit the Office to differentiate, for example, between two one-month extension of time fees erroneously paid as a small entity but on different dates;

(C) The deficiency owed amount (for each fee erroneously paid); and

(D) The total deficiency payment owed, which is the sum or total of the individual deficiency owed amounts set forth in paragraph (c)(2)(ii)(C) of this section.

(3) *Failure to comply with requirements.* If the requirements of paragraphs (c)(1) and (c)(2) of this section are not complied with, such

failure will either: be treated as an authorization for the Office to process the deficiency payment and charge the processing fee set forth in § 1.17(i), or result in a requirement for compliance within a one-month non-extendable time period to avoid the return of the fee deficiency paper, at the option of the Office.

(d) *Payment of deficiency operates as notification of loss of status.* Any payment submitted under paragraph (c) of this section will be treated under § 1.27(f)(2) as a notification of a loss of entitlement to small entity status.

14. Section 1.33 is proposed to be amended by revising paragraphs (a) and (b) to read as follows:

§ 1.33 Correspondence respecting patent applications, reexamination proceedings, and other proceedings.

(a) *Correspondence address and daytime telephone number.* When filing an application, a correspondence address must be set forth in either an application data sheet (§ 1.76), or elsewhere in a clearly identifiable manner in any paper submitted with an application filing. If no correspondence address is specified, the Office may treat the mailing address of the first named inventor (if provided, see § 1.76(b)(1) and § 1.63(c)(2)) as the correspondence address. The Office will direct all notices, official letters, and other communications relating to the application to the correspondence address. The Office will not engage in double correspondence with an applicant and an attorney or agent, or with more than one attorney or agent except as deemed necessary by the Commissioner. If more than one correspondence address is specified, the Office will establish one as the correspondence address. For the party to whom correspondence is to be addressed, a daytime telephone number should be supplied in a clearly identifiable manner and may be changed by any party who may change the correspondence address. The correspondence address may be changed as follows:

(1) *Prior to filing of a § 1.63 oath or declaration by any of the inventors.* If a § 1.63 oath or declaration has not been filed by any of the inventors, the correspondence address may be changed by the party who filed the application. If the application was filed by a registered attorney or agent, any other registered practitioner named in the transmittal papers may also change the correspondence address. Thus, the inventor(s), any registered practitioner named in the transmittal papers accompanying the original application, or a party that will be the assignee who filed the application, may change the correspondence address in that application under this paragraph.

(2) *Where a § 1.63 oath or declaration has been filed by any of the inventors.* If a § 1.63 oath or declaration has been filed, or is filed concurrent with the filing of an application, by any of the inventors, the correspondence address may be changed by the parties set forth in paragraph (b) of this section, except for (b)(2).

(b) *Amendments and other papers:* Amendments and other papers filed in the application must be signed by:

(1) An attorney or agent of record appointed in compliance with § 1.34(b);

(2) A registered attorney or agent not of record who acts in a representative capacity under the provisions of § 1.34(a);

(3) An assignee as provided for under § 3.71(b) of this chapter; or

(4) All of the applicants (§ 1.41(b)) for patent, unless there is an assignee of the entire interest and such assignee has taken action in the application in accordance with § 3.71 of this chapter.

* * * * *

15. Section 1.41 is proposed to be amended by revising paragraph (a) to read as follows:

§ 1.41 Applicant for patent.

(a) A patent is applied for in the name or names of the actual inventor or inventors.

(1) The inventorship of a nonprovisional application is that inventorship set forth in the oath or declaration as prescribed by § 1.63, except as provided for in § 1.53(d)(4) and § 1.63(d). If an oath or declaration as prescribed by § 1.63 is not filed during the pendency of a nonprovisional application, the inventorship is that inventorship set forth in the application papers filed pursuant to § 1.53(b), unless applicant files a paper including the processing fee set forth in § 1.17(i) and supplying or changing the name or names of the inventor or inventors.

(2) The inventorship of a provisional application is that inventorship set forth in the cover sheet as prescribed by § 1.51(c)(1). If a cover sheet as prescribed by § 1.51(c)(1) is not filed during the pendency of a provisional application, the inventorship is that inventorship set forth in the application papers filed pursuant to § 1.53(c), unless applicant files a paper including the processing fee set forth in § 1.17(q) and supplying or changing the name or names of the inventor or inventors.

(3) In a nonprovisional application filed without an oath or declaration as prescribed by § 1.63 or a provisional application filed without a cover sheet as prescribed by § 1.51(c)(1), the name, residence, and citizenship of each person believed to be an actual inventor should be provided when the application papers pursuant to § 1.53(b) or (c) are filed.

(4) The inventors who submitted an application under §§ 1.494 or 1.495 are the inventors in the international application designating the United States.

* * * * *

§ 1.44 [Removed and reserved]

16. Section 1.44 is proposed to be removed and reserved.

17. Section 1.47 is proposed to be revised to read as follows:

§ 1.47 Filing when an inventor refuses to sign or cannot be reached.

(a) If a joint inventor refuses to join in an application for patent or cannot be found or reached after diligent effort, the application may be made by the other inventor on behalf of himself or herself and the nonsigning inventor. The oath or declaration in such an application must be accompanied by a petition including proof of the pertinent facts, the fee set forth in § 1.17(h), and the last known address of the nonsigning inventor. The nonsigning inventor may subsequently join in the application on filing an oath or declaration complying with § 1.63.

(b) Whenever all of the inventors refuse to execute an application for patent, or cannot be found or reached after diligent effort, a person to whom an inventor has assigned or agreed in writing to assign the invention, or who otherwise shows sufficient proprietary interest in the matter justifying such action, may make application for patent on behalf of and as agent for all the inventors. The oath or declaration in such an application must be accompanied by a petition including proof of the pertinent facts, a showing that such action is necessary to preserve the rights of the parties or to prevent irreparable damage, the fee set forth in § 1.17(h), and the last known address of all of the inventors. An inventor may subsequently join in the application on filing an oath or declaration complying with § 1.63.

(c) The Office will send notice of the filing of the application to all inventors who have not joined in the application at the address(es) provided in the petition under this section, and publish notice of the filing of the application in the *Official Gazette.* The Office may dispense with this notice provision in a continuation or divisional application,

if notice regarding the filing of the prior application was given to the nonsigning inventor(s).

18. Section 1.48 is proposed to be revised to read as follows:

§ 1.48 Correction of inventorship in a patent application, other than a reissue application, pursuant to 35 U.S.C. 116.

(a) *Nonprovisional application after oath/declaration filed.* If the inventive entity is set forth in error in an executed § 1.63 oath or declaration in a nonprovisional application, and such error arose without any deceptive intention on the part of the person named as an inventor in error or on the part of the person who through error was not named as an inventor, the inventorship of the nonprovisional application may be amended to name only the actual inventor or inventors. If the nonprovisional application is involved in an interference, the amendment must comply with the requirements of this section and must be accompanied by a motion under § 1.634. Amendment of the inventorship requires:

(1) A request to correct the inventorship that sets forth the desired inventorship change;

(2) A statement from each person being added as an inventor and from each person being deleted as an inventor that the error in inventorship occurred without deceptive intention on his or her part;

(3) An oath or declaration by the actual inventor or inventors as required by § 1.63 or as permitted by §§ 1.42, 1.43 or 1.47;

(4) The processing fee set forth in § 1.17(i); and

(5) If an assignment has been executed by any of the original named inventors, the written consent of the assignee (see § 3.73(b) of this chapter).

(b) *Nonprovisional application—fewer inventors due to amendment or cancellation of claims.* If the correct inventors are named in a nonprovisional application, and the prosecution of the nonprovisional application results in the amendment or cancellation of claims so that fewer than all of the currently named inventors are the actual inventors of the invention being claimed in the nonprovisional application, an amendment must be filed requesting deletion of the name or names of the person or persons who are not inventors of the invention being claimed. If the application is involved in an interference, the amendment must comply with the requirements of this section and must be accompanied by a motion under § 1.634. Amendment of the inventorship requires:

(1) A request, signed by a party set forth in § 1.33(b), to correct the inventorship that identifies the named inventor or inventors being deleted and acknowledges that the inventor's invention is no longer being claimed in the nonprovisional application; and

(2) The processing fee set forth in § 1.17(i).

(c) *Nonprovisional application—inventors added for claims to unclaimed subject matter.* If a nonprovisional application discloses unclaimed subject matter by an inventor or inventors not named in the application, the application may be amended to add claims to the subject matter and name the correct inventors for the application. If the application is involved in an interference, the amendment must comply with the requirements of this section and must be accompanied by a motion under § 1.634. Amendment of the inventorship requires:

(1) A request to correct the inventorship that sets forth the desired inventorship change;

(2) A statement from each person being added as an inventor that the addition is necessitated by amendment of the claims and that the inventorship error occurred without deceptive intention on his or her part;

(3) An oath or declaration by the actual inventors as required by § 1.63 or as permitted by §§ 1.42, 1.43 or 1.47;

(4) The processing fee set forth in § 1.17(i); and

(5) If an assignment has been executed by any of the original named inventors, the written consent of the assignee (see § 3.73(b) of this chapter).

(d) *Provisional application—adding omitted inventors.* If the name or names of an inventor or inventors were omitted in a provisional application through error without any deceptive intention on the part of the omitted inventor or inventors, the provisional application may be amended to add the name or names of the omitted inventor or inventors. Amendment of the inventorship requires:

(1) A request, signed by a party set forth in § 1.33(b), to correct the inventorship that identifies the inventor or inventors being added and states that the inventorship error occurred without deceptive intention on the part of the omitted inventor or inventors; and

(2) The processing fee set forth in § 1.17(q).

(e) *Provisional application—deleting the name or names of the inventor or inventors.* If a person or persons were named as an inventor or inventors in a provisional application through error without any deceptive intention on the part of such person or persons, an amendment may be filed in the provisional application deleting the name or names of the person or persons who were erroneously named. Amendment of the inventorship requires:

(1) A request to correct the inventorship that sets forth the desired inventorship change;

(2) A statement by the person or persons whose name or names are being deleted that the inventorship error occurred without deceptive intention on the part of such person or persons;

(3) The processing fee set forth in § 1.17(q); and

(4) If an assignment has been executed by any of the original named inventors, the written consent of the assignee (see § 3.73(b) of this chapter).

(f)(1) *Nonprovisional application—filing executed oath/declaration corrects inventorship.* If the correct inventor or inventors are not named on filing a nonprovisional application under § 1.53(b) without an executed oath or declaration under § 1.63 by any of the inventors, the first submission of an executed oath or declaration under § 1.63 by any of the inventors during the pendency of the application will act to correct the earlier identification of inventorship. See § 1.497(d) for submission of an executed oath or declaration to enter the national stage under 35 U.S.C. 371 and § 1.494 or § 1.495 naming an inventive entity different from the inventive entity set forth in the international stage.

(2) *Provisional application—filing cover sheet corrects inventorship.* If the correct inventor or inventors are not named on filing a provisional application without a cover sheet under § 1.51(c)(1), the later submission of a cover sheet under § 1.51(c)(1) during the pendency of the application will act to correct the earlier identification of inventorship.

(g) *Additional information may be required.* The Office may require such other information as may be deemed appropriate under the particular circumstances surrounding the correction of inventorship.

(h) *Reissue applications not covered.* The provisions of this section do not apply to reissue applications. See §§ 1.171 and 1.175 for correction of inventorship in a patent via a reissue application.

(i) *Correction of inventorship in patent or interference.* See § 1.324 for correction of inventorship in a patent, and § 1.634 for correction of inventorship in an interference.

19. Section 1.51 is proposed to be amended by revising paragraph (b) to read as follows:

§ 1.51 General requisites of an application.

* * * * *

(b) A complete application filed under § 1.53(b) or § 1.53(d) comprises:

(1) A specification as prescribed by 35 U.S.C. 112, including a claim or claims, see §§ 1.71 to 1.77;

(2) An oath or declaration, see §§ 1.63 and 1.68;

(3) Drawings, when necessary, see §§ 1.81 to 1.85; and

(4) The prescribed filing fee, see § 1.16.

* * * * *

20. Section 1.52 is proposed to be revised to read as follows:

§ 1.52 Language, paper, writing, margins.

(a) *Papers which are to become a part of the permanent Patent and Trademark Office records in the file of a patent application.* (1) All papers, other than drawings, which are to become a part of the permanent Patent and Trademark Office records in the file of a patent application must be on sheets of paper that are:

(i) Flexible, strong, smooth, non-shiny, durable, and white;

(ii) Either 21.0 cm by 29.7 cm (DIN size A4) or 21.6 cm by 27.9 cm (8 ½ by 11 inches), with each sheet including a top margin of at least 2.0 cm (¾ inch), a left side margin of at least 2.5 cm (1 inch), a right side margin of at least 2.0 cm (¾ inch), and a bottom margin of at least 2.0 cm (¾ inch);

(iii) Written on only one side in portrait orientation;

(iv) Plainly and legibly written either by a typewriter or machine printer in permanent dark ink or its equivalent; and

(v) Presented in a form having sufficient clarity and contrast between the paper and the writing thereon to permit the direct reproduction of readily legible copies in any number by use of photographic, electrostatic, photo-offset, and microfilming processes and electronic capture by use of digital imaging and optical character recognition.

(2) All papers which are to become a part of the permanent records of the Patent and Trademark Office should have no holes in the sheets as submitted.

(3) The provisions of this paragraph and paragraph (b) of this section do not apply to the pre-printed information on forms provided by the Office.

(4) See § 1.58 for chemical and mathematical formulae and tables, and § 1.84 for drawings.

(5) If papers are submitted as part of the permanent record, other than the drawings, that do not comply with paragraph (a)(1) of this section the Office may at its option:

(i) Convert the papers submitted by applicant into papers that do comply with paragraph (a)(1) of this section and charge the applicant the costs incurred by the Office in doing so (§ 1.21(j)); or

(ii) Require that the applicant provide substitute papers that comply with paragraph (a)(1) of this section within a set time period.

(b) *The application (specification, including the claims, drawings, and oath or declaration) and any amendments or corrections to the application.* (1) The application and any amendments or corrections to the application (including any translation submitted pursuant to paragraph (d) of this section), except as provided for in § 1.69 and paragraph (d) of this section, must:

(i) Comply with the requirements of paragraph (a) of this section; and

(ii) Be in the English language or be accompanied by a translation of any corrections or amendments into the English language together with a statement that the translation is accurate.

(2) The specification (including the abstract and claims), and any amendments to the specification, must have:

(i) Lines that are 1 ½ or double spaced;

(ii) Text written in a block (nonscript) type font or lettering style having capital letters which are at least 0.21 cm (0.08 inch) high; and

(iii) No more than a single column of text.

(3) The claim or claims must commence on a separate sheet (§ 1.75(h)).

(4) The abstract must commence on a separate sheet (§ 1.72(b)).

(5) The pages of the specification including claims and abstract must be numbered consecutively, starting with 1, the numbers being centrally located above or preferably, below, the text.

(6) Paragraphs in the specification, other than in the claims or abstract, should be individually and consecutively numbered using Arabic numerals, so as to unambiguously identify each paragraph. The number should consist of at least four numerals contained in square brackets, including leading zeros (*e.g.*, [0001]). The numbers and enclosing brackets should appear to the right of the left margin as the first item in each paragraph, before the first word of the paragraph, and should be highlighted in bold. A gap, equivalent to approximately four spaces, should follow the number. Nontext elements (*e.g.*, tables, mathematical or chemical formulas, chemical structures, and sequence data) are considered part of the numbered paragraph around or above the elements, and should not be independently numbered. Even if a nontext element extends to the left margin, it should not be numbered as a separate and independent paragraph. A list is also treated as part of the paragraph around or above the list, and should not be independently numbered. Paragraph or section headers (titles), whether abutting the left margin or centered on the page, are not considered paragraphs and should not be numbered.

(7) If papers are submitted as part of the application that do not comply with paragraphs (b)(1) through (b)(5) of this section, the Office may at its option:

(i) Convert the papers submitted by applicant into papers that do comply with paragraphs (b)(1) through (b)(5) of this section and charge the applicant the costs incurred by the Office in doing so (§ 1.21(j)); or

(ii) Require that the applicant provide substitute papers that comply with paragraphs (b)(1) through (b)(5) of this section within a set time period.

(c)(1) Any interlineation, erasure, cancellation or other alteration of the application papers filed must be made before the signing of any accompanying oath or declaration pursuant to § 1.63 referring to those application papers and should be dated and initialed or signed by the applicant on the same sheet of paper. Application papers containing alterations made after the signing of an oath or declaration referring to those application papers must be supported by a supplemental oath or declaration under § 1.67. In either situation, a substitute specification (§ 1.125) is required if the application papers do not comply with paragraphs (a) and (b) of this section.

(2) After the signing of the oath or declaration referring to the application papers, amendments may only be made in the manner provided by § 1.121.

(3) Notwithstanding the provisions of this paragraph, if an oath or declaration is a copy of the oath or declaration from a prior application, the application for which such copy is submitted may contain alterations that do not introduce matter that would have been new matter in the prior application.

(d) A nonprovisional or provisional application may be filed in a language other than English.

(1) *Nonprovisional application.* If a nonprovisional application is filed in a language other than English, an English language translation of the non-English language application, a statement that the translation is accurate, and the

processing fee set forth in § 1.17(i) are required. If these items are not filed with the application, applicant will be notified and given a period of time within which they must be filed in order to avoid abandonment.

(2) *Provisional application:* If a provisional application is filed in a language other than English, an English language translation of the non-English language provisional application will not be required in the provisional application. If a nonprovisional application claims the benefit of such provisional application, however, an English language translation of the non-English language provisional application and a statement that the translation is accurate must be supplied if the nonprovisional application is involved in an interference (§ 1.630), or when specifically required by the examiner.

21. Section 1.53 is proposed to be amended by revising paragraphs (c)(1), (c)(2), (d)(4), (e)(2), (f) and (g) and adding paragraph (d)(10) to read as follows:

§ 1.53 Application number, filing date, and completion of application.

* * * * *

(c) * * *

(1) A provisional application must also include the cover sheet required by § 1.51(c)(1), which may be an application data sheet (§ 1.76), or a cover letter identifying the application as a provisional application. Otherwise, the application will be treated as an application filed under paragraph (b) of this section.

(2) An application for patent filed under paragraph (b) of this section may be converted to a provisional application and be accorded the original filing date of the application filed under paragraph (b) of this section. The grant of such a request for conversion will not entitle applicant to a refund of the fees which were properly paid in the application filed under paragraph (b) of this section. Such a request for conversion must be accompanied by the processing fee set forth in § 1.17(q) and be filed prior to the earliest of:

(i) Abandonment of the application filed under paragraph (b) of this section;

(ii) Payment of the issue fee on the application filed under paragraph (b) of this section;

(iii) Expiration of twelve months after the filing date of the application filed under paragraph (b) of this section; or

(iv) The filing of a request for a statutory invention registration under § 1.293 in the application filed under paragraph (b) of this section.

* * * * *

(d) * * *

(4) An application filed under this paragraph may be filed by fewer than all the inventors named in the prior application, provided that the request for an application under this paragraph when filed is accompanied by a statement requesting deletion of the name or names of the person or persons who are not inventors of the invention being claimed in the new application. No person may be named as an inventor in an application filed under this paragraph who was not named as an inventor in the prior application on the date the application under this paragraph was filed, except by way of correction of inventorship under § 1.48.

* * * * *

(10) See § 1.103(b) for requesting a limited suspension of action in an application filed under this paragraph.

(e) * * *

(2) Any request for review of a notification pursuant to paragraph (e)(1) of this section, or a notification that the original application papers lack a portion of the specification or drawing(s), must be by way of a petition pursuant to this paragraph accompanied by the fee set forth in § 1.17(h). In the absence of a timely (§ 1.181(f)) petition pursuant to this paragraph, the filing date of an application in which the applicant was notified of a filing error pursuant to paragraph (e)(1) of this section will be the date the filing error is corrected.

* * * * *

(f) *Completion of application subsequent to filing—Nonprovisional (including continued prosecution and reissue) application.* (1) If an application which has been accorded a filing date pursuant to paragraph (b) or (d) of this section does not include the basic filing fee, or if an application which has been accorded a filing date pursuant to paragraph (b) of this section does not include an oath or declaration by the applicant pursuant to §§ 1.63, 1.162 or 1.175, and applicant has provided a correspondence address (§ 1.33(a)), applicant will be notified and given a period of time within which to pay the filing fee, file an oath or declaration in an application under paragraph (b) of this section, and pay the surcharge required by § 1.16(e) to avoid abandonment.

(2) If an application which has been accorded a filing date pursuant to paragraph (b) of this section does not include the basic filing fee or an oath or declaration by the applicant pursuant to §§ 1.63, 1.162 or 1.175, and applicant has not provided a correspondence address (§ 1.33(a)), applicant has two months from the filing date of the application within which to pay the basic filing fee, file an oath or declaration, and pay the surcharge required by § 1.16(e) to avoid abandonment.

(3) This paragraph applies to continuation or divisional applications under paragraphs (b) or (d) of this section and to continuation-in-part applications under paragraph (b) of this section.

(4) See § 1.63(d) concerning the submission of a copy of the oath or declaration from the prior application for a continuation or divisional application under paragraph (b) of this section.

(5) If applicant does not pay one of the basic filing fee or the processing and retention fee set forth in § 1.21(l) during the pendency of the application, the Office may dispose of the application.

(g) *Completion of application subsequent to filing—provisional application.* (1) If a provisional application which has been accorded a filing date pursuant to paragraph (c) of this section does not include the cover sheet required by § 1.51(c)(1) or the basic filing fee (§ 1.16(k)), and applicant has provided a correspondence address (§ 1.33(a)), applicant will be notified and given a period of time within which to pay the basic filing fee, file a cover sheet (§ 1.51(c)(1)), and pay the surcharge required by § 1.16(l) to avoid abandonment.

(2) If a provisional application which has been accorded a filing date pursuant to paragraph (c) of this section does not include the cover sheet required by § 1.51(c)(1) or the basic filing fee (§ 1.16(k)), and applicant has not provided a correspondence address (§ 1.33(a)), applicant has two months from the filing date of the application within which to pay the basic filing fee, file a cover sheet (§ 1.51(c)(1)), and pay the surcharge required by § 1.16(l) to avoid abandonment.

(3) If applicant does not pay the basic filing fee during the pendency of the application, the Office may dispose of the application.

* * * * *

22. Section 1.55 is proposed to be amended by revising paragraph (a) to read as follows:

§ 1.55 Claim for foreign priority.

(a) An applicant in a nonprovisional application may claim the benefit of the filing date of one or more prior foreign applications under the conditions specified in 35 U.S.C. 119(a) through (d), 172, and 365(b).

(1) The claim for priority must identify the foreign application for

which priority is claimed, as well as any foreign application for the same subject having a filing date before that of the application for which priority is claimed, by specifying the application number, country (or intergovernmental organization), day, month, and year of its filing.

(2)(i) In an application filed under 35 U.S.C. 111(a), the claim for priority and the certified copy of the foreign application specified in 35 U.S.C. 119(b) must be filed before the patent is granted.

(ii) In an application that entered the national stage from an international application after compliance with 35 U.S.C. 371, the claim for priority must be made within the time limit set forth in the PCT and the Regulations under the PCT. If the certified copy of the foreign application has not been filed in accordance with the PCT and the Regulations under the PCT, it must be filed before the patent is granted.

(iii) When the application becomes involved in an interference (§ 1.630), when necessary to overcome the date of a reference relied upon by the examiner, or when deemed necessary by the examiner, the Office may require that the claim for priority and the certified copy of the foreign application be filed earlier than provided in paragraph (a)(2)(i) or (a)(2)(ii) of this section.

(iv) If the claim for priority or the certified copy of the foreign application is filed after the date the issue fee is paid, it must be accompanied by the processing fee set forth in § 1.17(i) but the patent will not include the priority claim unless corrected by a certificate of correction under 35 U.S.C. 255 and § 1.323 of this part.

(3) An English-language translation of a non-English-language foreign application is not required except when the application is involved in an interference (§ 1.630), when necessary to overcome the date of a reference relied upon by the examiner, or when specifically required by the examiner. If an English-language translation is required, it must be filed together with a statement that the translation of the certified copy is accurate.

* * * * *

23. Section 1.56 is proposed to be amended by adding a new paragraph (e) to read as follows:

§ 1.56 Duty to disclose information material to patentability.

* * * * *

(e) In any continuation-in-part application, the duty under this section includes the duty to disclose to the Office all information known to the person to be material to patentability, as defined in paragraph (b) of this section, which became available between the filing date of the prior application and the national or PCT international filing date of the continuation-in-part application.

24. Section 1.59 is proposed to be amended by revising paragraph (b) to read as follows:

§ 1.59 Expungement of information or copy of papers in application file.

* * * * *

(b) An applicant may request that the Office expunge and return information, other than what is excluded by paragraph (a)(2) of this section, by filing a petition under this paragraph. Any petition to expunge and return information from an application must include the fee set forth in § 1.17(h) and establish to the satisfaction of the Commissioner that the return of the information is appropriate.

* * * * *

25. Section 1.63 is proposed to be amended by revising paragraphs (a), (b), (c) and (e) to read as follows:

§ 1.63 Oath or declaration.

(a) An oath or declaration filed under § 1.51(b)(2) as a part of a nonprovisional application must:

(1) Be executed (*i.e.*, signed) in accordance with either § 1.66 or § 1.68;

(2) Identify each inventor and country of citizenship of each inventor; and

(3) State that the person making the oath or declaration believes the named inventor or inventors to be the original and first inventor or inventors of the subject matter which is claimed and for which a patent is sought.

(b) In addition to meeting the requirements of paragraph (a), the oath or declaration must also:

(1) Identify the application to which it is directed;

(2) State that the person making the oath or declaration has reviewed and understands the contents of the application, including the claims, as amended by any amendment specifically referred to in the oath or declaration; and

(3) State that the person making the oath or declaration acknowledges the duty to disclose to the Office all information known to the person to be material to patentability as defined in § 1.56.

(c) Unless such information is supplied on an application data sheet in accordance with § 1.76, the oath or declaration must also identify:

(1) Each inventor, by full name, including the family name, and at least one given name without abbreviation together with any other given name or initial;

(2) The mailing address and residence (if different from the mailing address) of each inventor; and

(3) Any foreign application for patent (or inventor's certificate) for which a claim for priority is made pursuant to § 1.55, and any foreign application having a filing date before that of the application on which priority is claimed, by specifying the application number, country, day, month, and year of its filing.

* * * * *

(e) A newly executed oath or declaration must be filed in any continuation-in-part application, which application may name all, more, or fewer than all of the inventors named in the prior application.

26. Section 1.64 is proposed to be revised to read as follows:

§ 1.64 Person making oath or declaration.

(a) The oath or declaration (§ 1.63), including any supplemental oath or declaration (§ 1.67), must be made by all of the actual inventors except as provided for in §§ 1.42, 1.43, 1.47 or 1.67.

(b) If the person making the oath or declaration or any supplemental oath or declaration is not the inventor (§§ 1.42, 1.43, 1.47 or 1.67), the oath or declaration shall state the relationship of the person to the inventor, and, upon information and belief, the facts which the inventor is required to state. If the person signing the oath or declaration is the legal representative of a deceased inventor, the oath or declaration shall also state that the person is a legal representative and the citizenship, residence and mailing address of the legal representative.

27. Section 1.67 is proposed to be amended by revising paragraph (a) and removing paragraph (c) to read as follows:

§ 1.67 Supplemental oath or declaration.

(a) The Office may require a supplemental oath or declaration meeting the requirements of § 1.63 or § 1.162 to correct any deficiencies or inaccuracies present in the earlier filed oath or declaration. If the earlier filed oath or declaration complied with § 1.63(a), the Office may permit the supplemental oath or declaration to be made by fewer than all of the inventors or by an applicant other than the inventor.

* * * * *

28. Section 1.72 is proposed to be revised to read as follows:

§ 1.72 Title and abstract.

(a) Unless the title is supplied in an application data sheet (§ 1.76), the title

of the invention, which should be as short and specific as possible, should appear as a heading on the first page of the specification.

(b) A brief abstract of the technical disclosure in the specification must commence on a separate sheet, preferably following the claims, under the heading ''Abstract'' or ''Abstract of the Disclosure.'' The abstract in an application filed under 35 U.S.C. 111 may not exceed 150 words in length. The purpose of the abstract is to enable the Patent and Trademark Office and the public generally to determine quickly from a cursory inspection the nature and gist of the technical disclosure. The abstract will not be used for interpreting the scope of the claims.

29. A new § 1.76 is proposed to be added to read as follows:

§ 1.76 Application data sheet.

(a) An application data sheet is a sheet or sheets containing bibliographic data concerning a patent application arranged in a specified format. If an application data sheet is provided, the application data sheet is part of the application.

(b) Bibliographic data as used in paragraph (a) of this section includes:

(1) *Applicant information.* This information includes the name, residence, mailing address, and citizenship of each applicant (§ 1.41(b)). The name of each applicant must include the family name, and at least one given name without abbreviation together with any other given name or initial. If the applicant is not an inventor, this information also includes the applicant's authority (§§ 1.42, 1.43 and 1.47) to apply for the patent on behalf of the inventor. The citizenship of each inventor must be provided in the oath or declaration under § 1.63 even if it is provided in the application data sheet (35 U.S.C. 115).

(2) *Correspondence information.* This information includes the correspondence address, which may be indicated by reference to a customer number, to which correspondence is to be directed (*see* § 1.33(a)).

(3) *Application information.* This information includes the title of the invention, the total number of drawing sheets, whether the drawings are formal, any docket number assigned to the application, and the type (*e.g.*, utility, plant, design, reissue utility, provisional) of application, and whether the application discloses any significant part of the subject matter of an application under a secrecy order pursuant to § 5.2 of this chapter (see § 5.2(c)).

(4) *Representative information.* This information includes the registration number of each practitioner, or the customer number, having a power of attorney or authorization of agent in the application. Providing this information in the application data sheet does not constitute a power of attorney or authorization of agent in the application (*see* § 1.34(b)).

(5) *Domestic priority information.* This information includes the application number, the filing date, the status (including patent number if available), and relationship of each application for which a benefit is claimed under 35 U.S.C. 119(e), 120, 121, or 365(c). Providing this information in the application data sheet constitutes the specific reference required by 35 U.S.C. 119(e) or 120 and § 1.78(a)(2) or § 1.78(a)(4) of this part.

(6) *Foreign priority information.* This information includes the application number, country, and filing date of each foreign application for which priority is claimed, as well as any foreign application having a filing date before that of the application for which priority is claimed. Providing this information in the application data sheet constitutes the claim for priority as required by 35 U.S.C. 119(b) and § 1.55(a) of this part.

(c) If an application contains an application data sheet, any inconsistency between the information provided in the application data sheet and the oath or declaration under § 1.63 will be resolved in favor of the information provided in the application data sheet. A supplemental application data sheet may be submitted to correct or update information provided in a previous application data sheet.

30. Section 1.77 is proposed to be revised to read as follows:

§ 1.77 Arrangement of application elements.

(a) The elements of the application, if applicable, should appear in the following order:

(1) Utility application transmittal form.

(2) Fee transmittal form.

(3) Application data sheet (see § 1.76).

(4) Specification.

(5) Drawings.

(6) Executed oath or declaration.

(b) The specification should include the following sections in order:

(1) Title of the invention, which may be accompanied by an introductory portion stating the name, citizenship and residence of the applicant.

(2) Cross-reference to related applications (unless included in the application data sheet).

(3) Statement regarding federally sponsored research or development.

(4) Reference to a ''computer program listing appendix'' (see § 1.96 (c)).

(5) Background of the invention.

(6) Brief summary of the invention.

(7) Brief description of the several views of the drawing.

(8) Detailed description of the invention.

(9) A claim or claims.

(10) Abstract of the disclosure.

(11) Sequence listing (see §§ 1.821 through 1.825).

(c) The text of the specification sections defined in paragraphs (b)(1) through (b)(3) and (b)(5) through (b)(11) of this section, if applicable, should be preceded by a section heading in uppercase and without underlining or bold type.

31. Section 1.78 is proposed to be amended by revising paragraphs (a)(2), (a)(4) and (c) to read as follows:

§ 1.78 Claiming benefit of earlier filing date and cross-references to other applications.

(a) * * *

(2) Except for a continued prosecution application filed under § 1.53(d), any nonprovisional application claiming the benefit of one or more prior filed copending nonprovisional applications or international applications designating the United States of America must contain a reference to each such prior application, identifying it by application number (consisting of the series code and serial number) or international application number and international filing date and indicating the relationship of the applications. Unless the reference required by this paragraph is included in an application data sheet (§ 1.76), the specification must contain or be amended to contain such reference in the first sentence following the title. The request for a continued prosecution application under § 1.53(d) is the specific reference required by 35 U.S.C. 120 to the prior application. The identification of an application by application number under this section is the specific reference required by 35 U.S.C. 120 to every application assigned that application number. Cross-references to other related applications may be made when appropriate (see § 1.14).

* * * * *

(4) Any nonprovisional application claiming the benefit of one or more prior filed copending provisional applications must contain a reference to each such prior provisional application, identifying it as a provisional application, and including the provisional application number (consisting of series code and serial number). Unless the reference required by this paragraph is included in an

application data sheet (§ 1.76), the specification must contain or be amended to contain such reference in the first sentence following the title.

* * * * *

(c) If an application or a patent under reexamination and at least one other application naming different inventors are owned by the same party and contain conflicting claims, and there is no statement of record indicating that the claimed inventions were commonly owned or subject to an obligation of assignment to the same person at the time the later invention was made, the Office may require the assignee to state whether the claimed inventions were commonly owned or subject to an obligation of assignment to the same person at the time the later invention was made, and, if not, indicate which named inventor is the prior inventor.

32. Section 1.84 is proposed to be revised to read as follows:

§ 1.84 Standards for drawings.

(a) *Drawings.* There are two acceptable categories for presenting drawings in utility patent applications:

(1) *Black ink.* Black and white drawings are normally required. India ink, or its equivalent that secures solid black lines, must be used for drawings, or

(2) *Color.* On rare occasions, color drawings may be necessary as the only practical medium by which to disclose the subject matter sought to be patented in a utility patent application or the subject matter of a statutory invention registration. The Patent and Trademark Office will accept color drawings in utility patent applications and statutory invention registrations only if color drawings are necessary for the understanding of the claimed invention and upon payment of the fee set forth in § 1.17(k) and submission of three sets of the color drawings. Color drawings are not permitted in international applications (see PCT Rule 11.13). If the subject matter of the application admits of illustration by a black and white drawing, the examiner may require a black and white drawing in place of the color drawing. The color drawings must be of sufficient quality so that all details in the drawings are reproducible in the printed patent. If color drawings are submitted, the specification must contain or be amended to contain the following language as the first paragraph of the brief description of the drawings:

The file of this patent contains at least one drawing executed in color. Copies of this patent with color drawing(s) will be provided by the Patent and Trademark Office upon request and payment of the necessary fee.

(b)(1) *Photographs.* Photographs are not ordinarily permitted in utility patent applications. The Office will accept photographs in utility patent applications, however, if photographs are the only practicable medium for illustrating the claimed invention. If the subject matter of the application admits of illustration by a drawing, the examiner may require a drawing in place of the photograph. The photographs must be of sufficient quality so that all details in the photographs are reproducible in the printed patent.

(2) *Color photographs.* Color photographs will be accepted in utility patent applications if the conditions for accepting color drawings and photographs have been satisfied. See paragraphs (a)(2) and (b)(1) of this section.

(c) *Identification of drawings.* Identifying indicia, if provided, should include the title of the invention, inventor's name, and application number, or docket number (if any) if an application number has not been assigned to the application. If this information is provided, it must be placed on the front of each sheet and centered within the top margin.

(d) *Type of paper.* Drawings submitted to the Office must be made on paper which is flexible, strong, white, smooth, non-shiny, and durable. All sheets must be reasonably free from cracks, creases, and folds. Only one side of the sheet may be used for the drawing. Each sheet must be reasonably free from erasures and must be free from alterations, overwritings, and interlineations. Photographs must be developed on paper or be permanently mounted on Bristol board meeting the sheet-size requirements of paragraph (e) of this section and the margin requirements of paragraph (f) of this section. See paragraph (b) of this section for other requirements for photographs.

(e) *Size of paper.* All drawing sheets in an application must be the same size. One of the shorter sides of the sheet is regarded as its top. The size of the sheets on which drawings are made must be:

(1) 21.0 cm by 29.7 cm (DIN size A4); or

(2) 21.6 cm by 27.9 cm (8½ by 11 inches).

(f) *Margins.* The sheets must not contain frames around the sight (*i.e.*, the usable surface), but should have scan target points (*i.e.*, cross-hairs) printed on two catercorner margin corners. Each sheet must include a top margin of at least 2.5 cm (1 inch), a left side margin of at least 2.5 cm (1 inch), a right side margin of at least 1.5 cm (⅝ inch), and a bottom margin of at least 1.0 cm (⅜ inch), and must leave a sight no greater than 17.0 cm by 26.2 cm on 21.0 cm by 29.7 cm (DIN size A4) drawing sheets, and a sight no greater than 17.0 cm by 24.4 cm (6¾ by 9⅝ inches) on 21.6 cm by 27.9 cm (8½ by 11 inch) drawing sheets.

(g) *Scale.* The scale to which a drawing is made must be large enough to show the mechanism without crowding when the drawing is reduced in size to two-thirds in reproduction. Indications such as ''actual size'' or ''scale ½'' on the drawings are not permitted since these lose their meaning with reproduction in a different format.

(h) *Character of lines, numbers, and letters.* All drawings must be made by a process which will give them satisfactory reproduction characteristics. Every line, number, and letter must be durable, clean, black (except for color drawings), sufficiently dense and dark, and uniformly thick and well-defined. The weight of all lines and letters must be heavy enough to permit adequate reproduction. This requirement applies to all lines however fine, to shading, and to lines representing cut surfaces in sectional views. Lines and strokes of different thicknesses may be used in the same drawing where different thicknesses have a different meaning.

(i) *Legends.* Suitable descriptive legends may be used subject to approval by the Office, or may be required by the examiner where necessary for understanding of the drawing. They should contain as few words as possible.

(j) *Numbers, letters, and reference characters.* (1) Reference characters (numerals are preferred), sheet numbers, and view numbers must be plain and legible, and must not be used in association with brackets or inverted commas, or enclosed within outlines, *e.g.*, encircled. They must be oriented in the same direction as the view so as to avoid having to rotate the sheet.

(2) The English alphabet must be used for letters, except where another alphabet is customarily used, such as the Greek alphabet to indicate angles, wavelengths, and mathematical formulas.

(3) Numbers, letters, and reference characters must measure at least 0.32 cm (⅛ inch) in height.

(4) The same part of an invention appearing in more than one view of the drawing must always be designated by the same reference character, and the same reference character must never be used to designate different parts.

(5) Only reference characters mentioned in the description may appear in the drawings. Reference

characters mentioned in the description must appear in the drawings.

(k) *Lead lines.* Lead lines are those lines between the reference characters and the details to which they refer. Such lines may be straight or curved and should be as short as possible. They must originate in the immediate proximity of the reference character and extend to the feature indicated. Lead lines must not cross each other. Lead lines are required for each reference character except for those which indicate the surface or cross section on which they are placed. Such a reference character must be underlined to make it clear that a lead line has not been left out by mistake. Lead lines must be executed in the same way as lines in the drawing. See paragraph (h) of this section.

(l) *Numbering of sheets of drawings.* The sheets of drawings should be numbered in consecutive Arabic numerals, starting with 1, within the sight as defined in paragraph (g) of this section. These numbers, if present, must be placed in the middle of the top of the sheet, but not in the margin. The numbers can be placed on the right-hand side if the drawing extends too close to the middle of the top edge of the usable surface. The drawing sheet numbering must be clear and larger than the numbers used as reference characters to avoid confusion. The number of each sheet may be shown by two Arabic numerals placed on either side of an oblique line, with the first being the sheet number and the second being the total number of sheets of drawings, with no other marking.

(m) *Numbering of views.* (1) The different views must be numbered in consecutive Arabic numerals, starting with 1, independent of the numbering of the sheets and, if possible, in the order in which they appear on the drawing sheet(s). Partial views intended to form one complete view, on one or several sheets, must be identified by the same number followed by a capital letter. View numbers must be preceded by the abbreviation ''FIG.'' Where only a single view is used in an application to illustrate the claimed invention, it must not be numbered and the abbreviation ''FIG.'' must not appear.

(2) Numbers and letters identifying the views must be simple and clear and must not be used in association with brackets, circles, or inverted commas. The view numbers must be larger than the numbers used for reference characters.

(n) *Security markings.* Authorized security markings may be placed on the drawings provided they are outside the sight, preferably centered in the top margin.

(o) *Corrections.* Any corrections on drawings submitted to the Office must be durable and permanent.

(p) See § 1.152 for design drawings, § 1.165 for plant drawings, and § 1.173 for reissue drawings.

33. Section 1.85 is proposed to be revised to read as follows:

§ 1.85 Corrections to drawings.

(a) If a drawing meets the requirements of § 1.84(d), (e) and (f) and is suitable for reproduction, but is not otherwise in compliance with § 1.84, the drawing may be admitted for examination.

(b) The Office will not release drawings for purposes of correction. If corrections are necessary, new corrected drawings must be submitted within the time set by the Office.

(c) If a corrected drawing is required or if a drawing does not comply with § 1.84 at the time an application is allowed, the Office may notify the applicant and set a three month period of time from the mail date of the notice of allowability within which the applicant must file a corrected or formal drawing in compliance with § 1.84 to avoid abandonment. This time period is not extendable under § 1.136(a) or (b).

34. Section 1.91 is proposed to be amended by revising paragraph (a)(3)(i) to read as follows:

§ 1.91 Models or exhibits not generally admitted as part of application or patent.

(a) * * *

(3) * * *

(i) The fee set forth in § 1.17(h); and

* * * * *

35. Section 1.96 is proposed to be amended by revising paragraphs (b) and (c) to read as follows:

§ 1.96 Submission of computer program listings.

* * * * *

(b) *Material which will be printed in the patent.* If the computer program listing is contained on one sheet, it may be submitted either as a drawing or as part of the specification.

(1) *Drawings.* If the listing is submitted as a drawing, it must be submitted in the manner and complying with the requirements for drawings as provided in § 1.84. At least one figure numeral is required on the sheet of drawing.

(2) *Specification.* (i) If the listing is submitted as part of the specification, it must be submitted in accordance with the provisions of § 1.52, at the end of the description but before the claims.

(ii) Any listing submitted as part of the specification must be a direct printout (*i.e.*, not a copy) from the computer's printer with dark solid black letters not less than 0.21 cm high, on white, unshaded and unlined paper, and the sheet should be submitted in a protective cover. Any amendments must be made by way of submission of a substitute sheet.

(c) *As an appendix which will not be printed.* Any computer program listing may, and any computer program listing that would be contained on more than one sheet must, be submitted on a Compact Disk-Read Only Memory (CD–ROM) or Compact Disk-Recordable (CD–R), which must be referred to in the specification (see § 1.77(b)(4)). A CD–ROM or CD–R containing such a computer program listing is to be referred to as a ''computer program listing appendix.'' The ''computer program listing appendix'' will not be part of the printed patent. Reference in the application to the ''computer program listing appendix'' must be made at the location indicated in § 1.77(b)(4). Any amendment to the ''computer program listing appendix'' must be by way of a new CD–ROM or CD–R containing a substitute computer program listing.

(1) *Availability of appendix.* Such ''computer program listing appendix'' will be available to the public for inspection, and copies thereof will be available for purchase with the file wrapper and contents, after a patent based on such application is granted or the application is otherwise made publicly available.

(2) *Submission requirements*—(i) A ''computer program listing appendix'' must be submitted on a CD–ROM or CD–R in accordance with the standards set forth in 36 CFR 1228.188(c) and (d).

(ii) The computer program listing must be written in American Standard Code for Information Interchange (ASCII) in the form of textual document files on a disk that complies with § 1.824(b). No other format shall be allowed. The CD–ROM or CD–R must be accompanied by documentation on paper in accordance with § 1.52(a) that contains the machine format (*e.g.*, IBM–PC, Macintosh)), the operating system (*e.g.*, MS–DOS, Macintosh, Unix) and any other special information that is necessary to identify, maintain, and interpret the ''computer program listing appendix.''

(iii) Multiple computer program listings for a single application may be placed on a single CD–ROM or CD–R. Multiple CD–ROMs or CD–Rs may be submitted for a single application if necessary. A separate CD–ROM or CD–R is required for each application containing a computer program listing

that must be submitted on a ''computer program listing appendix.''

(iv) A CD–ROM or CD–R ''computer program listing appendix'' must be labeled with the following information:

(A) The name of each inventor (if known);

(B) Title of the invention;

(C) The docket number used by the person filing the application to identify the application (if applicable).

36. Section 1.97 is proposed to be amended by revising paragraphs (a) through (e) to read as follows:

§ 1.97 Filing of information disclosure statement.

(a) In order for an applicant for a patent or for a reissue of a patent to have an information disclosure statement in compliance with § 1.98 considered by the Office during the pendency of the application, it must satisfy one of paragraphs (b), (c), or (d) of this section.

(b) An information disclosure statement shall be considered by the Office if filed by the applicant within any one of the following time periods:

(1) Within three months of the filing date of a national application other than a continued prosecution application under § 1.53(d);

(2) Within three months of the date of entry of the national stage as set forth in § 1.491 in an international application; or

(3) Before the mailing date of a first Office action on the merits.

(c) An information disclosure statement shall be considered by the Office if filed after the period specified in paragraph (b) of this section, provided that the information disclosure statement is filed before the mailing date of any of a final action under § 1.113, a notice of allowance under § 1.311, or an action that otherwise closes prosecution in the application, and it is accompanied by one of:

(1) A statement as specified in paragraph (e) of this section; or

(2) The fee set forth in § 1.17(p).

(d) An information disclosure statement shall be considered by the Office if filed by the applicant after the period specified in paragraph (c) of this section, provided that the information disclosure statement is filed on or before payment of the issue fee and is accompanied by:

(1) A statement as specified in paragraph (e) of this section; and

(2) The fee set forth in § 1.17(p).

(e) A statement under this section must state either:

(1) That each item of information contained in the information disclosure statement was first cited in a communication from a foreign patent office in a counterpart foreign application not more than three months prior to the filing of the information disclosure statement; or

(2) That no item of information contained in the information disclosure statement was cited in a communication from a foreign patent office in a counterpart foreign application, and, to the knowledge of the person signing the certification after making reasonable inquiry, no item of information contained in the information disclosure statement was known to any individual designated in § 1.56(c) more than three months prior to the filing of the information disclosure statement.

* * * * *

37. Section 1.98 is proposed to be revised to read as follows:

§ 1.98 Content of information disclosure statement.

(a) Any information disclosure statement filed under § 1.97 shall include:

(1) A list of all patents, publications or other information submitted for consideration by the Office;

(2) A legible copy of:

(i) Each U.S. and foreign patent;

(ii) Each publication or that portion which caused it to be listed;

(iii) For each cited pending U.S. application, the application specification including the claims, and any drawing of the application, or that portion of the application which caused it to be listed including any claims directed to that portion; and

(iv) All other information or that portion which caused it to be listed; and

(3) A concise explanation of the relevance, as it is presently understood by the individual designated in § 1.56(c) most knowledgeable about the content of the information, of each patent, publication, or other information listed that is not in the English language. The concise explanation may be either separate from the specification or incorporated therein. If a written English-language translation of a non-English-language document, or portion thereof, is within the possession, custody, or control of, or is readily available to any individual designated in § 1.56(c), a copy of the translation shall accompany the information disclosure statement.

(b) Each U.S. patent listed in an information disclosure statement shall be identified by patentee, patent number and issue date. Each listed U.S. application shall be identified by the inventor, application number and filing date. Each listed foreign patent or published foreign patent application shall be identified by the country or patent office which issued the patent or published the application, an appropriate document number, and the publication date indicated on the patent or published application. Each listed publication shall be identified by author (if any), title, relevant pages of the publication, date, and place of publication.

(c) When the disclosures of two or more patents or publications listed in an information disclosure statement are substantively cumulative, a copy of one of the patents or publications may be submitted without copies of the other patents or publications provided that a statement is made that these other patents or publications are cumulative.

(d) A copy of any patent, publication, application, or other information listed in an information disclosure statement is not required to be provided if it was previously cited by or submitted to the Office in a prior application, provided that:

(1) The prior application is properly identified in the statement and relied on for an earlier filing date under 35 U.S.C. 120; and

(2) Where the listed information was not cited by the Office, the information submission made in the prior application complied with paragraphs (a) through (c) of this section, and except for an application filed under § 1.53(d) the submission made in the prior application complied with § 1.97.

38. Section 1.102 is proposed to be amended by revising paragraph (d) to read as follows:

§ 1.102 Advancement of examination.

* * * * *

(d) A petition to make an application special on grounds other than those referred to in paragraph (c) of this section must be accompanied by the fee set forth in § 1.17(h).

39. Section 1.103 is proposed to be revised to read as follows:

§ 1.103 Suspension of action by the Office.

(a) *Suspension for cause.* On request of the applicant, the Office may grant a suspension of action under this paragraph for good and sufficient cause. The Office will not suspend action if a reply by applicant to an Office action is outstanding. Any petition for suspension of action under this paragraph must specify a period of suspension not exceeding six months. Any petition for suspension of action under this paragraph must also include:

(1) A showing of good and sufficient cause for suspension of action; and

(2) The fee set forth in § 1.17(h), unless such cause is the fault of the Office.

(b) *Limited suspension of action in a continued prosecution application (CPA) under § 1.53(d).* On request of the applicant, the Office may grant a suspension of action under this paragraph in a continued prosecution application under § 1.53(d) for a period not exceeding three months. Any request for suspension of action under this paragraph must be filed with the request for an application under § 1.53(d), specify the period of suspension, and include the processing fee set forth in § 1.17(i).

(c) *Notice of suspension on initiative of the Office.* The Office will notify applicant if the Office suspends action by the Office on an application on its own initiative.

(d) *Suspension of action for public safety or defense.* The Office may suspend action by the Office by order of the Commissioner if the following conditions are met:

(1) The application is owned by the United States;

(2) Publication of the invention may be detrimental to the public safety or defense; and

(3) The appropriate department or agency requests such suspension.

(e) *Statutory invention registration.* The Office will suspend action for the entire pendency of an application if the Office has accepted a request to publish a statutory invention registration in the application, except for purposes relating to patent interference proceedings under subpart E of this part.

40. A new § 1.105 is proposed to be added to read as follows:

§ 1.105 Requirements for information.

(a)(1) In the course of examining or treating a matter in a pending or abandoned application filed under 35 U.S.C. 111 or 371 (including a reissue application), in a patent, or in a reexamination proceeding, the examiner or other Office employee may require the submission of such information as may be reasonably necessary to properly examine or treat the matter.

(2) Any reply that states that the information required to be submitted is unknown and/or is not available will be accepted as a complete reply.

(b) The requirement for information of paragraph (a)(1) of this section may be included in an Office action, or sent separately.

(c) A reply, or a failure to reply, to a requirement for information under this rule will be governed by §§ 1.135 and 1.136.

41. Section 1.111 is proposed to be amended by revising the heading and paragraphs (a) and (c) to read as follows:

§ 1.111 Reply by applicant or patent owner to a non-final Office action.

(a) If the Office action after the first examination (§ 1.104) is adverse in any respect, the applicant or patent owner, if he or she persists in his or her application for a patent or reexamination proceeding, must reply thereto and request reconsideration or further examination, with or without amendment. See § 1.135 and § 1.136 for time for reply to avoid abandonment. A second or subsequent supplemental reply will be entered unless disapproved by the Commissioner.

* * * * *

(c) In amending in reply to a rejection of claims in an application or patent under reexamination, the applicant or patent owner must clearly point out the patentable novelty which he or she thinks the claims present in view of the state of the art disclosed by the references cited or the objections made. The applicant or patent owner must also show how the amendments avoid such references or objections.

42. Section 1.112 is proposed to be revised to read as follows:

§ 1.112 Reconsideration before final action.

After reply by applicant or patent owner (§ 1.111) to a non-final action, the application or patent under reexamination will be reconsidered and again examined. The applicant or patent owner will be notified if claims are rejected, or objections or requirements made, in the same manner as after the first examination (§ 1.104). Applicant or patent owner may reply to such Office action in the same manner provided in § 1.111, with or without amendment, unless such Office action indicates that it is made final (§ 1.113) or an appeal (§ 1.191) has been taken.

43. A new § 1.115 is proposed to be added to read as follows:

§ 1.115 Preliminary amendments.

(a) A preliminary amendment is an amendment that is received in the Office (§ 1.6) on or before the mail date of the first Office action under § 1.104.

(b) A preliminary amendment will be entered unless disapproved by the Commissioner. A preliminary amendment will not be disapproved if it is filed no later than:

(1) Three months from the filing date of an application under § 1.53(b);

(2) The filing date of a continued prosecution application under § 1.53(d); or

(3) Three months from the date the national stage is entered as set forth in § 1.491 in an international application.

(c) The time periods specified in paragraph (b) of this section are not extendable.

44. Section 1.121 is proposed to be amended by revising paragraphs (a) and (b) to read as follows:

§ 1.121 Manner of making amendments.

(a) *Amendments in applications, other than reissue applications.* Amendments in applications, excluding reissue applications, are made by filing a paper, in compliance with § 1.52, directing that specified amendments be made.

(1) *Specification other than the claims*—(i) *Amendment by instruction to delete, replace or add a paragraph:* If the paragraphs of the specification are numbered as provided in § 1.52(b)(6), amendments to the specification, other than the claims, may be made by submitting an instruction, referencing the paragraph number, to delete one or more paragraphs of the specification, to replace a deleted paragraph with one or more replacement paragraphs, or to add one or more paragraphs, along with the replacement or added paragraph(s). The replacement or added paragraph(s) must not include any markings to indicate the changes that have been made. The amendment must be accompanied by a copy of any replacement paragraph(s), on one or more pages separate from the amendment, marked-up to show all the changes made by brackets (for deleted matter) or underlining (for added matter), or by any equivalent marking system. If a deleted paragraph is replaced by a single paragraph, the replacement paragraph must retain the same number as the deleted paragraph. If a deleted paragraph is replaced by more than one paragraph, the numbering of the replacement paragraphs must begin with the number of the deleted paragraph with following paragraphs beginning with the number of the deleted paragraph followed by a single decimal and sequential integers (*e.g.*, paragraph 0071 is replaced by 0071, 0071.1, and 0071.2). Any paragraph(s) added between existing paragraphs must have the same number as the paragraph immediately above the added one, followed by a period and a new sequential number series (*e.g.*, 0071.1, 0071.2). When numbered paragraphs are added or deleted by amendment, the numbering of any unaffected paragraphs must remain unchanged. Subsequent amendments which may involve further replacement paragraphs are added in the same manner using existing paragraph numbers along with increasing numbers following a decimal. For clarity, a total renumbering of all previously added

paragraphs or the submission of a substitute specification with totally renumbered paragraphs may be required.

(ii) *Amendment by replacement section.* If the sections of the specification contain section headings as provided in § 1.77(b), § 1.154(b), or § 1.163(c), amendments to the specification, other than the claims, may be made by referring to the section heading along with an instruction to delete that section of the specification and to replace such deleted section with a replacement section. The replacement section must be in clean form and must not include any markings to indicate the changes that have been made. The amendment must be accompanied by a copy of the replacement section, on one or more pages separate from the amendment, marked-up to show all changes made by brackets (for deleted matter) or underlining (for added matter), or by any equivalent marking system.

(iii) *Amendment by substitute specification.* The specification, other than the claims, may also be amended by submission of a substitute specification in compliance with § 1.125. If the paragraphs of the specification are not numbered as provided in § 1.52(b)(6), and the sections of the specification do not contain section headings as provided in § 1.77(b), § 1.154(b), or § 1.163(c), the specification, other than the claims, may be amended only by submission of a substitute specification in compliance with § 1.125. The paragraphs of the substitute specification, other than the claims, should be individually numbered in Arabic numerals so that any further amendment to the specification may be made by replacement paragraph(s) in accordance with paragraph (a)(1)(i) of this section. The amendment must be accompanied by a copy of the substitute specification marked-up to show all changes made by brackets (for deleted matter), or underlining (for added matter), or by any equivalent marking system.

(iv) Matter deleted by amendment pursuant to paragraph (a)(1) of this section can be reinstated only by a subsequent amendment presenting the previously deleted matter.

(2) *Claims.* Amendments to a claim must be made by rewriting such claim with all changes (*e.g.*, additions, deletions, modifications) included therein, or by directions to cancel or delete such claim. The rewriting of a claim (with the same or a new number) will be construed as directing the deletion of the previous version of that claim. A rewritten or newly added claim must be in clean form without markings as to the changes from the previous version of the claim or a canceled claim. If a claim is amended by rewriting such claim with the same number, the amendment must be accompanied by a copy of the rewritten claim, on one or more pages separate from the amendment, marked-up to show all the changes made by brackets (for deleted matter) or underlining (for added matter) or by any equivalent marking system, relative to the previous version of that claim. A claim canceled by amendment (deleted in its entirety) can be reinstated only by a subsequent amendment presenting the claim as a new claim with a new claim number.

(3) *Drawings.* Application drawings are amended in the following manner: Any change to the patent drawings must be submitted as a sketch on a separate paper showing the proposed changes in red for approval by the examiner. Upon approval by the examiner, new drawings in compliance with § 1.84 including the changes must be filed.

(4) *Disclosure consistency.* The disclosure must be amended, when required by the Office, to correct inaccuracies of description and definition, and to secure substantial correspondence between the claims, the remainder of the specification, and the drawings.

(5) *No new matter.* No amendment may introduce new matter into the disclosure of an application.

(b) *Amendments in reissue applications.* Any amendment to the description and claims of a reissue application must be made in accordance with § 1.173.

* * * * *

45. Section 1.125 is proposed to be amended by revising paragraphs (b)(2) and (c) to read as follows:

§ 1.125 Substitute specification.

* * * * *

(b) * * *

(2) A marked-up copy of the substitute specification showing all the changes to (including the matter being added to and the matter being deleted from) the specification of record. Numbering the paragraphs of the specification of record is not considered a change that must be shown pursuant to this paragraph.

(c) A substitute specification submitted under this section must be submitted in clean form without markings as to amended material. The paragraphs of any substitute specification, other than the claims, should be individually numbered in Arabic numerals so that any amendment to the specification may be made by replacement paragraph in accordance with § 1.121(a)(1)(i).

* * * * *

46. Section 1.131 is proposed to be amended by revising its heading and paragraph (a) to read as follows:

§ 1.131 Affidavit or declaration of prior invention.

(a) When any claim of an application or a patent under reexamination is rejected, the inventor of the subject matter of the rejected claim, the owner of the patent under reexamination, or the party qualified under §§ 1.42, 1.43, or 1.47, may submit an appropriate oath or declaration to establish invention of the subject matter of the rejected claim prior to the effective date of the reference or activity on which the rejection is based. The effective date of a U.S. patent is the date that such U.S. patent is effective as a reference under 35 U.S.C. 102(e). Prior invention may not be established under this section in any country other than the United States, a NAFTA country, or a WTO member country. Prior invention may not be established under this section before December 8, 1993, in a NAFTA country other than the United States, or before January 1, 1996, in a WTO member country other than a NAFTA country. Prior invention may not be established under this section if either:

(1) The rejection is based upon a U.S. patent to another or others which claims the same patentable invention as defined in § 1.601(n); or

(2) The rejection is based upon a statutory bar.

* * * * *

47. Section 1.132 is proposed to be revised to read as follows:

§ 1.132 Affidavits or declarations traversing rejections or objections.

When any claim of an application or a patent under reexamination is rejected or objected to, the inventor of the subject matter of the rejected claim, an oath or declaration may be submitted to traverse the rejection or objection. An oath or declaration may not be submitted under this section to traverse a rejection if the rejection is based upon a U.S. patent to another or others which claims the same patentable invention as defined in § 1.601(n).

48. Section 1.133 is proposed to be amended by revising paragraph (a) to read as follows:

§ 1.133 Interviews.

(a) Interviews with examiners concerning applications and other matters pending before the Office must be conducted on Office premises and within office hours, as the respective

examiners may designate. Interviews will not be permitted at any other time or place without the authority of the Commissioner. Interviews for the discussion of the patentability of pending applications will not occur before the first Office action. The examiner may require that an interview be scheduled in advance.

* * * * *

49. Section 1.136 is proposed to be amended by adding paragraph (c) to read as follows:

§ 1.136 Extensions of time.

* * * * *

(c) If an applicant is notified in a ''Notice of Allowability'' that an application is otherwise in condition for allowance, the following time periods are not extendable if set in the ''Notice of Allowability'' or in an Office action having a mail date on or after the mail date of the ''Notice of Allowability'':

(1) The period for submitting an oath or declaration in compliance with § 1.63;

(2) The period for submitting formal drawings set under § 1.85(c); and

(3) The period for making a deposit set under § 1.809(c).

50. Section 1.137 is proposed to be amended by revising paragraph (c) to read as follows:

§ 1.137 Revival of abandoned application or lapsed patent.

* * * * *

(c)(1) Any petition to revive pursuant to this section in a design application must be accompanied by a terminal disclaimer and fee as set forth in § 1.321 dedicating to the public a terminal part of the term of any patent granted thereon equivalent to the period of abandonment of the application. Any petition to revive pursuant to this section in either a utility or plant application filed before June 8, 1995, must be accompanied by a terminal disclaimer and fee as set forth in § 1.321 dedicating to the public a terminal part of the term of any patent granted thereon equivalent to the lesser of:

(i) The period of abandonment of the application; or

(ii) The period extending beyond twenty years from the date on which the application for the patent was filed in the United States or, if the application contains a specific reference to an earlier filed application(s) under 35 U.S.C. 120, 121, or 365(c), from the date on which the earliest such application was filed.

(2) Any terminal disclaimer pursuant to paragraph (c)(1) of this section must also apply to any patent granted on a continuing utility or plant application filed after June 8, 1995, or a continuing design application, that contains a specific reference under 35 U.S.C. 120, 121, or 365(c) to the application for which revival is sought.

(3) The provisions of paragraph (c)(1) of this section do not apply to applications for which revival is sought solely for purposes of copendency with a utility or plant application filed on or after June 8, 1995, or to lapsed patents.

* * * * *

51. Section 1.138 is proposed to be revised to read as follows:

§ 1.138 Express abandonment.

(a) An application may be expressly abandoned by filing in the Patent and Trademark Office a written declaration of abandonment identifying the application. Express abandonment of the application may not be recognized by the Office unless it is actually received by appropriate officials in time to act thereon before the date of issue.

(b) A written declaration of abandonment must be signed by a party authorized under § 1.33(b)(1), (b)(3) or (b)(4) to sign a paper in the application, except as otherwise provided in this paragraph. A registered attorney or agent not of record who acts in a representative capacity under the provisions of § 1.34(a) when filing a continuing application may expressly abandon the prior application as of the filing date granted to the continuing application.

52. Section 1.152 is proposed to be revised to read as follows:

§ 1.152 Design drawings.

The design must be represented by a drawing that complies with the requirements of § 1.84, and must contain a sufficient number of views to constitute a complete disclosure of the appearance of the design. Appropriate and adequate surface shading should be used to show the character or contour of the surfaces represented. Solid black surface shading is not permitted except when used to represent the color black as well as color contrast. Broken lines may be used to show visible environmental structure, but may not be used to show hidden planes and surfaces which cannot be seen through opaque materials. Alternate positions of a design component, illustrated by full and broken lines in the same view are not permitted in a design drawing. Photographs and ink drawings are not permitted to be combined as formal drawings in one application. Photographs submitted in lieu of ink drawings in design patent applications must not disclose environmental structure but must be limited to the design for the article claimed.

53. Section 1.154 is proposed to be revised to read as follows:

§ 1.154 Arrangement of application elements.

(a) The elements of the design application, if applicable, should appear in the following order:

(1) Design application transmittal form.

(2) Fee transmittal form.

(3) Application data sheet (see § 1.76).

(4) Specification.

(5) Drawings or photographs.

(6) Executed oath or declaration (see § 1.153(b)).

(b) The specification should include the following sections in order:

(1) Preamble, stating name of the applicant, title of the design, and a brief description of the nature and intended use of the article in which the design is embodied.

(2) Cross-reference to related applications (unless included in the application data sheet).

(3) Statement regarding federally sponsored research or development.

(4) Description of the figure or figures of the drawing.

(5) Feature description.

(6) A single claim.

(c) The text of the specification sections defined in paragraph (b) of this section, if applicable, should be preceded by a section heading in uppercase and without underlining or bold type.

54. Section 1.155 is proposed to be revised to read as follows:

§ 1.155 Expedited examination of design patents.

(a) The applicant may request that the Office expedite the examination of a design application. To qualify for expedited examination:

(1) The application must include drawings in compliance with § 1.84;

(2) The applicant must have conducted a preexamination search; and

(3) The applicant must file a request for expedited examination including:

(i) The fee set forth in § 1.17(t); and

(ii) A statement that a preexamination search was conducted. The statement must also indicate the field of search and include an information disclosure statement in compliance with § 1.98.

(b) The Office will not examine an application that is not in condition for examination (*e.g.*, missing basic filing fee) even if the applicant files a request for expedited examination under this section.

55. Section 1.163 is proposed to be revised to read as follows:

§ 1.163 Specification and arrangement of application elements.

(a) The specification must contain as full and complete a disclosure as possible of the plant and the characteristics thereof that distinguish the same over related known varieties, and its antecedents, and must particularly point out where and in what manner the variety of plant has been asexually reproduced. For a newly found plant, the specification must particularly point out the location and character of the area where the plant was discovered.

(b) The elements of the plant application, if applicable, should appear in the following order:

(1) Plant application transmittal form.

(2) Fee transmittal form.

(3) Application data sheet (see § 1.76).

(4) Specification.

(5) Drawings (in duplicate).

(6) Executed oath or declaration (§ 1.162).

(c) The specification should include the following sections in order:

(1) Title of the invention, which may include an introductory portion stating the name, citizenship, and residence of the applicant.

(2) Cross-reference to related applications (unless included in the application data sheet).

(3) Statement regarding federally sponsored research or development.

(4) Latin name of the genus and species of the plant claimed.

(5) Variety denomination.

(6) Background of the invention.

(7) Brief summary of the invention.

(8) Brief description of the drawing.

(9) Detailed botanical description.

(10) A single claim.

(11) Abstract of the disclosure.

(d) The text of the specification or sections defined in paragraph (c) of this section, if applicable, should be preceded by a section heading in upper case, without underlining or bold type.

56. Section 1.173 is proposed to be revised to read as follows:

§ 1.173 Reissue specification, drawings, and amendments.

(a) *Contents of a reissue application.* An application for reissue must contain the entire specification, including the claims, and the drawings of the patent. No new matter shall be introduced into the application.

(1) *Specification, including claims.* The entire specification, including the claims, of the patent for which reissue is requested must be furnished in the form of a copy of the printed patent, but with only a single column of the printed patent securely mounted, or otherwise reproduced in permanent form, on a single page. If an amendment of the reissue application is to be included, it must be made pursuant to paragraph (b) of this section.

(2) *Drawings.* Applicant must submit a clean copy of each drawing sheet of the printed patent at the time the reissue application is filed. If such copy complies with § 1.84, no further drawings will be required. Where a drawing of the reissue application is to include any changes relative to the patent being reissued, the changes to the drawing must be made in accordance with paragraph (b)(3) of this section. The Office will not transfer the drawings from the patent file to the reissue application.

(b) *Making amendments in a reissue application.* An amendment in a reissue application is made either upon filing, by incorporating the changes physically within the specification, including the claims, using markings pursuant to paragraph (d) of this section, or by filing an amendment paper as a preliminary amendment or during prosecution directing that specified changes be made to the application specification, including the claims, or to the drawings.

(1) *Specification other than the claims.* Changes to the specification, other than to the claims, must be made by submission of the entire text of an added or rewritten paragraph, including markings pursuant to paragraph (d) of this section, except that an entire paragraph may be deleted by a statement deleting the paragraph without presentation of the text of the paragraph. The precise point in the specification must be identified where any added or rewritten paragraph is located.

(2) *Claims.* An amendment paper must include the entire text of each claim being changed by such amendment paper and of each claim being added by such amendment paper. For any claim changed by the amendment paper, a parenthetical expression ''amended,'' ''twice amended,'' *etc.*, should follow the claim number. Each changed patent claim and each added claim must include markings pursuant to paragraph (d) of this section, except that a patent claim or added claim should be canceled by a statement canceling the claim without presentation of the text of the claim.

(3) *Drawings.* Any change to the patent drawings must be submitted as a sketch on a separate paper showing the proposed changes in red for approval by the examiner. Upon approval by the examiner, new drawings in compliance with § 1.84 including the approved changes must be filed. Amended figures must be identified as ''Amended,'' and any added figure must be identified as ''New.'' In the event that a figure is canceled, the figure must be surrounded by brackets and identified as ''Canceled.''

(c) *Status of claims and support for claim changes.* Whenever there is an amendment to the claims pursuant to paragraph (b) of this section, there must also be supplied, on pages separate from the pages containing the changes, the status (*i.e.*, pending or canceled), as of the date of the amendment, of all patent claims and of all added claims, and an explanation of the support in the disclosure of the patent for the changes to the claims made by the amendment paper.

(d) *Changes shown by markings.* Any changes relative to the patent being reissued which are made to the specification, including the claims, upon filing, or by an amendment paper in the reissue application, must include the following markings:

(1) The matter to be omitted by reissue must be enclosed in brackets; and

(2) The matter to be added by reissue must be underlined.

(e) *Numbering of patent claims preserved.* Patent claims may not be renumbered. The numbering of any claims added in the reissue application must follow the number of the highest numbered patent claim.

(f) *Amendment of disclosure may be required.* The disclosure must be amended, when required by the Office, to correct inaccuracies of description and definition, and to secure substantial correspondence between the claims, the remainder of the specification, and the drawings.

(g) *Amendments made relative to patent.* All amendments must be made relative to the patent specification, including the claims, and drawings, which are in effect as of the date of filing of the reissue application.

§ 1.174 [Removed and Reserved]

57. Section 1.174 is proposed to be removed and reserved.

58. Section 1.176 is proposed to be revised to read as follows:

§ 1.176 Examination of reissue.

(a) A reissue application will be examined in the same manner as a non-reissue nonprovisional application, and will be subject to all the requirements of the rules related to non-reissue applications. Restriction between subject matter of the original patent claims and previously unclaimed subject matter may be required.

(b) The examiner will act on applications for reissue in advance of

other nonprovisional applications. An application for reissue, other than a continued prosecution application under § 1.53(d), will not be acted on sooner than two months after the announcement of the filing of the reissue application in the *Official Gazette.*

59. Section 1.177 is proposed to be revised to read as follows:

§ 1.177 Issuance of multiple reissue patents.

(a) The Office may reissue a patent as multiple reissue patents. If applicant files more than one application for the reissue of a single patent, each such application must contain or be amended to contain in the first sentence of the specification a notice stating that more than one reissue application has been filed and identifying each of the reissue applications by relationship, application number and filing date. The Office may correct any reissue patent resulting from an application to which this paragraph applies and not containing the required notice by certificate of correction under § 1.322.

(b) If applicant files more than one application for the reissue of a single patent, each claim of the patent being reissued must be presented in each of the reissue applications as an amended, unamended, or canceled (shown in brackets) claim, with each such claim bearing the same number as in the patent being reissued. The same claim of the patent being reissued may not be presented in its original unamended form for examination in more than one of such multiple reissue applications. The numbering of any added claims in any of the multiple reissue applications must follow the number of the highest numbered original patent claim.

(c) If any one of the several reissue applications by itself fails to correct an error in the original patent as required by 35 U.S.C. 251, but is otherwise in condition for allowance, the Office may suspend action in the allowable application until all issues are resolved as to at least one of the remaining reissue applications. The Office may also merge two or more of the multiple reissue applications into a single reissue application. No reissue application containing only unamended patent claims and not correcting an error in the original patent will be passed to issue by itself.

60. Section 1.178 is proposed to be revised to read as follows:

§ 1.178 Original patent.

The application for a reissue should be accompanied by an offer to surrender the original patent. The application should also be accompanied by the original patent, or if the original is lost or inaccessible, by a statement to that effect. The application may be accepted for examination in the absence of the original patent or the statement, but one or the other must be supplied before the application is allowed. If a reissue is refused, the original patent will be returned to applicant upon request.

61. Section 1.193 is proposed to be amended by revising paragraph (b)(1) to read as follows:

§ 1.193 Examiner's answer and reply brief.

* * * * *

(b)(1) Appellant may file a reply brief to an examiner's answer or a supplemental examiner's answer within two months from the date of such examiner's answer or supplemental examiner's answer. See § 1.136(b) for extensions of time for filing a reply brief in a patent application and § 1.550(c) for extensions of time for filing a reply brief in a reexamination proceeding. The primary examiner must either acknowledge receipt and entry of the reply brief or withdraw the final rejection and reopen prosecution to respond to the reply brief. A supplemental examiner's answer is not permitted, unless the application has been remanded by the Board of Patent Appeals and Interferences for such purpose.

* * * * *

62. Section 1.303 is proposed to be amended by revising paragraph (a) to read as follows:

§ 1.303 Civil action under 35 U.S.C. 145, 146, 306.

(a) Any applicant or any owner of a patent involved in a reexamination proceeding dissatisfied with the decision of the Board of Patent Appeals and Interferences, and any party to an interference dissatisfied with the decision of the Board of Patent Appeals and Interferences may, instead of appealing to the U.S. Court of Appeals for the Federal Circuit (§ 1.301), have remedy by civil action under 35 U.S.C. 145 or 146, as appropriate. Such civil action must be commenced within the time specified in § 1.304.

* * * * *

63. Section 1.311 is proposed to be amended by revising paragraph (b) to read as follows:

§ 1.311 Notice of allowance.

* * * * *

(b) An authorization to charge the issue fee (§ 1.18) to a deposit account may be filed in an individual application only after mailing of the notice of allowance.

64. Section 1.312 is proposed to be revised to read as follows:

§ 1.312 Amendments after allowance.

(a) No amendment may be made as a matter of right in an application after the mailing of the notice of allowance. Any amendment pursuant to this paragraph filed before the payment of the issue fee may be entered on the recommendation of the primary examiner, approved by the Commissioner, without withdrawing the application from issue.

(b) Any amendment pursuant to paragraph (a) of this section filed after the date the issue fee is paid must be accompanied by a petition under § 1.313(c)(1) to withdraw the application from issue, an unequivocal statement that one or more claims are unpatentable, and an explanation as to how the amendment is necessary to render such claim or claims patentable.

65. Section 1.313 is proposed to be revised to read as follows:

§ 1.313 Withdrawal from issue.

(a) Applications may be withdrawn from issue for further action at the initiative of the Office or upon petition by the applicant. To request that the Office withdraw an application from issue, the applicant must file a petition under this section including the fee set forth in § 1.17(h) and a showing of good and sufficient reasons why withdrawal of the application is necessary. If the Office withdraws the application from issue, the Office will issue a new notice of allowance if the Office again allows the application.

(b) Once the issue fee has been paid, the Office will not withdraw the application from issue at its own initiative for any reason except:

(1) A mistake on the part of the Office;

(2) A violation of § 1.56 or illegality in the application;

(3) Unpatentability of one or more claims; or

(4) For interference.

(c) Once the issue fee has been paid, the application will not be withdrawn from issue upon petition by the applicant for any reason except:

(1) Unpatentability of one of more claims, which petition must be accompanied by a statement of such unpatentability and an amendment in compliance with § 1.312(b); or

(2) Express abandonment of the application. Such express abandonment may be in favor of a continuing application.

(d) A petition under this section will not be effective to withdraw the application from issue unless it is actually received and granted by the

appropriate officials before the date of issue. Withdrawal of an application from issue after payment of the issue fee may not be effective to avoid publication of application information.

66. Section 1.314 is proposed to be revised to read as follows:

§ 1.314 Issuance of patent.

If applicant timely pays the issue fee, the Office will issue the patent in regular course unless the application is withdrawn from issue (§ 1.313), or the Office defers issuance of the patent. To request that the Office defer issuance of a patent, applicant must file petition under this section including the fee set forth in § 1.17(h) and a showing of good and sufficient reasons why it is necessary to defer issuance of the patent.

67. Section 1.322 is proposed to be amended by revising paragraph (a) to read as follows:

§ 1.322 Certificate of correction of Office mistake.

(a) The Office may issue a certificate of correction under the conditions specified in 35 U.S.C. 254 at the request of the patentee or the patentee's assignee or on its own initiative. If the request relates to a patent involved in an interference, the request must comply with the requirements of this section and be accompanied by a motion under § 1.635. The Office will not issue such a certificate on its own initiative without first notifying the patentee (including any assignee of record) at the correspondence address of record as specified in § 1.33(a) and affording the patentee an opportunity to be heard.

* * * * *

68. Section 1.323 is proposed to be revised to read as follows:

§ 1.323 Certificate of correction of applicant's mistake.

The Office may issue a certificate of correction under the conditions specified in 35 U.S.C. 255 at the request of the patentee or the patentee's assignee, upon payment of the fee set forth in § 1.20(a). If the request relates to a patent involved in an interference, the request must comply with the requirements of this section and be accompanied by a motion under § 1.635.

69. Section 1.324 is proposed to be amended by revising its heading and paragraph (b)(1) and adding paragraph (c) to read as follows:

§ 1.324 Correction of inventorship in patent, pursuant to 35 U.S.C. 256.

* * * * *

(b) * * *

(1) Where one or more persons are being added, a statement from each person who is being added as an inventor that the inventorship error occurred without any deceptive intention on his or her part;

* * * * *

(c) For correction of inventorship in an application see §§ 1.48 and 1.497, and in an interference see § 1.634.

70. Section 1.366 is proposed to be amended by revising paragraph (c) to read as follows:

§ 1.366 Submission of maintenance fees.

* * * * *

(c) In submitting maintenance fees and any necessary surcharges, identification of the patents for which maintenance fees are being paid must include the patent number, and the application number of the United States application for the patent on which the maintenance fee is being paid. If the payment includes identification of only the patent number (*i.e.,* does not identify the application number of the United States application for the patent on which the maintenance fee is being paid), the Office may apply the payment to the patent identified by patent number in the payment or may return the payment.

* * * * *

71. Section 1.446 is proposed to be amended by revising paragraphs (a) and (b) to read as follows:

§ 1.446 Refund of international application filing and processing fees.

(a) Money paid for international application fees, where paid by actual mistake or in excess, such as a payment not required by law or Treaty and it Regulations, may be refunded. A mere change of purpose after the payment of a fee will not entitle a party to a refund of such fee. The Office will not refund amounts of twenty-five dollars or less unless a refund is specifically requested, and will not notify the payor of such amounts. If the payor or party requesting a refund does not provide the banking information necessary for making refunds by electronic funds transfer, the Office may use the banking information provided on the payment instrument to make any refund by electronic funds transfer.

(b) Any request for refund under paragraph (a) must be filed within two years from the date the fee was paid. If the Office charges a deposit account by an amount other than an amount specifically indicated in an authorization under § 1.25(b), any request for refund based upon such charge must be filed within two years from the date of the deposit account statement indicating such charge, and include a copy of that deposit account statement. The time periods set forth in this paragraph are not extendable.

* * * * *

72. Section 1.497 is proposed to be amended by revising paragraph (b)(2) and adding paragraph (d) to read as follows:

§ 1.497 Oath or declaration under 35 U.S.C. 371(c)(4).

* * * * *

(b) * * *

(2) If the person making the oath or declaration or any supplemental oath or declaration is not the inventor (§§ 1.42, 1.43, or 1.47), the oath or declaration shall state the relationship of the person to the inventor, and, upon information and belief, the facts which the inventor would have been required to state. If the person signing the oath or declaration is the legal representative of a deceased inventor, the oath or declaration shall also state that the person is a legal representative and the citizenship, residence and mailing address of the legal representative.

* * * * *

(d) If the oath or declaration filed pursuant to 35 U.S.C. 371(c)(4) and this section names an inventive entity different from the inventive entity set forth in the international stage, the oath or declaration must be accompanied by:

(1) A statement from each person being added as an inventor and from each person being deleted as an inventor that any error in inventorship in the international stage occurred without deceptive intention on his or her part;

(2) The processing fee set forth in § 1.17(i); and

(3) If an assignment has been executed by any of the original named inventors, the written consent of the assignee (see § 3.73(b)).

73. Section 1.510 is proposed to be amended by revising paragraph (b)(4) to read as follows:

§ 1.510 Request for reexamination.

* * * * *

(b) * * *

(4) The entire specification, including the claims, of the patent for which reexamination is requested, in the form of a copy of the printed patent, but with only a single column of the printed patent securely mounted, or otherwise reproduced in permanent form, on a single sheet. A clean copy of each drawing sheet of the printed patent must also be furnished. Additionally, a copy of any disclaimer, certificate of correction, or reexamination certificate issued in the patent must be included.

* * * * *

74. Section 1.530 is proposed to be amended by revising its heading and paragraph (d), and adding paragraphs (e) through (l) to read as follows:

§ 1.530 Statement; amendment by patent owner; inventorship change.

* * * * *

(d) *Making amendments in a reexamination proceeding.* A proposed amendment in a reexamination proceeding is made by filing a paper directing that proposed specified changes be made to the patent specification, including the claims, or to the drawings. An amendment paper directing that proposed specified changes be made in a reexamination proceeding may be submitted as an accompaniment to a request filed by the patent owner in accordance with § 1.510(e), as part of a patent owner statement in accordance with paragraph (b) of this section, or, where permitted, during the conduct of the reexamination proceeding pursuant to § 1.550(a).

(1) *Specification other than the claims.* Changes to the specification, other than to the claims, must be made by submission of the entire text of an added or rewritten paragraph including markings pursuant to paragraph (f) of this section, except that an entire paragraph may be deleted by a statement deleting the paragraph, without presentation of the text of the paragraph. The precise point in the specification must be identified where any added or rewritten paragraph is located.

(2) *Claims.* An amendment paper must include the entire text of each patent claim which is being proposed to be changed by such amendment paper and of each new claim being proposed to be added by such amendment paper. For any claim changed by the amendment paper, a parenthetical expression ''amended,'' ''twice amended,'' *etc.*, should follow the claim number. Each patent claim proposed to be changed and each proposed added claim must include markings pursuant to paragraph (f) of this section, except that a patent claim or proposed added claim should be canceled by a statement canceling the claim, without presentation of the text of the claim.

(3) *Drawings.* Any change to the patent drawings must be submitted as a sketch on a separate paper showing the proposed changes in red for approval by the examiner. Upon approval of the changes by the examiner, only new sheets of drawings including the changes and in compliance with § 1.84 must be filed. Amended figures must be identified as ''Amended,'' and any added figure must be identified as ''New.'' In the event a figure is canceled, the figure must be surrounded by brackets and identified as ''Canceled.''

(e) *Status of claims and support for claim changes.* Whenever there is an amendment to the claims pursuant to paragraph (d) of this section, there must also be supplied, on pages separate from the pages containing the changes, the status (*i.e.*, pending or canceled), as of the date of the amendment, of all patent claims and of all added claims, and an explanation of the support in the disclosure of the patent for the changes to the claims made by the amendment paper.

(f) *Changes shown by markings.* Any changes relative to the patent being reexamined which are made to the specification, including the claims, must include the following markings:

(1) The matter to be omitted by the reexamination proceeding must be enclosed in brackets; and

(2) The matter to be added by the reexamination proceeding must be underlined.

(g) *Numbering of patent claims preserved.* Patent claims may not be renumbered. The numbering of any claims added in the reexamination proceeding must follow the number of the highest numbered patent claim.

(h) *Amendment of disclosure may be required.* The disclosure must be amended, when required by the Office, to correct inaccuracies of description and definition, and to secure substantial correspondence between the claims, the remainder of the specification, and the drawings.

(i) *Amendments made relative to patent.* All amendments must be made relative to the patent specification, including the claims, and drawings, which are in effect as of the date of filing the request for reexamination.

(j) *No enlargement of claim scope.* No amendment may enlarge the scope of the claims of the patent or introduce new matter. No amendment may be proposed for entry in an expired patent. Moreover, no amendment, other than the cancellation of claims, will be incorporated into the patent by a certificate issued after the expiration of the patent.

(k) *Amendments not effective until certificate.* Although the Office actions will treat proposed amendments as though they have been entered, the proposed amendments will not be effective until the reexamination certificate is issued.

(l) *Correction of inventorship in reexamination proceedings.* (1) When it appears that the correct inventor or inventors were not named in a patent being reexamined through error without deceptive intention on the part of the actual inventor or inventors, the Commissioner may, on petition of all the parties and the assignees and satisfactory proof of the facts and payment of the fee set forth in § 1.20(b), or on order of a court before which such matter is called in question, include in the reexamination certificate to be issued under § 1.570 an amendment naming only the actual inventor or inventors. The petition must be submitted as part of the reexamination proceeding, and must satisfy the requirements of § 1.324.

(2) Notwithstanding paragraph (l)(1) of this section, if a petition to correct inventorship satisfying the requirements of § 1.324 is filed in a reexamination proceeding, and the reexamination proceeding is terminated other than in a reexamination certificate under § 1.570, a certificate of correction indicating the change of inventorship stated in the petition will be issued upon request by the patentee.

75. Section 1.550 is proposed to be amended by revising paragraphs (a) through (c) to read as follows:

§ 1.550 Conduct of reexamination proceedings.

(a) All reexamination proceedings, including any appeals to the Board of Patent Appeals and Interferences, will be conducted with special dispatch within the Office. After issuance of the reexamination order and expiration of the time for submitting any responses thereto, the examination will be conducted in accordance with §§ 1.104, 1.105, 1.110–1.113, 1.115, and 1.116 and will result in the issuance of a reexamination certificate under § 1.570.

(b) The patent owner will be given at least thirty days to respond to any Office action. Such response may include further statements in response to any rejections and/or proposed amendments or new claims to place the patent in a condition where all claims, if amended as proposed, would be patentable.

(c)(1) On or before the day on which an action by the patent owner is due in a reexamination proceeding, the time for taking action by a patent owner will be extended only for sufficient cause, and for a reasonable time specified. Any request for such extension must be filed on or before the day on which action by the patent owner is due, but in no case will the mere filing of a request effect any extension. See § 1.304(a) for extensions of time for filing a notice of appeal to the U.S. Court of Appeals for the Federal Circuit or for commencing a civil action.

(2) After the day on which an action by the patent owner is due in a

reexamination proceeding, the time for taking action by a patent owner will be extended only upon the granting of a petition for extension of time to accept late papers on the grounds that submission of the papers was unintentionally delayed. A petition must be:

(i) Accompanied by papers effecting the action by the patent owner required to continue prosecution of the reexamination proceeding;

(ii) Accompanied by the petition fee as set forth in § 1.17(h);

(iii) Accompanied by a statement that the delay was unintentional. The Commissioner may require additional information where there is a question whether the delay was unintentional; and

(iv) Filed as a complete petition within the full statutory time period for submission of the papers that were unintentionally delayed.

* * * * *

76. Section 1.666 is proposed to be amended by revising paragraph (b) to read as follows:

§ 1.666 Filing of interference settlement agreements.

* * * * *

(b) If any party filing the agreement or understanding under paragraph (a) of this section so requests, the copy will be kept separate from the file of the interference, and made available only to Government agencies on written request, or to any person upon petition accompanied by the fee set forth in § 1.17(h) and on a showing of good cause.

* * * * *

77. Section 1.720 is proposed to be amended by revising paragraphs (b) and (g) to read as follows:

§ 1.720 Conditions for extension of patent term.

* * * * *

(b) The term of the patent has never been previously extended, except for extensions issued pursuant to § 1.701, § 1.760, or § 1.790;

* * * * *

(g) The term of the patent, including any interim extension issued pursuant to § 1.790, has not expired before the submission of an application in compliance with § 1.741; and

* * * * *

78. Section 1.730 is proposed to be revised to read as follows:

§ 1.730 Applicant for extension of patent term; signature requirements.

(a) Any application for extension of a patent term must be submitted by the owner of record of the patent or its agent and must comply with the requirements of § 1.740.

(b) If the application is submitted by the patent owner, the application must be signed either by:

(1) The patent owner in compliance with § 3.73(b) of this chapter; or

(2) A registered practitioner on behalf of the patent owner.

(c) If the application is submitted on behalf of the patent owner by an agent of the patent owner (*e.g.*, a licensee of the patent owner), the application must be signed by a registered practitioner on behalf of the agent. The Office may require proof that the agent is authorized to act on behalf of the patent owner.

(d) If the application is signed by a registered practitioner, the Office may require proof that the practitioner is authorized to act on behalf of the patent owner or agent of the patent owner.

79. Section 1.740 is proposed to be amended by revising its heading, the introductory text of paragraph (a), and paragraphs (a)(9), (a)(10), (a)(14), (a)(15), (b) and (c) to read as follows:

§ 1.740 Formal requirements for application for extension of patent term; correction of informalities.

(a) An application for extension of patent term must be made in writing to the Commissioner. A formal application for the extension of patent term must include:

* * * * *

(9) A statement that the patent claims the approved product or a method of using or manufacturing the approved product, and a showing which lists each applicable patent claim and demonstrates the manner in which at least one such patent claim reads on:

(i) The approved product, if the listed claims include any claim to the approved product;

(ii) The method of using the approved product, if the listed claims include any claim to the method of using the approved product; and

(iii) The method of manufacturing the approved product, if the listed claims include any claim to the method of manufacturing the approved product;

(10) A statement beginning on a new page, of the relevant dates and information pursuant to 35 U.S.C. 156(g) in order to enable the Secretary of Health and Human Services or the Secretary of Agriculture, as appropriate, to determine the applicable regulatory review period as follows:

(i) For a patent claiming a human drug, antibiotic, or human biological product:

(A) The effective date of the investigational new drug (IND) application and the IND number;

(B) The date on which a new drug application (NDA) or a Product License Application (PLA) was initially submitted and the NDA or PLA number; and

(C) The date on which the NDA was approved or the Product License issued;

(ii) For a patent claiming a new animal drug:

(A) The date a major health or environmental effects test on the drug was initiated, and any available substantiation of that date, or the date of an exemption under subsection (j) of section 512 of the Federal Food, Drug, and Cosmetic Act became effective for such animal drug;

(B) The date on which a new animal drug application (NADA) was initially submitted and the NADA number; and

(C) The date on which the NADA was approved;

(iii) For a patent claiming a veterinary biological product:

(A) The date the authority to prepare an experimental biological product under the Virus-Serum-Toxin Act became effective;

(B) The date an application for a license was submitted under the Virus-Serum-Toxin Act; and

(C) The date the license issued;

(iv) For a patent claiming a food or color additive:

(A) The date a major health or environmental effects test on the additive was initiated and any available substantiation of that date;

(B) The date on which a petition for product approval under the Federal Food, Drug and Cosmetic Act was initially submitted and the petition number; and

(C) The date on which the FDA published a **Federal Register** notice listing the additive for use;

(v) For a patent claiming a medical device:

(A) The effective date of the investigational device exemption (IDE) and the IDE number, if applicable, or the date on which the applicant began the first clinical investigation involving the device if no IDE was submitted and any available substantiation of that date;

(B) The date on which the application for product approval or notice of completion of a product development protocol under section 515 of the Federal Food, Drug and Cosmetic Act was initially submitted and the number of the application; and

(C) The date on which the application was approved or the protocol declared to be completed;

* * * * *

(14) The prescribed fee for receiving and acting upon the application for extension (see § 1.20(j)); and

(15) The name, address, and telephone number of the person to whom inquiries and correspondence relating to the application for patent term extension are to be directed.

(b) The application under this section must be accompanied by two additional copies of such application.

(c) If an application for extension of patent term is informal under this section, the Office will so notify the applicant. The applicant has two months from the mail date of the notice, or such time as is set in the notice, within which to correct the informality. Unless the notice indicates otherwise, this time period may be extended under the provisions of § 1.136.

80. Section 1.741 is proposed to be amended by revising its heading, the introductory text of paragraph (a) and paragraphs (a)(5) and (b) to read as follows:

§ 1.741 Complete application given a filing date; petition procedure.

(a) The filing date of an application for extension of a patent term is the date on which a complete application is received in the Office or filed pursuant to the procedures set forth in § 1.8 or § 1.10. A complete application must include:

* * * * *

(5) Sufficient information to enable the Commissioner to determine under subsections (a) and (b) of 35 U.S.C. 156 the eligibility of a patent for extension and the rights that will be derived from the extension and information to enable the Commissioner and the Secretary of Health and Human Services or the Secretary of Agriculture to determine the length of the regulatory review period; and

* * * * *

(b) If an application for extension of patent term is incomplete under this section, the Office will so notify the applicant. If applicant requests review of a notice that an application is incomplete, or review of the filing date accorded an application under this section, applicant must file a petition pursuant to this paragraph accompanied by the fee set forth in § 1.17(h) within two months of the mail date of the notice that the application is incomplete, or the notice according the filing date complained of. Unless the notice indicates otherwise, this time period may be extended under the provisions of § 1.136.

81. Section 1.780 is proposed to be revised to read as follows:

§ 1.780 Certificate or order of extension of patent term.

If a determination is made pursuant to § 1.750 that a patent is eligible for extension and that the term of the patent is to be extended, a certificate of extension, under seal, or an order granting interim extension under 35 U.S.C. 156(d)(5), will be issued to the applicant for the extension of the patent term. Such certificate or order will be recorded in the official file of the patent and will be considered as part of the original patent. Notification of the issuance of the certificate or order of extension will be published in the *Official Gazette* of the Patent and Trademark Office. Notification of the issuance of the order granting an interim extension under 35 U.S.C. 156(d)(5), including the identity of the product currently under regulatory review, will be published in the *Official Gazette* of the Patent and Trademark Office and in the **Federal Register**. No certificate of, or order granting, an extension will be issued if the term of the patent cannot be extended, even though the patent is otherwise determined to be eligible for extension. In such situations, the final determination made pursuant to § 1.750 will indicate that no certificate or order will issue.

82. Section 1.809 is proposed to be amended by revising paragraphs (b) introductory text, (b)(1) and (c) to read as follows:

§ 1.809 Examination procedures.

* * * * *

(b) The applicant for patent or patent owner shall reply to a rejection under paragraph (a) of this section by—

(1) In the case of an applicant for patent, making an acceptable original or replacement or supplemental deposit or assuring the Office in writing that an acceptable deposit will be made, or, in the case of a patent owner, requesting a certificate of correction of the patent which meets the terms of paragraphs (b) and (c) of § 1.805, or

* * * * *

(c) If an application for patent is otherwise in condition for allowance except for a needed deposit and the Office has received a written assurance that an acceptable deposit will be made, applicant will be notified and given a period of time within which the deposit must be made in order to avoid abandonment. This time period is not extendable under § 1.136(a) or (b) (see § 1.136(c)).

* * * * *

83. Section 1.821 is proposed to be amended by revising paragraphs (c), (e) and (f) to read as follows:

§ 1.821 Nucleotide and/or amino acid sequence disclosures in patent applications.

* * * * *

(c) Patent applications which contain disclosures of nucleotide and/or amino acid sequences must contain such nucleotide and/or amino acid sequences disclosure and associated information as a separate part of the disclosure using the symbols and format in accordance with the requirements of §§ 1.822 and 1.823. This disclosure is hereinafter referred to as the ''Sequence Listing.'' Each sequence disclosed must appear separately in the ''Sequence Listing.'' Each sequence set forth in the ''Sequence Listing'' shall be assigned a separate sequence identifier. The sequence identifiers shall begin with 1 and increase sequentially by integers. If no sequence is present for a sequence identifier, the code ''000'' shall be used in place of the sequence. The response for the numeric identifier <160> (see § 1.823(b)) shall include the total number of SEQ ID NOs, whether followed by a sequence or by the code ''000.'' The ''Sequence Listing'' must be submitted either on:

(1) Paper in compliance with § 1.823; or

(2) A Compact Disk-Read Only Memory (CD–ROM) or Compact Disk-Recordable (CD–R) in compliance with § 1.823. Applicant may submit a second copy of such a CD–ROM or CD–R ''Sequence Listing'' to satisfy the requirement for a ''Sequence Listing'' in a computer readable format pursuant to paragraph (e) of this section, provided that the CD–ROM or CD–R ''Sequence Listing'' meets the requirements of § 1.824(b) and (c)(4).

* * * * *

(e) In addition to the submission of the ''Sequence Listing'' referred to in paragraph (c) of this section, a copy of this ''Sequence Listing'' must also be submitted in computer readable form in accordance with the requirements of § 1.824. The computer readable form submitted pursuant to this paragraph must be a copy of the ''Sequence Listing'' submitted pursuant to paragraph (c) of this section and will not necessarily be retained as a part of the patent application file. If the computer readable form of a new application is to be identical with the computer readable form of another application of the applicant on file in the Patent and Trademark Office, reference may be made to the other application and computer readable form in lieu of filing a duplicate computer readable form in the new application if the computer readable form in the other application was compliant with all of the

requirements of this subpart. The new application shall be accompanied by a letter making such reference to the other application and computer readable form, both of which shall be completely identified. In the new application, applicant must also request the use of the compliant computer readable form (CRF) ''Sequence Listing'' that is already on file for the other application and must state that the paper or CD–ROM or CD–R copy of the ''Sequence Listing'' in the new application is identical to the computer readable (CRF) copy filed for the other application.

(f) In addition to the paper or CD–ROM or CD–R copy required by paragraph (c) of this section and the computer readable form required by paragraph (e) of this section, a statement that the content of the paper, CD–ROM, or CD–R submission under paragraph (c) of this section and the computer readable (CRF) copy under paragraph (e) of this section are the same must be submitted with the computer readable form (*e.g.*, a statement that ''the information recorded in computer readable form is identical to the paper (or CD–ROM or CD–R) copy of the sequence listing submitted under § 1.821(c)'' submitted under § 1.821(c)).

* * * * *

84. Section 1.823 is proposed to be amended by revising its heading and paragraph (a) to read as follows:

§ 1.823 Requirements for nucleotide and/or amino acid sequences as part of the application.

(a)(1) If the ''Sequence Listing'' required by § 1.821(c) is submitted on paper: The ''Sequence Listing,'' setting forth the nucleotide and/or amino acid sequence and associated information in accordance with paragraph (b) of this section, must begin on a new page and must be titled ''Sequence Listing.'' The ''Sequence Listing'' preferably should be numbered independently of the numbering of the remainder of the application. Each page of the ''Sequence Listing'' should contain no more than 66 lines and each line should contain no more than 72 characters. A fixed-width font should be used exclusively throughout the ''Sequence Listing.''

(2) If the ''Sequence Listing'' required by § 1.821(c) is submitted on a CD–ROM or CD–R: The ''Sequence Listing'' must be submitted as a text file in the American Standard Code for Information Interchange (ASCII) in accordance with the standards for that medium set forth in 36 CFR 1228.188(c) and (d). No other format shall be allowed. The CD–ROM or CD–R ''Sequence Listing'' must also be accompanied by documentation on paper that is adequate to identify, maintain, and interpret the electronic ''Sequence Listing.'' A notation that a ''Sequence Listing'' is submitted on a CD–ROM or CD–R must be placed conspicuously in the specification (see § 1.77(b)(11)). The CD–ROM or CD–R ''Sequence Listing'' also must be labeled with the following information:

(i) The name of each inventor (if known);

(ii) The title of the invention;

(iii) The sequence identifiers of the ''Sequence Listings'' on that CD–ROM or CD–R; and

(iv) The docket number used by the person filing the application to identify the application (if applicable).

* * * * *

84a. Section 1.824 is proposed to be amended by revising paragraph (c)(4) to read as follows:

§ 1.824 Form and format for nucleotide and/or amino acid sequence submissions in computer readable form.

* * * * *

(c) * * *

(4) CD–ROM or CD–R: Format ISO 9660 or High Sierra Format.

* * * * *

85. Section 1.825 is proposed to be amended by revising paragraphs (a) and (b) to read as follows:

§ 1.825 Amendments to or replacement of sequence listing and computer readable copy thereof.

(a) Any amendment to the paper copy of the ''Sequence Listing'' submitted pursuant to § 1.821 must be made by submission of substitute sheets. Any amendment to the CD–ROM or CD–R copy of the ''Sequence Listing'' submitted pursuant to § 1.821 must be made by submission of a new CD–ROM or CD–R containing a substitute ''Sequence Listing.'' Amendments must be accompanied by a statement that indicates support for the amendment in the application-as-filed, and a statement that the substitute sheets or new CD–ROM or CD–R includes no new matter.

(b) Any amendment to the paper, CD–ROM, or CD–R copy of the ''Sequence Listing'' pursuant to paragraph (a) of this section must be accompanied by a substitute copy of the computer readable form of the ''Sequence Listing'' required pursuant to § 1.821(e), including all previously submitted data with the amendment incorporated therein, and accompanied by a statement that the computer readable form copy is the same as the substitute paper or new CD–ROM or CD–R copy of the ''Sequence Listing.''

* * * * *

PART 3—ASSIGNMENT, RECORDING AND RIGHTS OF ASSIGNEE

86. The authority citation for 37 CFR part 3 continues to read as follows:

Authority: 15 U.S.C. 1123; 35 U.S.C. 6.

87. Section 3.27 is proposed to be revised to read as follows:

§ 3.27 Mailing address for submitting documents to be recorded.

Documents and cover sheets to be recorded should be addressed to the Commissioner of Patents and Trademarks, Box Assignment, Washington, D.C. 20231, unless they are filed together with new applications.

88. Section 3.71 is proposed to be revised to read as follows:

§ 3.71 Prosecution by assignee.

(a) *Patents—Conducting of prosecution.* One or more assignees as defined in paragraph (b) of this section may, after becoming of record pursuant to paragraph (c) of this section, conduct prosecution of a national patent application or a reexamination proceeding to the exclusion of either the inventive entity, or the assignee(s) previously entitled to conduct prosecution.

(b) *Patents—Assignee(s) who can prosecute.* The assignee(s) who may conduct either the prosecution of a national application for patent or a reexamination proceeding are:

(1) *A single assignee.* An assignee of the entire right, title and interest in the application or patent being reexamined who is of record, or

(2) *Partial assignee(s) together or with inventor(s).* All partial assignees, or all partial assignees and inventors who have not assigned their right, title and interest in the application or patent being reexamined, who together own the entire right, title and interest in the application or patent being reexamined. A partial assignee is any assignee of record having less than the entire right, title and interest in the application or patent being reexamined.

(c) *Patents—Becoming of record.* An assignee becomes of record either in a national patent application or a reexamination proceeding by filing a statement in compliance with § 3.73(b).

(d) *Trademarks.* The assignee of a trademark application or registration may prosecute a trademark application; submit documents to maintain a trademark registration; or file papers against a third party in reliance on the assignee's trademark application or registration, to the exclusion of the original applicant or previous assignee. The assignee must establish ownership in compliance with § 3.73(b).

89. Section 3.73 is proposed to be revised to read as follows:

§ 3.73 Establishing right of assignee to take action.

(a) The inventor is presumed to be the owner of a patent application, and any patent that may issue therefrom, unless there is an assignment. The original applicant is presumed to be the owner of a trademark application or registration, unless there is an assignment.

(b)(1) In order to request or take action in a patent or trademark matter, the assignee must establish its ownership of the patent or trademark property to the satisfaction of the Commissioner. The establishment of ownership by the assignee may be combined with the paper that requests or takes the action. Ownership is established by submitting to the Office a signed statement identifying the assignee, accompanied by either:

(i) Documentary evidence of a chain of title from the original owner to the assignee (*e.g.*, copy of an executed assignment). The documents submitted to establish ownership may be required to be recorded pursuant to § 3.11 in the assignment records of the Office as a condition to permitting the assignee to take action in a matter pending before the Office; or

(ii) A statement specifying where documentary evidence of a chain of title is recorded in the assignment records of the Office (*e.g.*, reel and frame number).

(2) The submission establishing ownership must show that the party signing the submission is a party authorized to act on behalf of the assignee by:

(i) Including a statement that the party signing the submission is authorized to act on behalf of the assignee; or

(ii) Being signed by a person having apparent authority to sign on behalf of the assignee, *e.g.*, an officer of the assignee.

(c) For patent matters only:

(1) Establishment of ownership by the assignee must be submitted prior to, or at the same time as, the paper requesting or taking action is submitted.

(2) If the submission under this section is by an assignee of less than the entire right, title and interest, such assignee must indicate the extent (by percentage) of its ownership interest or the Office may refuse to accept the submission.

90. Section 3.81 is proposed to be revised to read as follows:

§ 3.81 Issue of patent to assignee.

For a patent application, if an assignment of the entire right, title, and interest is recorded before the issue fee is paid, the patent may issue in the name of the assignee. If the assignee holds an undivided part interest, the patent may issue jointly to the inventor and the assignee. If the patent is to issue solely or jointly to that assignee, the name of the assignee must be provided at the time the issue fee is paid.

PART 5—SECRECY OF CERTAIN INVENTIONS AND LICENSES TO EXPORT AND FILE APPLICATIONS IN FOREIGN COUNTRIES

91. The authority citation for 37 CFR part 5 would continue to read as follows:

Authority: 35 U.S.C. 6, 41, 181–188, as amended by the Patent Law Foreign Filing Amendments Act of 1988, Pub. L. 100–418, 102 Stat. 1567; the Arms Export Control Act, as amended, 22 U.S.C. 2751 *et seq.*; the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011 *et seq.*; and the Nuclear Non-Proliferation Act of 1978, 22 U.S.C. 3201 *et seq.*; and the delegations in the regulations under these Acts to the Commissioner (15 CFR 370.10(j), 22 CFR 125.04, and 10 CFR 810.7).

92. Section 5.1 is proposed to be revised to read as follows:

§ 5.1 Applications and correspondence involving national security.

(a) All correspondence in connection with this part, including petitions, should be addressed to ''Assistant Commissioner for Patents (Attention Licensing and Review), Washington, D.C. 20231.''

(b) Application as used in this part includes provisional applications filed under 35 U.S.C. 111(b) (§ 1.9(a)(2) of this chapter), nonprovisional applications filed under 35 U.S.C. 111(a) or entering the national stage from an international application after compliance with 35 U.S.C. 371 (§ 1.9(a)(3)), or international applications filed under the Patent Cooperation Treaty prior to entering the national stage of processing (§ 1.9(b)).

(c) Patent applications and documents relating thereto that are national security classified (see § 1.9(i) of this chapter) and contain authorized national security markings (*e.g.*, ''Confidential,'' ''Secret'' or ''Top Secret'') are accepted by the Office. National security classified documents filed in the Office must be either hand-carried to Licensing and Review or mailed to the Office in compliance with paragraph (a) of this section.

(d) The applicant in a national security classified patent application must obtain a secrecy order pursuant to § 5.2(a). If a national security classified patent application is filed without a notification pursuant to § 5.2(a), the Office will set a time period within which either the application must be declassified, or the application must be placed under a secrecy order pursuant to § 5.2(a), or the applicant must submit evidence of a good faith effort to obtain a secrecy order pursuant to § 5.2(a) from the relevant department or agency in order to prevent abandonment of the application. If evidence of a good faith effort to obtain a secrecy order pursuant to § 5.2(a) from the relevant department or agency is submitted by the applicant within the time period set by the Office, but the application has not been declassified or placed under a secrecy order pursuant to § 5.2(a), the Office will again set a time period within which either the application must be declassified, or the application must be placed under a secrecy order pursuant to § 5.2(a), or the applicant must submit evidence of a good faith effort to again obtain a secrecy order pursuant to § 5.2(a) from the relevant department or agency in order to prevent abandonment of the application.

(e) A national security classified patent application will not be allowed pursuant to § 1.311 of this chapter until the application is declassified and any secrecy order pursuant to § 5.2(a) has been rescinded.

(f) Applications on inventions made outside the United States and on inventions in which a U.S. Government defense agency has a property interest will not be made available to defense agencies.

93. Section 5.2 is proposed to be amended by adding a new paragraph (c) to read as follows:

§ 5.2 Secrecy order.

* * * * *

(c) An application disclosing any significant part of the subject matter of an application under a secrecy order pursuant to paragraph (a) of this section also falls within the scope of such secrecy order. Any such application that is pending before the Office must be promptly brought to the attention of Licensing and Review, unless such application is itself under a secrecy order pursuant to paragraph (a) of this section. Any subsequently filed application containing any significant part of the subject matter of an application under a secrecy order pursuant to paragraph (a) of this section must either be hand-carried to Licensing and Review or mailed to the Office in compliance with § 5.1(a).

94. Section 5.12 is amended by revising paragraph (b) to read as follows:

§ 5.12 Petition for license.

* * * * *

(b) A petition for license must include the fee set forth in § 1.17(h), the petitioner's address, and full instructions for delivery of the requested license when it is to be delivered to other than the petitioner. The petition should be presented in letter form.

PART 10—REPRESENTATION OF OTHERS BEFORE THE PATENT AND TRADEMARK OFFICE

95. The authority citation for 37 CFR part 10 would continue to read as follows:

Authority: 5 U.S.C. 500, 15 U.S.C. 1123; 35 U.S.C. 6, 31, 32, 41.

96. Section 10.23 is proposed to be amended by revising paragraph (c)(11) to read as follows:

§ 10.23 Misconduct.

* * * * *

(c) * * *

(11) Except as permitted by § 1.52(c) of this chapter, knowingly filing or causing to be filed an application containing any material alteration made in the application papers after the signing of the accompanying oath or declaration without identifying the alteration at the time of filing the application papers.

* * * * *

Dated: September 17, 1999.

Q. Todd Dickinson,

Acting Assistant Secretary of Commerce and Acting Commissioner of Patents and Trademarks.

[FR Doc. 99–24922 Filed 10–1–99; 8:45 am]

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federal register

Monday
October 4, 1999

Part III

Department of Justice

Office of Juvenile Justice and Delinquency Prevention

Evaluation Facilitation for the Tribal Youth Program; Notice

DEPARTMENT OF JUSTICE

Office of Juvenile Justice and Delinquency Prevention

[OJP (OJJDP)–1249]

RIN 1121–ZB82

Evaluation Facilitation for the Tribal Youth Program

AGENCY: Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, Justice.

ACTION: Announcement of Discretionary Competitive Cooperative Agreement.

SUMMARY: The Office of Juvenile Justice and Delinquency Prevention (OJJDP) is requesting applications for the Evaluation Facilitation for the Tribal Youth Program. The Evaluation Facilitator will provide direction, training, and technical assistance to local Program Assessment Teams that will be conducting participatory evaluations of juvenile justice projects under OJJDP's Tribal Youth Program. The Evaluation Facilitator will also conduct an analysis of the juvenile justice system structure and operations in each site. This analysis will address the relationship the juvenile justice activities and responsibilities of tribal, county, State, and Federal governmental entities and the historical, social, and economic context in which they exist.

DATES: Applications must be received by November 18, 1999.

ADDRESSES: Interested applicants can obtain an application kit from the Juvenile Justice Clearinghouse at 800–638–8736. The application kit is also available at OJJDP's Web site at www.ojjdp.ncjrs.org/grants/about.html#kit.

FOR FURTHER INFORMATION CONTACT: Phelan Wyrick, Program Manager, Office of Juvenile Justice and Delinquency Prevention, 202–353–9254. [This is not a toll-free number.]

SUPPLEMENTARY INFORMATION:

Purpose

The purpose of this program is to provide high quality guidance and direction to up to five local stakeholder teams that will be conducting evaluations of projects supported by the Tribal Youth Program. The Evaluation Facilitator will also conduct an analysis of the structure and operations of the juvenile justice system and tribal justice system at each of these sites. Applications are encouraged from researchers and evaluators who have experience conducting large-scale participatory evaluations and/or working closely with tribal populations.

Background

The Tribal Youth Program was designed to provide federally recognized Indian tribes [1] with support for juvenile justice activities in one or more of the following categories:

- Reduce, control, and prevent crime both by and against tribal youth.
- Provide interventions for court-involved tribal youth.
- Improve tribal juvenile justice systems.
- Provide prevention programs focusing on alcohol and drugs.

These categories are broad, allowing applicants for the Tribal Youth Program to customize their applications to the particular needs of their communities. The Tribal Youth Program will fund sites for a project period of 3 years. Funding under this program may be applied toward starting new projects or continuing, expanding, or enhancing existing projects. Applicants responding to this program announcement should review the Tribal Youth Program Guidelines and Application Kit for more detailed information. Copies of that announcement can be obtained by calling OJJDP's Juvenile Justice Clearinghouse at 800–638–8736 or sending an e-mail request to puborder@ncjrs.org. Fax-on-demand service is also available through the Clearinghouse number listed above (choose option 1, then option 2). OJJDP program announcements are also available online at www.ojjdp.ncjrs.org/grants/current.html.

Site Selection Procedures for the Evaluation

Of the sites that will be selected to receive funding under the Tribal Youth Program, up to five will be selected to participate in this evaluation. These sites will receive supplemental funding to support their evaluation efforts. To be eligible for this supplemental funding, sites must receive an award under the Tribal Youth Program and must have explicitly applied for inclusion in the evaluation as part of their Tribal Youth Program application. The pool of eligible applicants will then be reviewed by OJJDP and the Evaluation Facilitator selected under this solicitation. Efforts will be made to include at least one Alaska Native village. Criteria for selection will include:

- Willingness and capacity to use multiple and varied approaches to collect information.
- Willingness to commit resources (in-kind services).
- Willingness to involve key stakeholders in decisionmaking around the evaluation.
- Degree to which the evaluation activity is perceived as being useful to the program's end users.
- Potential to build an evaluation capacity within the tribal community.

Sites will be notified if they are selected for the participatory evaluation and will be given instructions for submitting applications for supplemental funding after the initial Tribal Youth Program awards have been made.

Evaluation Strategy

Research and program evaluation in Indian country have been criticized for returning little practical information or resources to the people who are the focus of study. Meetings and focus groups with tribal practitioners and researchers in Indian Country have revealed a strong interest in research and evaluation that are driven by members of the community, respectful of tribal values and customs, and geared toward practical application and local utilization of findings. The need for building local research and evaluation capacity has also been highlighted.

Under this solicitation, OJJDP will competitively award one cooperative agreement for an Evaluation Facilitator for the participatory evaluation of the Tribal Youth Program. The Evaluation Facilitator's primary role is to guide the process of the participatory evaluation and provide training and technical assistance in each of the selected sites. The secondary role of the Evaluation Facilitator will be to provide an analysis of the structure and operations of the existing juvenile justice system and tribal justice system in each site.

Facilitating the Participatory Evaluation

The participatory evaluation is designed to assess program implementation and outcomes by forming partnerships between the Evaluation Facilitator and local Program Assessment Teams (PAT's). PAT's will be composed of individuals at each selected evaluation site who have a stake in the program, such as program staff, community residents, tribal leaders/tribal council, elders, native youth, and parents. With the assistance of the Evaluation Facilitator, PAT's will design and implement culturally appropriate process and outcome evaluations of their local projects under the Tribal Youth Program. The Evaluation Facilitator will provide

[1] Federally recognized Indian tribes are those tribes listed in the Federally Recognized Tribes List Act located in the lower 48 States and Alaska Native villages in Alaska.

intensive training and technical assistance to PAT's as they move through the evaluation process. This approach is designed to build local evaluation capacity while the evaluation remains community driven and directed toward practical application and utility of findings. Thus, this evaluation is designed to address concerns that have been raised by practitioners and researchers in tribal government and communities.

Up to five of the Tribal Youth Program sites will be selected to participate in the evaluation and will receive supplemental funding for evaluation in addition to their Tribal Youth Program awards. PAT's will be formed at each of the evaluation sites. At minimum, PAT's will be composed of one half-time coordinator and several additional volunteer members including program stakeholders and community members, as noted above. PAT members will not be required to have previous evaluation or research experience. However, PAT's will make the final decisions on such issues as the selection of evaluation questions and methods of inquiry, and PAT members will carry out the tasks of data collection and analysis. Throughout the process, PAT's will be responsible for interpreting and adhering to local values and customs with regard to data collection and information sharing. PAT's will also be responsible for reporting their activities to the Evaluation Facilitator.

The Evaluation Facilitator will build local evaluation capacity by providing direction, training, and technical assistance over a 3-year project period to PAT members. The Evaluation Facilitator must be able to respond to direct requests for guidance and training. Training should cover areas including, but not limited to, program evaluation design, construction of program logic models, data collection procedures, selection and construction of data collection instruments, data analysis techniques, and reporting. Furthermore, the Evaluation Facilitator must be able to anticipate future and unrecognized needs that the PAT's may have as they conduct their evaluation. Both the Evaluation Facilitator and the PAT's will be responsible for ensuring that the program assessment includes evaluation of both process and outcomes and that the assessment produces results that have direct practical implications for program development.

Training visits to each of the sites during the first year of the project will be critical. It is likely that at least one Alaska Native village site will be included in the evaluation, and travel should be budgeted accordingly. Through the Tribal Youth Program, the PAT's will have access to a computer system with Internet access and e-mail capability. It is expected that ongoing communication will take place with the sites and assistance will be given via e-mail, electronic file transfer, telephone, and conventional mail.

Since programs are likely to be in early developmental and planning phases during much of the first 12 months, evaluation activities should focus on assembling an effective PAT, planning and implementing a process evaluation, and planning an outcome evaluation. The Evaluation Facilitator will be responsible for providing the necessary direction, training and technical assistance to accomplish these tasks.

Analyzing the Existing Juvenile Justice System and Tribal Justice System

It is the responsibility of the Evaluation Facilitator to conduct an analysis of the existing juvenile justice system at each of the evaluation sites. A central feature of this analysis will be the relationships between tribal government and county, State, and Federal entities and other tribal governments as they relate to juvenile justice. The analysis should also include indicators of workload within the juvenile justice system and tribal justice system; data management procedures and capabilities; and the relationship between the juvenile and adult criminal components of the system. Minimally, this effort will require review of official documents and interviews with key informants and community members. Additional data collection activities such as field observations or case reviews are encouraged and may be necessary.

The local project that is being supported by the Tribal Youth Program should be examined in the context of the existing juvenile justice system and tribal justice system. To do this, the Evaluation Facilitator will have to become familiar with the program activities at the sites as well as the tribal government and tribal body. This familiarity is expected to develop through the preliminary reports from PAT's and close interactions with site personnel through training and technical assistance.

The written analysis of the existing juvenile justice system and tribal justice system should include specific recommendations for improving juvenile justice system operations at individual sites and at other county, State, and Federal government entities that share responsibility for handling juvenile offenders. The analytical report should be completed in the first 12 months of the project period, and updates must be provided in each of the subsequent budget periods.

Goals

The goals for this project are to:

- Provide direction, training, and technical assistance to local Program Assessment Teams for a participatory evaluation that covers both the process and the outcomes of the Tribal Youth Program.
- Analyze the existing juvenile justice system and tribal justice system structure and operations at each evaluation site and identify the location and function of the activities under the Tribal Youth Program within the context of this system.
- Analyze the relationships between tribal government and county, State, and Federal government agencies and other tribal governments as they relate to juvenile justice responsibilities and operations.

Objectives

The objectives for this project are to:

- Provide direction, training, and technical assistance necessary for each Program Assessment Team to construct program models and evaluation designs that cover both process and outcomes.
- Provide direction, training, and technical assistance necessary for each Program Assessment Team to select and carry out procedures for data collection, analysis, and reporting.
- Document the structure of the existing juvenile justice system and tribal justice system at each site.
- Document workload, data management procedures and capabilities, and the relationship between the juvenile and adult criminal justice systems in each site.
- Document the activities of the projects at the sites that are participating in the evaluation of the Tribal Youth Program.
- Document the relationships between tribal government and county, State, and Federal agencies as they relate to the existing juvenile justice system.
- Provide reports as indicated below.

Products

The Evaluation Facilitator will be responsible for supplying PAT's with training materials (*e.g.*, written guidance, sample instruments, instructional materials), as necessary.

The Evaluation Facilitator will submit progress reports 6 months and 11 months into the first year of the project. These reports will include discussion of

developments or changes in the Program Assessment Teams, training activities to date and plans for future training, progress of local evaluation designs, and progress of the juvenile justice system documentation (required for the first report only).

At the conclusion of the first 12-month budget period, the Evaluation Facilitator will submit a separate analytical report covering the juvenile justice system in each of the evaluation sites, the relationships between tribal and nontribal governmental entities in this system, and the location and function of the Tribal Youth Program activities in the context of this system. This report should be suitable for publication as an OJJDP Bulletin.

In the second and third years of the project period, PAT's will be responsible for providing written reports on evaluation findings addressing both program process and outcomes. At the end of the second year, the Evaluation Facilitator will provide a preliminary report on progress and early findings from the process and outcome evaluations at each of the sites. Also at this time, the Evaluation Facilitator will provide an updated report on the analysis of the juvenile justice system and tribal justice system at each site. At the end of the third year, the Evaluation Facilitator will integrate the reports provided by the PAT's into a larger document that will include a final site-by-site analysis of the local juvenile justice system and tribal justice system, the role of tribal government or eligible native corporations in this system, and the development and impact of the efforts funded under the Tribal Youth Program. This document will constitute the final report for the Evaulation Facilitator and should include detailed descriptions of evaluation methods and results. A less detailed version of this report will also be created for publication in a form that is suitable for an OJJDP Bulletin.

Eligibility Requirements

OJJDP invites applications from public and private agencies, organizations, and institutions (including tribal colleges and universities, pursuant to Executive order 13021) and from individuals. Private, for-profit organizations must agree to waive any profit or fee. Joint applications from two or more eligible applicants are welcome; however, one applicant must be clearly indicated as the primary applicant (for correspondence and award purposes) and the others indicated as coapplicants.

Project Abstract

Applications must include a project abstract that summarizes the problems to be addressed, the goals of the project, project design, and the management and organizational capability of the applicant. The abstract should be double-spaced and no longer than 250 words.

Selection Criteria

Applications will be evaluated and rated by a peer review panel according to the criteria outlined below.

Problem(s) To Be Addressed (20 points)

Applicants must include in the project narrative a clear and concise discussion of issues related to conducting research and evaluation in American Indian and Alaska Native communities. Specifically, applicants should discuss approaches to applying evaluation methods in culturally sensitive ways for these populations. Also, applicants should discuss current juvenile justice issues in tribal communities within the framework of the cultural history of these populations.

Goals and Objectives (15 points)

Applicants must define specific and measurable goals and objectives for coordinating and implementing this project. These should be guided by the requirements in this solicitation, but the applicant should expand and augment them to fit with its approach to the project.

Project Design (25 points)

The application should describe in detail the overall design of the project. The discussion should include a description of anticipated training and technical assistance activities related to both the process and the outcome evaluation. It is important to describe how the applicant will work directly with the sites in providing guidance for the evaluation process, which includes, but is not limited to, evaluation design, the construction of program logic models, data collection procedures, selection and construction of data collection instruments, data analysis, and reporting. The applicant should also describe in detail the methods to be used to document and analyze the existing juvenile justice systems. This description should include specification of the information and data elements that will be collected.

The application must include a timeline that indicates when specific tasks will be started and completed and when products will be submitted. The timeline must be referenced as appropriate in the narrative but should be placed in appendix A of the application.

Management and Organizational Capability (30 points)

The application must include a discussion of how the applicant will coordinate with Program Assessment Teams and others to achieve evaluation goals and objectives. The applicant's management structure and staffing must be adequate and appropriate for the successful implementation of the project. The applicant must identify responsible individuals and key consultants, their time commitment, and major tasks. Key staff and consultants should have significant experience in training; group facilitation; and program evaluation, including both process and outcome evaluations using both qualitative and quantitative methods. They should demonstrate the ability to work effectively with tribal populations. Staff and key consultant résumés must be attached as part of the appendixes.

Budget (10 points)

Applicants must provide a proposed budget that is complete, detailed, reasonable, allowable, and cost effective in relation to the activities to be undertaken during the first 12 months of the project period. Applicants should budget for travel to one cross-site cluster meeting in addition to any other travel. A brief budget narrative should also be included.

Format

The body of the application may not exceed 30 pages in length. These page limits do not include the budget narrative, appendixes, application forms, or assurances. The narrative portion of the application must be submitted on 8½ by 11-inch paper, double spaced on one side of the paper in a standard 12-point font. These standards are necessary to maintain a fair and uniform standard among all applicants. If the narrative does not conform to these standards, OJJDP will deem the application ineligible for consideration.

Award Period

This project will be funded in the form of a cooperative agreement with a project period of 36 months. The initial budget period for this application is 12 months. Funding in subsequent budget periods may be at lower levels and will depend upon grantee performance, availability of funds, and other criteria established at the time of award.

Award Amount

Up to $550,000 is available to the Evaluation Facilitator for the initial 12-month budget period. Of these funds, $150,000 will be awarded by the Evaluation Facilitator during this budget period through contracts with the five PAT sites to support this evaluation activity, including the provision of information and data to the Evaluation Facilitator.

Catalog of Federal Domestic Assistance (CFDA) Number

For this program, the CFDA number, which is required on Standard Form 424, Application for Federal Assistance, is 16.731. This form is included in OJJDP's Application Kit, which can be obtained by calling the Juvenile Justice Clearinghouse at 800–638–8736 or sending an e-mail request to puborder@ncjrs.org. The Application Kit is also available online at www.ojjdp.ncjrs.org/grants/about.html#kit.

Coordination of Federal Efforts

To encourage better coordination among Federal agencies in addressing State and local needs, the U.S. Department of Justice is requesting applicants to provide information on the following: (1) active Federal grant awards supporting this or related efforts, including awards from the U.S. Department of Justice; (2) any pending applications for Federal funds for this or related efforts; and (3) plans for coordinating any funds described in items (1) and (2) with the funding sought by this application. For each Federal award, applicants must include the program or project title, the Federal grantor agency, the amount of the award, and a brief description of its purpose.

''Related efforts'' is defined for these purposes as one of the following:

- Efforts for the same purpose (i.e., the proposed award would supplement, expand, complement, or continue activities funded with other Federal grants).
- Another phase or component of the same program or project (e.g., to implement a planning effort funded by other Federal funds or to provide a substance abuse treatment or education component within a criminal justice project).
- Services of some kind (e.g., technical assistance or evaluation) to the program or project described in the application.

Delivery Instructions

All application packages must be mailed or delivered to the Office of Juvenile Justice and Delinquency Prevention, c/o Juvenile Justice Resource Center, 2277 Research Boulevard, Mail Stop 2K, Rockville, MD 20850; 301–519–5535. Note: In the lower left-hand corner of the envelope, the applicant must clearly write ''Evaluation Facilitation for the Tribal Youth Program.''

Due Date

Applicants are responsible for ensuring that the original and five copies of the application package are received by 5 p.m. ET on November 18, 1999.

Contact

For further information, contact Phelan Wyrick, Research and Program Development Division, 202–353–9254, or send an e-mail inquiry to wyrickp@ojp.usdoj.gov.

Suggested Resources

Ayers, T. 1987. Stakeholders as partners in evaluation: A stakeholder-collaborative approach. *Evaluation and Program Planning* 10:263–271.

Bureau of Justice Statistics. 1999. *American Indians and Crime.* U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics.

Burke, B. 1998. Evaluating for a change: Reflections on participatory methodology. *New Directions in Evaluation* 80:43–56.

Dugan, M. 1996. Participatory and empowerment evaluation: Lessons learned in training and technical assistance. In *Empowerment Evaluation: Knowledge and Tools for Self-Assessment & Accountability,* edited by D. Fetterman, S. Kaftearian, and A. Wandersman. Thousand Oaks, CA: Sage.

Gaventa, J., Creed, V., and Morrissey, J. 1998. Scaling up: Participatory monitoring and evaluation of a Federal empowerment program. *New Directions in Evaluation* 80:81–94.

Assessment & Accountability, edited by D. Fetterman, S. Kaftearian, and A. Wandersman, Thousand Oaks, CA: Sage.

Gaventa, J., Creed, V., and Morrissey, J. 1998. Scaling up: Participatory monitoring and evaluation of a Federal empowerment program. *New Directions in Evaluation* 80:81–94.

Melton, A. 1995. Indigenous justice systems and tribal society. *Judicature* 79:126–133.

Nielsen, M., and Silverman, R. 1996. *Native Americans, Crime, and Justice.* Boulder, CO: Westview Press.

Pommersheim, F. 1995. *Braid of feathers: American Indian law and contemporary tribal life.* Berkeley: University of California Press.

Dated: September 24, 1999.

Shay Bilchik,

Administrator, Office of Juvenile Justice and Delinquency Prevention.

[FR Doc. 99–25645 Filed 10–1–99; 8:45 am]

BILLING CODE 4410–18–P

federal register

Monday
October 4, 1999

Part IV

Department of Commerce

Bureau of Export Administration

Bureau of the Census

15 CFR Parts 30 et al.

Revisions to the Export Administration Regulations: Parties to a Transaction and Their Responsibilities, Routed Export Transactions, Shipper's Export Declarations, and Export Clearance; Proposed Rule

Amendment to Foreign Trade Statistics Regulations To Clarify Exporters' and Forwarding Agents' Responsibilities and To Clarify Provisions for Authorizing an Agent To Prepare and File a Shipper's Export Declaration on Behalf of a Principal Party in Interest; Proposed Rule

DEPARTMENT OF COMMERCE

Bureau of Export Administration

15 CFR Parts 732, 740, 743, 748, 750, 752, 758, 762, and 772

[Docket No. 990709186–9186–01]

RIN 0694–AB88

Parties to a Transaction and their responsibilities, Routed Export Transactions, Shipper's Export Declarations, and Export Clearance

AGENCY: Bureau of Export Administration, Commerce.

ACTION: Proposed rule, with request for comments.

SUMMARY: The Bureau of Export Administration proposes to revise the Export Administration Regulations (EAR) to clarify the responsibilities of parties to an export transaction, the filing and use of Shipper's Export Declarations, Destination Control Statement requirements, and other export clearance issues.

DATES: Comments must be received December 3, 1999.

ADDRESSES: Written comments should be sent to Sharron Cook, Regulatory Policy Division, Office of Exporter Services, Bureau of Export Administration, Room 2705, 14th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20230.

FOR FURTHER INFORMATION CONTACT: Sharron Cook, Regulatory Policy Division, Bureau of Export Administration, at (202) 482–2440.

SUPPLEMENTARY INFORMATION:

Background

The Bureau of Export Administration (BXA) proposes to amend the Export Administration Regulations (EAR) in order to simplify and clarify the export clearance process and facilitate compliance. BXA's primary objective is to promote flexibility so that parties to transactions subject to the EAR may structure their transactions freely, consistent with national security and foreign policy objectives.

In this proposed rule, BXA defines new terms, including ''principal parties in interest'', ''routed export transaction'', and ''end-user'', and clarifies existing ones (notably the definition of ''exporter''). The proposed amendments ensure that for every transaction subject to the EAR, some party to the transaction is clearly responsible for determining licensing authority (License, License Exception, or NLR), and for obtaining the appropriate license or other authorization. The proposed amendments also encourage communication among all parties to a transaction to ensure that each party knows its responsibilities in order to comply with the EAR.

For export control purposes the exporter has generally been the seller. An export transaction, however, has two principal parties in interest: a U.S. party and a foreign party—usually the seller and the buyer. In a ''routed export transaction,'' the foreign principal party in interest agrees to terms of sale that may include assuming responsibility for export licensing. This proposed rule provides that when the foreign principal party expressly assumes responsibility in writing for determining license requirements and obtaining necessary authorization, that foreign party must have a U.S. agent who becomes the ''exporter'' for export control purposes. Without such a written undertaking by the foreign principal, the U.S. principal is the exporter, with all attendant responsibilities.

The Shipper's Export Declaration (SED) plays an important role in export clearance. Both the EAR and the Foreign Trade Statistics Regulations (FTSR) of the Bureau of Census contain specific requirements regarding the use of this document. The EAR govern the use of the SED as an export control document, while the FTSR govern its use as a source of trade statistics. For statistical purposes, the Census Bureau requires the name of the U.S. principal party in interest, generally the seller, in Block (1a) of the SED. For purposes of responsibility for export licensing requirements under the EAR, however, the U.S. agent of the foreign principal party in interest may be the exporter, regardless of who is listed in Block (1a) of the SED. It is important to note that all parties who participate in transactions subject to the EAR are responsible for complying with the EAR. Therefore, a party that is listed in Block 1(a) of the SED or in the exporter field of the Automated Export System (AES) record is not the sole party to the transaction responsible for compliance with the EAR.

In addition to clarifying export licensing responsibilities, this rule institutes a requirement that the export licensee communicate license conditions to all parties to whom those conditions apply and, when required by the license, to obtain written acknowledgment of receipt of the conditions. This new provision is part of BXA's License and Enforcement Action Program (LEAP), which is designed to enhance compliance with the EAR.

Finally, these proposed amendments significantly revise the first six sections of Part 758 of the EAR by reorganizing, streamlining and clarifying necessary provisions while deleting unnecessary or redundant provisions. Section 758.1 consolidates into one section all export control-related provisions pertaining to SEDs. In consolidating these provisions into one section, BXA has eliminated those that are already contained in the FTSR, or that were otherwise unrelated to export controls. Section 758.2 clarifies and consolidates provisions relating to the responsibilities of the parties, and § 758.3 consolidates, but does not significantly change, provisions concerning the use of an export license. Section 758.4, which contained very specific provisions relating to conformity of documents, has been greatly simplified in the interest of flexibility. Sections 758.5 and § 758.6 have been combined and reduced into one paragraph.

Although the Export Administration Act (EAA) expired on August 20, 1994, the President invoked the International Emergency Economic Powers Act and continued in effect the EAR, and, to the extent permitted by law, the provisions of the EAA in Executive Order 12924 of August 19, 1994, extended by Presidential notice of August 10, 1999, 64 FR 44101 (August 13, 1999).

Rulemaking Requirements

1. This proposed rule has been determined to be significant for purposes of E.O. 12866.

2. Notwithstanding any other provision of law, no person is required to, nor shall any person be subject to a penalty for failure to comply with a collection of information, subject to the Paperwork Reduction Act (PRA), unless that collection of information displays a currently valid OMB Control Number. This rule contains and involves collections of information subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule involves collections that have been approved by the Office of Management and Budget under control numbers 0694–0038, and 0694–0096. This rule contains collections that have been approved by the Office of Management and Budget under control numbers: 0607–0152, 0694–0040, 0694–0094, 0694–0095, 0694–0097, 0694–0088, and 0694–XXXX.

Comments are invited on (a) whether the collection of information is necessary for the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection

of information; (c) ways to enhance the quality, utility, and clarify of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Send comments regarding these or any other aspects of the collection of information to: Sharron Cook, Regulatory Policy Division, Bureau of Export Administration, U.S. Department of Commerce Room 2705, 14th Street and Pennsylvania Ave., N.W. Washington, DC 20230.

Because of the importance of the issues raised by these regulations, this rule is issued in proposed form and comments will be considered in the development of final regulations. Comments will be considered on provisions included in the regulations as well as provisions or guidance which commenters believe should be included in the regulations. Accordingly, the Department encourages interested persons who wish to comment to do so at the earliest possible time to permit the fullest consideration of their views.

The period for submission of comments will close December 3, 1999. The Department will consider all comments received before the close of the comment period in developing final regulations. Comments received after the end of the comment period will be considered if possible, but their consideration cannot be assured. The Department will not accept public comments accompanied by a request that a part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. The Department will return such comments and materials to the person submitting the comments and will not consider them in the development of final regulations. All public comments on these regulations will be a matter of public record and will be available for public inspection and copying. In the interest of accuracy and completeness, the Department requires comments in written form.

Oral comments must be followed by written memoranda, which will also be a matter of public record and will be available for public review and copying. Communications from agencies of the United States Government or foreign governments will not be made available for public inspection.

The public record concerning these regulations will be maintained in the Bureau of Export Administration Freedom of Information Records Inspection Facility, Room 6883, Department of Commerce, 14th Street and Pennsylvania Avenue, N.W., Washington, DC 20230. Records in this facility, including written public comments and memoranda summarizing the substance of oral communications, may be inspected and copied in accordance with regulations published in Part 4 of Title 15 of the Code of Federal Regulations. Information about the inspection and copying of records at the facility may be obtained from the Bureau of Export Administration Freedom of Information Officer, at the above address or by calling (202) 482–0500.

3. This rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

4. The provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, the opportunity for public participation, and a delay in effective date, are inapplicable because this regulation involves a military and foreign affairs function of the United States (Sec. 5 U.S.C. 553(a)(1)). Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 5 U.S.C. or by any other law, the requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable.

List of Subjects

15 CFR Part 730

Administrative practice and procedure, Advisory committees, Exports, Foreign trade, Reporting and recordkeeping requirements, Strategic and critical materials.

15 CFR Parts 740, 743, 748, 750, 752, and 758

Administrative practice and procedure, Exports, Foreign trade, Reporting and Record keeping requirements.

15 CFR Part 762

Administrative practice and procedure, Business and industry, Confidential business information, Exports, Foreign trade, Reporting and recordkeeping requirements.

Accordingly, parts 732, 740, 743, 748, 750, 752, 758, 762, and 772 of the Export Administration Regulations (15 CFR Parts 730–799) are proposed to be amended as follows:

1. The authority citation for 15 CFR parts 758 and 762 are revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 12924, 59 FR 43437, 3 CFR, 1994 Comp., p. 917; Notice of August 10, 1999, 64 FR 44101 (August 13, 1999).

2. The authority citation for 15 CFR parts 732, 748, 752, and 772 are revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 12924, 59 FR 43437, 3 CFR, 1994 Comp., p. 917; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; Notice of August 10, 1999, 64 FR 44101 (August 13, 1999).

3. The authority citation for 15 CFR part 740 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 12924, 59 FR 43437, 3 CFR, 1994 Comp., p. 917; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; Notice of August 10, 1999, 64 FR 44101 (August 13, 1999).

4. The authority citation for 15 CFR part 743 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq*; 50 U.S.C. 1701 *et seq*; E.O. 12924, 59 FR 43437, 3 CFR, 1994 Comp., p. 917; Notice of August 10, 1999, 64 FR 44101 (August 13, 1999).

5. The authority citation for 15 CFR part 750 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 12924, 59 FR 43437, 3 CFR, 1994 Comp., p. 917; E.O. 12981, 60 FR 62980, 3 CFR, 1997 Comp., p. 60; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; Notice of August 10, 1999, 64 FR 44101 (August 13, 1999).

6. Parts 740 through 772 are amended by revising the phrase ''U.S. exporter'' to read ''exporter'' in the following places:

§ 740.9(a)(2)(iii) last sentence
§ 740.10(b)(3)(ii)(C)
§ 743.1(b)
§ 748.11(e)(4)(ii)(1)
Supplement No. 3 to part 748, ''BXA–711, Statement By ultimate consignee and Purchaser Instructions'', Block 8
Supplement No. 3 to part 752, ''Instructions on Completing Form BXA–752 ''Statement by Consignee in Support of Special Comprehensive License'', Block 5

PART 732—[AMENDED]

7. Section 732.5 is revised to read as follows:

§ 732.5 Steps regarding Shipper's Export Declaration, Destination Control Statements, and recordkeeping.

(a) *Step 27: Shipper's Export Declaration (SED).* Exporters or agents authorized to complete the Shipper's Export Declaration (SED), or to file SED

information electronically using the Automated Export System (AES), should review § 758.1 of the EAR to determine when an SED is required and what export control information should be entered on the SED or AES record. More detailed information about how to complete an SED or file the SED information electronically using AES may be found in the Bureau of Census Foreign Trade Statistics Regulations (FTSR) at 15 CFR part 30. Reexporters and firms exporting from abroad may skip Steps 27 through 29 and proceed directly to § 732.6 of this part.

(1) *Entering license authority.* You must enter the correct license authority for your export on the SED or AES record (License number, License Exception symbol, or No License Required designator ''NLR'') as appropriate. See § 758.1(f) of the EAR and 15 CFR 30.7(m) of the FTSR.

(i) *License number and expiration date.* If you are exporting under the authority of a license, you must enter the license number on the SED or AES record. The expiration date must be entered on paper versions of the SED only.

(ii) *License Exception.* If you are exporting under the authority of a License Exception, you must enter the correct License Exception symbol (e.g., LVS, GBS, CIV) on the SED or AES record. See § 740.1 of the EAR.

(iii) *NLR.* If you are exporting items for which no license is required, you must enter the designator NLR. You should use the NLR designator in two circumstances: first, when the items to be exported are subject to the EAR but not listed on the Commerce Control List (CCL) (i.e., items that are classified as EAR99), and second, when the items to be exported are listed on the CCL but do not require a license. Use of the NLR designator is also a representation that no license is required under any of the General Prohibitions set forth in part 736 of the EAR.

(2) *Item description.* You must enter an item description identical to the item description on the license when a license is required or enter an item description sufficient in detail to permit review by the U.S. Government and verification of the Schedule B Number (or Harmonized Tariff Schedule number) for License Exception shipments or shipments for which No License is Required (NLR). See § 758.1(f) of the EAR; and 15 CFR 30.7(l) of the FTSR.

(3) *Entering the ECCN.* You must enter the correct Export Control Classification Number (ECCN) on the SED or AES record for all items having a classification other than EAR99, i.e., items listed on the Commerce Control List in Supplement No. 1 to part 774 of the EAR. See § 758.1(f) of the EAR; and 15 CFR 30.7(m) of the FTSR.

(b) *Step 28: Destination Control Statement.* The Destination Control Statement (DCS) must be entered on the invoice and on the bill of lading, air waybill, or other export control document that accompanies the shipment from its point of origin in the United States to the ultimate consignee or end-user abroad. The person responsible for preparation of those documents is responsible for entry of the DCS. The DCS is required for all exports from the United States of items on the Commerce Control List that are not classified as EAR99, unless the export may be made under License Exception BAG or GFT (see part 740 of the EAR). Reexporters should review § 752.15 of the EAR for DCS requirements when using a Special Comprehensive License; otherwise, DCS requirements do not apply to reexports.

(c) *Step 29: Recordkeeping.* Records of transactions subject to the EAR must be maintained for five years in accordance with the recordkeeping provisions of part 762 of the EAR.

PART 740—[AMENDED]

8. Section 740.1 is amended by revising paragraph (d) to read as follows:

§ 740.1 Introduction.

* * * * *

(d) *Shipper's Export Declaration: Clearing exports under License Exceptions.* You must enter on any required Shipper's Export Declaration (SED) or Automated Export System (AES) record the correct License Exception symbol, e.g., LVS, TMP, etc., for the License Exception(s) you use to export. In addition, you must enter the correct Export Control Classification Number (ECCN), e.g., 4A003, 5A002, etc., on the SED or AES record for all items having a classification other than EAR99, i.e., items listed on the Commerce Control List in Supplement No. 1 to part 774 of the EAR. See § 758.1 of the EAR for Shipper's Export Declaration requirements.

* * * * *

PART 748—[AMENDED]

9. Section 748.4 is amended by revising paragraphs (a) and (b) to read as follows:

§ 748.4 Basic guidance related to applying for a license.

(a) *License Applicant.* (1) *Export transactions.* Only a person in the United States may apply for a license to export items from the United States. The applicant must be the exporter, who is that principal party in interest with the authority to determine and control the sending of items out of the United States. See definition of ''exporter'' in part 772 of the EAR.

(2) *Routed export transactions.* The U.S. principal party in interest or the duly authorized U.S. agent of the foreign principal party in interest may apply for a license to export items from the United States. Prior to submitting an application, the agent that applies for a license on behalf of the foreign principal party in interest must obtain a power of attorney or other written authorization from the foreign principal party in interest. See § 758.2(c) and (e) of the EAR.

(3) *Reexport transactions.* The U.S. or foreign principal party in interest, or the duly authorized U.S. agent of the foreign principal party in interest, may apply for a license to reexport controlled items from one country to another. Prior to submitting an application, an agent that applies for a license on behalf of a foreign principal party in interest must obtain a power-of-attorney or other written authorization from the foreign principal party in interest. See power-of-attorney requirements in paragraph (b)(2) of this section.

(b) *Disclosure of parties on license applications and the power of attorney.* (1) *Disclosure of parties.* License applicants must disclose the names and addresses of all parties to a transaction. When the applicant is the U.S. agent of the foreign principal party in interest, the applicant must disclose the fact of the agency relationship, and the name and address of the agent's principal. If there is any doubt about which persons should be named as parties to the transaction, the applicant should disclose the names of all such persons and the functions to be performed by each in Block 24 (Additional Information) of the BXA–748P Multipurpose Application form. Note that when the foreign principal party in interest is the ultimate consignee or end-user, the name and address need not be repeated in Block 24. See ''Parties to the transaction'' in § 748.5.

(2) *Power of attorney or other written authorization.* Prior to submitting an application for a license, an agent must obtain a power of attorney or other written authorization from the foreign principal party in interest to act on behalf of the foreign principal party in interest. When completing the BXA–748P Multipurpose Application Form, Block 7 (documents on file with applicant) must be marked ''other'' and

Block 24 (Additional information) must be marked ''748.4(b)(2)'' to indicate that the power of attorney or other written authorization is on file with the applicant (agent). See part 762 of the EAR for recordkeeping requirements.

* * * * *

10. Section 748.5 is revised to read as follows:

§ 748.5 Parties to the transaction.

The following parties may be entered on the BXA–748P Multipurpose Application Form. The definitions, which also appear in part 772 of the EAR, are set out here for your convenience to assist you in filling out your application correctly.

(a) *Applicant.* The person who applies for an export or reexport license, and who has the authority of a principal party in interest to determine and control the export or reexport of items. See § 748.4(a) of this part and definition of ''exporter'' in part 772 of the EAR.

(b) *Other party authorized to receive license.* The person authorized by the applicant to receive the license. If a person and address is listed in Block 15 of the BXA–748P Multipurpose Application Form, the Bureau of Export Administration will send the license to that person instead of the applicant. Designation of another party to receive the license does not alter the responsibilities of the applicant, licensee or exporter.

(c) *Purchaser.* The person abroad who has entered into the transaction to purchase an item for delivery to the ultimate consignee. In most cases, the purchaser is not a bank, forwarding agent, or intermediary. The purchaser and ultimate consignee may be the same entity.

(d) *Intermediate consignee.* The person that acts as an agent for a principal party in interest and takes possession of the items for the purpose of effecting delivery of the items to the ultimate consignee. The intermediate consignee may be a bank, forwarding agent, or other person who acts as an agent for a principal party in interest.

(e) *Ultimate consignee.* The principal party in interest located abroad who receives the exported or reexported items. The ultimate consignee is not a forwarding agent or other intermediary, but may be the end-user.

(f) *End-user.* The person abroad that receives and ultimately uses the exported or reexported items. The end-user is not a forwarding agent or intermediary, but may be the purchaser or ultimate consignee.

PART 750—[AMENDED]

11. Section 750.7 is amended by revising paragraph (d) to read as follows:

§ 750.7 Issuance of licenses.

* * * * *

(d) *Responsibility of the licensee.* The person to whom a license is issued is the licensee. In export transactions, the exporter must be the licensee, and the exporter-licensee is responsible for the proper use of the license, and for all terms and conditions of the license, except to the extent that certain terms and conditions are directed toward some other party to the transaction. In reexport or routed export transactions, a U.S. agent acting on behalf of a foreign principal party in interest may be the licensee; in these cases, both the agent and the foreign principal party in interest, on whose behalf the agent has acted, are responsible for the use of the license, and for all terms and conditions of the license, except to the extent that certain terms and conditions are directed toward some other party to the transaction. It is the licensee's responsibility to communicate the specific license conditions to the parties to whom those conditions apply. In addition, when required by the license, the licensee is responsible for obtaining written acknowledgment(s) of receipt of the conditions from the parties to whom those conditions apply.

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PART 752—[AMENDED]

11. Section 752.15 is amended by revising the citation ''§ 758.3'' to read ''§ 758.1'' in paragraph (a) introductory text.

PART 758—[AMENDED]

12. Part 758 is amended by revising §§ 758.1, through 758.5 and removing and reserving § 758.6, to read as follows:

§ 758.1 The Shipper's Export Declaration (SED).

(a) *The Shipper's Export Declaration (SED).* The SED (Forms 7525–V or 7525–V-Alt or the Automated Export System (AES electronic equivalent)) is used by the Bureau of Census to collect trade statistics and by the Bureau of Export Administration for export control purposes. The SED and the AES collect basic information such as the names and addresses of the parties to a transaction; the description, the Export Control Classification Number (ECCN) (when required), the Schedule B number or Harmonized Tariff Schedule number, the quantity and value of the items exported; and the license authority for the export. The SED or the AES electronic equivalent is a statement to the United States Government that the transaction occurred as described.

(b) *When an SED is required.* You must file a paper SED, or file the SED information electronically using the AES, with the United States Government in the following situations:

(1) For all shipments of tangible items subject to the EAR that are authorized under a license, regardless of value or destination;

(2) For all shipments of tangible items subject to the EAR that are authorized under a License Exception or NLR, when the value of the items classified under a single Schedule B Number (or Harmonized Tariff Schedule number) is over $2,500, except as exempted by the Foreign Trade Statistics Regulations (FTSR) in 15 CFR part 30 and referenced in paragraph (c) of this section;

(3) For all shipments subject to the EAR that are destined to Cuba, Iran, Iraq, Libya, North Korea, Serbia, Sudan, or Syria, regardless of value (see 15 CFR 30.55(h) of the FTSR); and

(4) For all shipments that will be transshipped through Canada to a third destination, where the shipment would require an SED if shipped directly to the final destination from the United States (see 15 CFR 30.58(c) of the FTSR).

Note to paragraph (b): In addition to the Shipper's Export Declaration for exports, the Bureau of Census Foreign Trade Statistics Regulations provide for a specific Shipper's Export Declaration for In-Transit Goods (Form 7513). See 15 CFR 30.3 and 30.8 of the FTSR.

(c) *Exemptions.* A complete list of exemptions from the SED or AES filing requirement is set forth in the FTSR. Some of these FTSR exemptions have elements in common with certain EAR License Exceptions. An FTSR exemption may be narrower than a License Exception. The following references are provided in order to direct you to the FTSR exemptions that relate to EAR License Exceptions:

(1) License Exception Baggage (BAG), as set forth in § 740.14 of the EAR. See 15 CFR § 30.56 of the FTSR;

(2) License Exception Gift Parcels and Humanitarian Donations (GFT), as set forth in § 740.12 of the EAR. See 15 CFR 30.55(g) of the FTSR;

(3) License Exception Aircraft and Vessels (AVS), as set forth in § 740.15 of the EAR. See 15 CFR 30.55(l) of the FTSR;

(4) License Exception Governments and International Organizations (GOV), as set forth in § 740.11 of the EAR. See 15 CFR 30.53 of the FTSR;

(5) License Exception Technology and Software Under Restriction (TSR), as set forth in § 740.6 of the EAR. See 15 CFR 30.54(b) and 30.55 (h) of the FTSR; or

(6) License Exception Temporary Imports, Exports, and Reexports (TMP) ''tools of trade'', as set forth in § 740.9(a)(2)(i) of the EAR. See 15 CFR 30.56(b) of the FTSR.

(d) *Notation on export documents for exports exempt from SED requirements.* When an exemption from filing the Shipper's Export Declaration applies, the forwarding or other agent must include on the bill of lading, air waybill, or other loading document the export authority of the items, i.e., either the number of and expiration date of a license issued by BXA, the appropriate License Exception symbol, or NLR ''No License Required'' designator. This notation applies to any bill of lading or other loading document, including one issued by a consolidator (indirect carrier) for an export included in a consolidated shipment. However, this requirement does not apply to a ''master'' bill of lading or other loading document issued by a carrier to cover a consolidated shipment. The bill of lading or other loading document must be available for inspection along with the items prior to lading on the carrier.

(e) *Signing the Shipper's Export Declaration.* The person who signs the SED must be in the United States at the time of signing. That person, whether exporter or agent, is responsible for the truth, accuracy, and completeness of the SED, except insofar as that person can demonstrate that he or she reasonably relied on information furnished by others.

(f) *The SED or AES electronic equivalent is an export control document.* The SED or AES electronic equivalent is a statement to the U.S. Government. The SED or AES electronic equivalent is an export control document as defined in part 772 of the EAR. False statements made thereon may be a violation of § 764.2(g) of the EAR. When an SED or AES electronic equivalent is presented to the U.S. Government, the signer or filer of the SED or AES electronic equivalent represents the following:

(1) Export of the items described on the SED or AES electronic equivalent is authorized under the terms and conditions of the designated license issued by BXA; is in accordance with the terms and conditions of the appropriate License Exception; or is authorized under ''NLR'' as No License is Required for the shipment;

(2) Statements on the SED or AES electronic equivalent are in conformity with the contents of any license issued by BXA; and

(3) All information shown on the SED or AES electronic equivalent is true, accurate, and complete.

(g) *Export control information requirement on the SED or AES electronic equivalent.* You must show the license authority (License number, License Exception, or No License Required (NLR)), the Export Control Classification Number (ECCN) (when required), and the item description in the designated blocks of the SED or AES electronic equivalent.

(1) *Specific information requirements for licensed exports.* When exporting under the authority of a license, you must enter on the Shipper's Export Declaration or AES equivalent the license number and expiration date (the expiration date is only required on paper versions of the SED), the ECCN, and an item description identical to the item description on the license. The item description on the license must be stated in Commerce Control List terms, which may be inadequate to meet Census Bureau requirements. In this event, the item description you place on the SED or AES electronic equivalent must be given in enough additional detail to permit verification of the Schedule B Number (or Harmonized Tariff Schedule number) (e.g., size, material, or degree of fabrication). See 15 CFR 30.7(l) of the FTSR. If you include other items on the SED or AES electronic equivalent that do not require licenses, but that may be exported under the authority of a License Exception or No License Required, you must show the License Exception symbol or NLR designator, along with the specific description (quantity, Schedule B Number (or Harmonized Tariff Schedule number), value) of the item(s) to which the authorization applies in the designated blocks. See 15 CFR 30.7(m) of the FTSR.

(2) *Specific information requirements for License Exceptions.* You must enter on any required Shipper's Export Declaration (SED) or AES electronic equivalent the correct License Exception symbol (e.g., LVS, GBS, CIV) for the License Exception(s) under which you are exporting. Also, you must enter the correct Export Control Classification Number (ECCN) on the SED or AES electronic equivalent for all items having a classification other than EAR99, i.e., items listed on the Commerce Control List in Supplement No. 1 to part 774 of the EAR. In addition, an item description that is sufficiently detailed to permit review by the U.S. Government and verification of the Schedule B Number (or Harmonized Tariff Schedule number) is required. See § 740.1(d) of the EAR.

(3) *Specific information requirements when no license is required.* You must enter on any required Shipper's Export Declaration (SED) or AES electronic equivalent the ''NLR'' designation when the items to be exported are subject to the EAR but not listed on the Commerce Control List (i.e., items are classified as EAR99), and when the items to be exported are listed on the CCL but do not require a license. In addition, you must enter the correct ECCN on the SED or AES electronic equivalent for all items being exported under the NLR provisions that have a classification other than EAR99, i.e., items listed on the Commerce Control List in Supplement No. 1 to part 774 of the EAR. Also, you must enter on the SED or AES electronic equivalent an item description that is sufficiently detailed to permit review by the U.S. Government and verification of the Schedule B Number (or Harmonized Tariff Schedule number). The designator ''TSPA'' may be used, but is not required, when the export consists of technology or software outside the scope of the EAR. See § 734.7 through § 734.11 of the EAR for TSPA information.

(h) *Submission of the SED.* The SED must be submitted to the U.S. Government in the manner prescribed by the Bureau of Census Foreign Trade Statistics Regulations (15 CFR part 30).

(i) *Exports by U.S. Mail.* When you make an export by U.S. mail that requires the submission of an SED, a properly executed paper version of the SED must be submitted to the post office at the place of mailing, or you must file the export information via AES procedures found in the FTSR. See 15 CFR 30.12 of the FTSR. Whenever you export items subject to the EAR that meets one of the exemptions for submission of an SED, you must enter the appropriate export authority on the parcel, i.e., either the number of and expiration date of a license issued by BXA, the appropriate License Exception symbol, or NLR ''No License Required'' designator.

(j) *Power of attorney or other written authorization.* (1) In a ''power of attorney'' or other written authorization, authority is conferred upon an agent to perform certain specified acts or kinds of acts on behalf of a principal.

(2) An agent must obtain a power of attorney or other written authorization in the following circumstances:

(i) An agent that represents a foreign principal party in interest in a routed transaction must obtain a power of

attorney or other written authorization that sets forth his authority;

(ii) An agent that applies for a license on behalf of a principal party in interest must obtain a power of attorney or other written authorization that sets forth the agent's authority to apply for the license on behalf of the principal.

Note to paragraph (j)(2): The Bureau of Census Foreign Trade Statistics Regulations impose additional requirements for a power of attorney or other written authorization. See 15 CFR 30.4 (e) of the FTSR.

(3) This requirement for a power of attorney or other written authorization is a legal requirement aimed at ensuring that the parties to a transaction negotiate and understand their responsibilities. The absence of a power of attorney or other written authorization does not prevent BXA from using other evidence to establish the existence of an agency relationship for purposes of imposing liability.

§ 758.2 Responsibilities of parties to the transaction.

(a) *General.* All parties that participate in transactions subject to the EAR must comply with the EAR. Parties are free to structure transactions as they wish, and to delegate functions and tasks as they deem necessary, as long as the transaction complies with the EAR. However, acting through a forwarding or other agent, or delegating or redelegating authority, does not in and of itself relieve anyone of responsibility for compliance with the EAR.

(b) *Export transactions.* The U.S. principal party in interest is the exporter, except in certain routed transactions. The exporter must determine licensing authority (License, License Exception, or NLR), and obtain the appropriate license or other authorization. The exporter may hire forwarding or other agents to perform various tasks, but doing so does not necessarily relieve the exporter of compliance responsibilities.

(c) *Routed export transactions.* All provisions of the EAR, including the end-use and end-user controls found in part 744 of the EAR, and the General Prohibitions found in part 736 of the EAR, apply to routed export transactions. The U.S. principal party in interest is the exporter and must determine licensing authority (License, License Exception, or NLR), and obtain the appropriate license or other authorization, unless the U.S. principal party in interest obtains from the foreign principal party in interest a writing wherein the foreign principal party in interest expressly assumes responsibility for determining licensing requirements and obtaining license authority, making the U.S. agent of the foreign principal party in interest the exporter for EAR purposes. See § 748.4(a)(3) of the EAR.

Note to paragraph (c) For statistical purposes, the Census Bureau requires the name of the U.S. principal party in interest, generally the seller, in Block (1a) of the SED. For purposes of licensing responsibility under the EAR, however, the U.S. agent of the foreign principal party in interest may be the exporter, regardless of who is listed in Block (1a) of the SED.

(d) *Information sharing requirements.* In routed export transactions where the foreign principal party in interest assumes responsibility for determining and obtaining licensing authority, the U.S. principal party in interest must, upon request, provide the foreign principal party in interest and its forwarding or other agent with the Export Control Classification Number (ECCN), or with sufficient technical information to determine classification. In addition, the U.S. principal party in interest must provide the foreign principal party in interest or the foreign principal's agent any information that it knows will affect the determination of license authority. See § 758.1(f) of the EAR.

(e) *Power of attorney or other written authorization.* In routed export transactions, a forwarding or other agent that represents the foreign principal party in interest, or who applies for a license on behalf of the foreign principal party in interest, must obtain a power of attorney or other written authorization from the foreign principal party in interest to act on its behalf. See § 748.4(b) and § 758.1(i) of the EAR.

§ 758.3 Use of export license.

(a) *License valid for shipment from any port.* An export license issued by BXA authorizes exports from any port of export in the United States unless the license states otherwise. Items that leave the United States at one port, cross adjacent foreign territory, and reenter the United States at another port before being exported to a foreign country, are treated as exports from the last U.S. port of export.

(b) *Shipments against expiring license.* Any item requiring a license that has not departed from the final U.S. port of export by midnight of the expiration date on an export license may not be exported under that license unless the shipment meets the requirements of paragraphs (b) (1) or (2) of this section.

(1) BXA grants an extension; or

(2) Prior to midnight on the date of expiration on the license, the items:

(i) Were laden aboard the vessel; or

(ii) Were located on a pier ready for loading and not for storage, and were booked for a vessel that was at the pier ready for loading; or

(iii) The vessel was expected to be at the pier for loading before the license expired, but exceptional and unforseen circumstances delayed it, and BXA or the U.S. Customs Service make a judgment that undue hardship would result if a license extension were required.

(c) *Reshipment of undelivered items.* If the consignee does not receive an export made under a license because the carrier failed to deliver it, the exporter may reship the same or an identical item, subject to the same limitations as to quantity and value as described on the license, to the same consignee and destination under the same license. If an item is to be reshipped to any person other than the original consignee, the shipment is considered a new export and requires a new license. Before reshipping, satisfactory evidence of the original export and of the delivery failure, together with a satisfactory explanation of the delivery failure, must be submitted by the exporter to the following address: Operations Division, Bureau of Export Administration, U.S. Department of Commerce, Room 2705, 14th Street & Pennsylvania Avenue, N.W., Washington, D.C. 20230.

§ 758.4 Conformity of documents and unloading of items.

(a) *Purpose.* The purpose of this section is to prevent items licensed for export from being diverted while in transit or thereafter. It also sets forth the duties of the parties when the items are unloaded in a country other than that of the ultimate consignee as stated on the export license.

(b) *Conformity of documents.* When a license is issued by BXA, the information entered on related export control documents (e.g., the SED, bill of lading or air waybill) must be consistent with the license.

(c) *Issuance of the bill of lading or air waybill.*—(1) *Ports in the country of the ultimate consignee.* No person may issue a bill of lading or air waybill that provides for delivery of licensed items to any foreign port located outside the country of the intermediate or the ultimate consignee named on the BXA license and Shipper's Export Declaration (SED).

(2) *Optional ports of unloading.* (i) *Licensed items.* No person may issue a bill of lading or air waybill that provides for delivery of licensed items to optional ports of unloading unless all the optional ports are within the country of

ultimate destination or are included on the BXA license and SED.

(ii) *Unlicensed items.* For shipments of items that do not require a license, the exporter may designate optional ports of unloading on the SED and other export control documents, so long as the optional ports are in countries to which the items could also have been exported without a license. See also 15 CFR 30.7(h) of the FTSR.

(d) *Delivery of items.* No person may deliver items to any country other than the country of the intermediate or ultimate consignee named on the BXA license and SED without prior written authorization from BXA, except for reasons beyond the control of the carrier (such as acts of God, perils of the sea, damage to the carrier, strikes, war, political disturbances or insurrection).

(e) *Procedures for unscheduled unloading.*—(1) *Unloading in country where no license is required.* When items are unloaded in a country to which the items could be exported without a license issued by BXA, no notification of BXA is required. However, any persons disposing of the items must continue to comply with the terms and conditions of any license or license exception, and with any other relevant provisions of the EAR.

(2) *Unloading in a country where a license is required.* (i) When items are unloaded in a country to which the items would require a license issued by BXA, no person may effect delivery or entry of the items into the commerce of the country where unloaded without prior written approval from BXA. The carrier, in ensuring that the items do not enter the commerce of the country, may have to place the items in custody, or under bond or other guaranty. In addition, the carrier must inform the exporter and BXA of the unscheduled unloading in a time frame that will enable the exporter to submit its report within 10 days from the date of unscheduled unloading. The exporter must within 10 days of the unscheduled unloading report the facts to and request authorization for disposition from BXA using either: mail, fax, or E-mail. The report to BXA must include:

(A) A copy of the manifest of the diverted cargo;

(B) Identification of the place of unloading; and

(C) A proposal for disposition of the items and a request for authorization for such disposition from BXA.

(ii) *Contact information.* U.S. Department of Commerce, Bureau of Export Administration, Office of Exporter Services, Room 1093, 14th and Pennsylvania Avenue, N.W., Washington, D.C. 20230; phone number 202–482–0436; facsimile number 202–482–3322; and E-Mail address: RPD@BXA.DOC.GOV.

§ 758.5 Destination Control Statement.

The Destination Control Statement (DCS) must be entered on the invoice and on the bill of lading, air waybill, or other export control document that accompanies the shipment from its point of origin in the United States to the ultimate consignee or end-user abroad. The person responsible for preparation of those documents is responsible for entry of the DCS. The DCS is required for all exports from the United States of items on the Commerce Control List that are not classified as EAR99, unless the export may be made under License Exception BAG or GFT (see part 740 of the EAR). At a minimum, the DCS must state: ''These commodities, technology or software were exported from the United States in accordance with the Export Administration Regulations. Diversion contrary to U.S. law is prohibited.''

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PART 762—[AMENDED]

13. Section 762.2 is amended by:

a. Revising the citation ''§ 758.1(b)(3)'' to read ''§ 758.2(d)(2)(ii)'' in paragraph (b)(29);

b. Revising the citation ''758.6'' to read ''§ 758.1'' in paragraph (b)(31);

c. Revising paragraphs (b)(15), (b)(37), and (b)(38); and

d. Adding a new paragraph (b)(39) to read as follows:

§ 762.2 Records to be retained.

* * * * *

(b) * * *

(15) § 750.7, Issuance of license and acknowledgment of conditions;

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(37) § 743.1, Wassenaar reports;

(38) § 748.14, Exports of firearms; and

(39) § 758.2(c), Assumption writing.

PART 772—[AMENDED]

14. Part 772 is amended by revising the definitions of ''Applicant'' , ''Exporter'', ''Forwarding agent'', ''Intermediate consignee'', ''Purchaser'', and ''Ultimate Consignee'; removing the definition for ''U.S. exporter'; and adding definitions for ''End-user'', ''Order Party'', ''Other party authorized to receive license'', ''Principal parties in interest'', and ''Routed export transaction'' in alphabetical order, to read as follows:

* * * * *

Applicant. The person who applies for an export or reexport license, and who has the authority of a principal party in interest to determine and control the export or reexport of items. See § 748.4 of the EAR and definition for ''exporter'' in this part of the EAR.

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End-user. The person abroad that receives and ultimately uses the exported or reexported items. The end-user is not a forwarding agent or intermediary, but may be the purchaser or ultimate consignee.

* * * * *

Exporter. The person in the United States who has the authority of a principal party in interest to determine and control the sending of items out of the United States. For purposes of completing the SED or filing export information on the Automated Export System (AES), the exporter is the U.S. principal party in interest (see Foreign Trade Statistics Regulations, 15 CFR part 30).

* * * * *

Forwarding agent. The person in the United States who is authorized by a principal party in interest to perform the services required to facilitate the export of the items from the United States. This may include air couriers or carriers. In routed export transactions, the forwarding agent and the exporter may be the same for compliance purposes under the EAR.

* * * * *

Intermediate consignee. The person that acts as an agent for a principal party in interest for the purpose of effecting delivery of items to the ultimate consignee. The intermediate consignee may be a bank, forwarding agent, or other person who acts as an agent for a principal party in interest.

* * * * *

Order Party. The person in the United States who conducted the direct negotiations or correspondence with the foreign purchaser or ultimate consignee and who, as a result of these negotiations, received the order from the foreign purchaser or ultimate consignee.

Other party authorized to receive license. The person authorized by the applicant to receive the license. If a person and address is listed in Block 15 of the BXA–748P Multipurpose Application Form, the Bureau of Export Administration will send the license to that person instead of the applicant. Designation of another party to receive the license does not alter the responsibilities of the applicant, licensee or exporter.

* * * * *

Principal parties in interest. Those persons in a transaction that receive the primary benefit, monetary or otherwise,

of the transaction. Generally, the principals in a transaction are the seller and the buyer. In most cases, the forwarding or other agent is not a principal party in interest.

* * * * *

Purchaser. The person abroad who has entered into a transaction to purchase an item for delivery to the ultimate consignee. In most cases, the purchaser is not a bank, forwarding agent, or intermediary. The purchaser and ultimate consignee may be the same entity.

* * * * *

Routed export transaction. A transaction where the foreign principal party in interest authorizes a U.S. forwarding or other agent to facilitate export of items from the United States.

* * * * *

Ultimate consignee. The principal party in interest located abroad who receives the exported or reexported items. The ultimate consignee is not a forwarding agent or other intermediary, but may be the end-user.

* * * * *

Dated: September 23, 1999.

R. Roger Majak,

Assistant Secretary for Export Administration.

[FR Doc. 99–25604 Filed 10–1–99; 8:45 am]

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DEPARTMENT OF COMMERCE

Bureau of the Census

15 CFR Part 30

[Docket No. 980716180–9171–02]

RIN 0607–AA20

Clarification of Exporters' and Forwarding Agents' Responsibilities; Authorizing an Agent To Prepare and File a Shipper's Export Declaration on Behalf of a Principal Party in Interest

AGENCY: Bureau of the Census, Commerce.

ACTION: Supplementary notice of proposed rulemaking.

SUMMARY: The U.S. Census Bureau (Census Bureau) proposes amending the Foreign Trade Statistics Regulations (FTSR), 15 CFR part 30, to clarify the responsibilities of exporters and forwarding agents in completing the Shipper's Export Declaration (SED) and to clarify provisions for authorizing forwarding agents to prepare and file an SED or file the export information electronically using the Automated Export System (AES) on behalf of a principal party in interest.

DATES: Written comments must be submitted on or before December 3, 1999.

ADDRESSES: Direct all written comments on this proposed rulemaking to the Director, U.S. Census Bureau, Room 2049, Federal Building 3, Washington, D.C. 20233.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to C. Harvey Monk, Jr., Chief, Foreign Trade Division, U.S. Census Bureau, Room 2104, Federal Building 3, Washington, D.C. 20233–6700, by telephone on (301) 457–2255 or by fax on (301) 457–2645.

SUPPLEMENTARY INFORMATION:

Background

The Census Bureau is responsible for collecting, compiling, and publishing trade statistics for the United States. These data are used by various Federal Government agencies and the private sector for planning and policy development. In order to accomplish its mission, the Census Bureau must receive accurate statistical information from the trade community. The Shipper's Export Declaration (SED) and the Automated Export System (AES) record are the primary vehicles used for collecting such trade data, and the information contained therein is used by the Census Bureau for statistical purposes only and is confidential under the provisions of Title 13, United States Code (U.S.C.), Section 301(g). The Census Bureau's primary objective in this proposed rule is to ensure the accuracy of its trade statistics and to clarify reporting responsibilities for all parties involved in export transactions.

As such the Census Bureau proposes amending the FTSR to clarify responsibilities of exporters and forwarding agents in completing the SED and to clarify who should be listed in the ''Exporter'' box on the SED and in the exporter field on the AES record. This proposed rule defines new terms, including ''U.S. principal party in interest'' and ''routed export transaction,'' and clarifies existing ones (notably the definition of ''exporter'') for purposes of completing the SED. The proposed rule will also clarify provisions authorizing an agent to prepare and file an SED or its AES electronic equivalent on behalf of a principal party in interest.

The Census Bureau published a notice of proposed rulemaking on this subject in the **Federal Register** on August 6, 1998 (63 FR 41979). As a result of comments received on that proposed rulemaking and subsequent discussions with the Bureau of Export Administration (BXA), the Census Bureau has decided to issue a supplementary notice of proposed rulemaking to address the issues raised during the comment period and to further clarify provisions contained in that notice of proposed rulemaking. The BXA is also revising appropriate sections of the Export Administration Regulations (EAR) in a document published elsewhere in this issue of the **Federal Register**. The EAR will conform to the provisions of the FTSR in reference to clarifying the responsibilities of exporters and forwarding agents in completing the SED, and BXA will also propose changes to the EAR to simplify export clearance.

Comments

The Census Bureau received sixty-nine (69) comments on the notice of proposed rulemaking published in the **Federal Register** on August 6, 1998 (63 FR 41979). Of the comments received, fifty-nine (59) were opposed to some provisions of the proposed rule and ten supported the proposed rulemaking. Of the fifty-nine comments opposed to the proposed rule, twenty-four (24) had interpreted the rule to require that the ''manufacturer'' always be listed as the exporter of record on the SED in all export transactions. This was a misinterpretation of the proposed rule, and the revised proposed rulemaking will clearly stipulate that only the ''U.S. seller or principal party in interest'' be listed as the exporter on the SED. Only when the manufacturer is the actual ''seller of the merchandise for export'' should it be listed as exporter on the SED or AES electronic record.

The other major reason for opposition to the proposed rule concerned identifying the U.S. seller or principal as the ''exporter of record'' in EX WORKS (EXW) transactions. EXW is a ''term of sale'' whereby the foreign buyer takes possession of the merchandise in the United States, and the foreign buyer takes responsibility for facilitating the export of the merchandise out of the United States, including export documentation responsibility. The major concern the U.S. sellers presented, when required to be listed as the ''exporter of record'' in these transactions, is that the U.S. seller does not have effective control over the merchandise once it is turned over to the foreign buyer's agent. The U.S. seller does not want to be held liable for any export control violations that may occur in such a transaction.

The proposed Census Bureau export regulations do not intend to interfere with the terms of sale between the

foreign buyer and the U.S. seller in the export transaction. However, in order to collect accurate trade statistics, it is critical to have the actual ''U.S. seller or principal party in interest'' listed as exporter on the SED or the AES electronic record. BXA's proposed rule addresses the liability concerns of exporters in such transactions.

The ten comments in support of the proposed rule indicated approval for the clarification of duties and responsibilities of exporters and forwarding agents and the clarification of the power of attorney provisions contained in the proposed rule. Those comments supported the clarification of the definition of exporter and felt it gave them more control over the export transaction even in the EXW transaction. The Census Bureau responded to all comments and informed the commentors that a supplementary notice of proposed rulemaking would be issued to address their concerns.

Response to Comments and Proposed Action

In response to the comments received from the trade community on the notice of proposed rulemaking published in the **Federal Register** on August 6, 1998 (63 FR 41979), the Census Bureau proposes amending 15 CFR Part 30 to: (a) define the term ''exporter,'' for purposes of the FTSR and completing the SED or AES record, as the U.S. principal party in interest in the export transaction; (b) clarify the reporting responsibilities of the U.S. principal party in interest and forwarding agent in completing the SED or AES record; (c) clarify provisions for authorizing an agent to prepare and file an SED or file the information electronically using the AES; and (d) clarify the documentation and compliance responsibilities of parties involved in the export transaction. For purposes of this rule all references to preparing and filing the paper SED also pertain to preparing and filing the AES electronic record.

This proposed rule will clarify the responsibilities of the U.S. principal party in interest and the forwarding agent in preparing the SED or AES record. For export shipments the Census Bureau recognizes ''routed export transactions'' as a subset of ''export transactions.'' A routed export transaction is where the foreign principal party in interest authorizes a U.S. forwarding or other agent to facilitate export of items from the United States.

For purposes of completing the SED or AES record, the *Exporter* is the U.S. principal party in interest in the transaction. The U.S. principal party in interest is the person in the United States that receives the primary benefit, monetary or otherwise, of the export transaction. Generally, that person would be the U.S. seller, manufacturer, order party, or foreign entity, if in the United States when signing the SED. In most cases, the forwarding agent is not a principal party in interest. The Exporter box on the SED will be revised to read ''Exporter (U.S. Principal Party in Interest).''

However, the EAR defines the exporter as the person in the United States who has the authority of a principal party in interest to determine and control the sending of items out of the United States (see EAR 15 CFR Part 772). This definition permits the forwarding agent to apply for a license and act as exporter in some transactions.

The person who signs the SED must be in the United States at the time of signing. If a U.S. manufacturer sells merchandise directly to a foreign buyer for export, the U.S. manufacturer must be listed as the U.S. principal party in interest on the SED. If a U.S. manufacturer sells merchandise, as a domestic sale, to a U.S. buyer (wholesaler/distributor) and that U.S. buyer sells the merchandise to a foreign principal for export, the U.S. seller (wholesaler/distributor) must be listed as the U.S. principal party in interest on the SED. If a U.S. order party, as defined in § 30.4(a)(1) of this rule, arranges for the sale and export of merchandise to a foreign principal directly, the U.S. order party must be listed as the U.S. principal party in interest on the SED.

For purposes of completing the SED or AES record, the *forwarding agent* is the person in the United States who is authorized by the U.S. principal party in interest or, in a routed transaction, the foreign principal, to prepare and file the SED or its AES electronic equivalent. In routed export transactions, the forwarding agent and the exporter may be the same for compliance purposes under the EAR, but the forwarding agent is rarely the ''exporter'' in box 1a of the SED or in the ''exporter'' field of the AES record. For example, only when a forwarding agent acts as an ''order party'' can they be listed as ''exporter'' in box 1a on the SED or in the ''exporter'' field of the AES record.

The U.S. principal party in interest can prepare and file the SED or AES record, or it can authorize a forwarding agent to prepare and file the SED or AES record on its behalf. If the U.S. principal party in interest authorizes a forwarding agent to complete the SED or AES record on its behalf, the U.S. principal party in interest is responsible for: (A) Providing the forwarding agent with the information necessary to complete the SED or AES record; (B) Providing the forwarding agent with authorization to complete the SED or AES record, in the form of a power of attorney or written authorization, or signing the authorization box printed on the paper SED (box 23 on Form 7525–V or box 29 on Form 7525–V–ALT); and (C) Maintaining the documentation to support the information provided to the forwarding agent for completing the SED or AES record.

The forwarding agent, if authorized by a principal party in interest, is responsible for: (A) Preparing the SED or AES record, based on instructions received from the U.S. principal party in interest or other parties in the transaction; (B) Providing the U.S. principal party in interest with a copy of the export information filed in the form of a completed SED, an electronic facsimile, or in any other manner prescribed by the exporter; and (C) Maintaining the documentation to support the information reported on the SED or AES record.

In a routed export transaction, where a foreign principal designates a U.S. forwarding agent to act on its behalf to prepare and file the SED or AES record, the U.S. principal party in interest must provide the forwarding agent with the following information to assist them in preparing the SED or AES record: (1) Name and address of the exporter (U.S. principal party in interest); (2) Exporter's (U.S. principal party in interest) Internal Revenue Service (IRS) Employer Identification Number (EIN); (3) point of origin (State or Foreign Trade Zone (FTZ)); (4) schedule B description of commodities; (5) domestic (D), foreign (F), or Foreign Military Sale (FMS) (M) code; (6) Schedule B Number; (7) quantity; (8) Upon request by the foreign principal or its agent, the Export Control Classification Number (ECCN) or with sufficient technical information to determine classification; (9) Any information that it knows will affect the determination of license authority.

(**Note:** For Items 8 and 9, where the foreign principal party in interest has assumed responsibility for determining and obtaining license authority, the EAR sets forth the information sharing requirements that apply at 15 CFR 758.2(d)).

In a routed export transaction, the forwarding agent is responsible for preparing the SED or AES record based on instructions received from the U.S. principal party in interest and other parties involved in the transaction. In addition to reporting the information

provided by the U.S. principal party in interest on the SED or AES record, the forwarding agent must provide the following export information on the SED or AES record: (1) Date of exportation; (2) bill of lading/airway bill number; (3) ultimate consignee; (4) intermediate consignee; (5) forwarding agent name and address; (6) country of ultimate destination; (7) loading pier; (8) method of transportation; (9) exporting carrier; (10) port of export; (11) port of unloading; (12) containerized; (13) weight; (14) value; (15) ECCN; (16) License Authority;

(**Note:** For items 15 and 16 where the foreign principal party in interest has assumed responsibility for determining and obtaining license authority, the EAR sets forth the information sharing requirements that apply at 15 § 758.2(d));

and

(17) signing the certification statement on the paper SED (box 24 on Form 7525–V and box 36 on Form 7525–V–ALT). In a routed export transaction, the U.S. principal party in interest must be listed as exporter (U.S. principal party in interest) on the SED or on the AES record.

In a routed export transaction, the forwarding agent is responsible for: (A) Obtaining a power of attorney or written authorization from the foreign principal to act on its behalf; (B) Upon request, providing the U.S. principal party in interest with appropriate documentation verifying that the information provided by the U.S. principal party in interest was accurately reported on the SED or AES record; and (C) Maintaining the documentation to support the information reported on the SED or AES record.

The FTSR places primary responsibility for compliance of the SED and AES requirements on the U.S. principal party in interest in an export transaction and on the forwarding agent in a routed export transaction. However, the FTSR also considers all parties involved in the transaction responsible for the truth, accuracy, and completeness of the information reported on the SED. The parties to the transaction must provide the forwarding agent with the information necessary to correctly prepare the paper SED or to file the data electronically using the AES. As always, documentation must be maintained by all parties involved in the transaction to support the information reported on the SED or the AES record.

All parties that participate in transactions subject to the FTSR are responsible for compliance with the FTSR. In all cases where a violation of the FTSR occurs, the documentation of all parties involved in the transaction must be made available to the proper enforcement officials to determine the liability and responsibility for the export violation pursuant to FTSR § 30.11. Acting through a forwarding or other agent or delegating or redelegating authority does not in and of itself relieve anyone of their compliance responsibility.

This notice further clarifies provisions for using a power of attorney or written authorization when a principal party in interest authorizes a forwarding agent to prepare and file the SED on its behalf and when the SED information is filed electronically, using the AES. Suggested formats for a power of attorney and a written authorization for executing a SED are available upon request from the U.S. Census Bureau, Foreign Trade Division (FTD).

This amendment will further specify in § 30.4(f) the requirement that the SED be prepared in English. This provision is already included in the Census Bureau's instructions for completing the SED and this amendment will simply include that requirement in the Code of Federal Regulations (CFR).

In addition, this amendment clarifies the provision in § 30.7(d)(2) that a foreign principal, if operating in the U.S. at the time of export, must be listed as exporter (U.S. principal party in interest) on the SED, but does not need to report an IRS EIN or a Social Security Number (SSN) on the SED. Using an EIN or SSN that is not your own is prohibited. However, if no EIN or SSN is available, the Dunn and Bradstreet (DUNS) number, border crossing number, passport number, or any number assigned by U.S. Customs is required to be reported.

The revisions contained in this supplementary notice of proposed rulemaking are consistent with the provisions of the BXA's proposed revisions to the EAR regarding the export control responsibilities of exporters and forwarding agents. The Department of the Treasury concurs with the provisions contained in this proposed rule.

Program Requirements

In order to comply with the requests from the trade community to update the provisions of the FTSR and to clarify the items discussed above, the Census Bureau proposes amending appropriate sections of the FTSR.

The Census Bureau proposes revising Section 30.4 to: (A) Define the term ''exporter,'' for purposes of the FTSR and completing the SED or AES electronic record, as the U.S. principal party in interest in the export transaction; (B) Clarify the reporting responsibilities of the U.S. principal party in interest and forwarding agent in completing the SED or AES record; (C) Clarify provisions for obtaining authorization for preparing and filing the SED or the AES electronic record; and (D) Clarify the documentation and compliance responsibilities of parties involved in the export transaction.

The Census Bureau proposes redesignating Section 30.4(b) to Section 30.4(f) and include the provision that the SED be prepared in English to be consistent with the current instructions for preparing the SED.

The Census Bureau proposes redesignating Section 30.4(C) to Section 30.4 (g) with minor wording revisions.

The Census Bureau proposes amending Section 30.7(d)(1), ''*Name of exporter and exporter's Employer Identification Number,*'' to clarify the designation of ''exporter'' named on the SED by reference to § 30.4.

The Census Bureau proposes amending Section 30.7(d)(2), ''*Exporters Employer Identification Number,*'' to clarify the requirement that a foreign principal, if in the United States when signing the SED, must be listed as ''exporter'' on the SED or AES record. However, if no EIN or SSN is available, the DUNS number, border crossing number, passport number, or any number assigned by U.S. Customs is required to be reported.

The Census Bureau further proposes amending section 30.7(e), ''*Agent of exporter (forwarding agent),*'' to specify the responsibilities of the forwarding agent in preparing the SED by reference to § 30.4.

Rulemaking Requirements

This proposed rule is exempt from all requirements of Section 553 of the Administrative Procedure Act because it deals with a foreign affairs function (5 U.S.C. (A) (1)). However, this rule is being published as a proposed rule with an opportunity for public comment because of the importance of the issues raised by this rulemaking.

Regulatory Flexibility Act

Because a notice of proposed rulemaking is not required by 5 U.S.C. 553 or any other law, a Regulatory Flexibility Analysis is not required and has not been prepared (5 U.S.C. 603(a)).

Executive Orders

This proposed rule has been determined to be significant for purposes of Executive Order 12866. This proposed rule does not contain policies with Federalism implications

sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

Paperwork Reduction Act

Notwithstanding any other provisions of law, no person is required to respond to, nor shall a person be subject to, a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a currently valid Office of Management and Budget (OMB) control number.

This proposed rule covers collections of information subject to the provisions of the PRA, which are cleared by the OMB under OMB Control Number 0607–0152.

This proposed rule will not impact the current reporting-hour burden requirements as approved under OMB Control Number 0607–0152 under provisions of the PRA, Public Law 104–13.

List of Subjects in 15 CFR Part 30

Economic statistics, Foreign trade, Exports, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, it is proposed that part 30 be amended as follows:

PART 30—FOREIGN TRADE STATISTICS

1. The authority citation for 15 CFR Part 30 continues to read as follows:

Authority: 5 U.S.C. 301; 13 U.S.C. 301–307; Reorganization Plan No. 5 of 1950 (3 CFR 1949–1953 Comp., 1004); Department of Commerce Organization Order No. 35–2A. August 4, 1975, 40 CFR 42765.

Subpart A—General Requirements—Exporter

2. In part 30, footnotes 4, 5, 6 and 9 are proposed to be redesignated as footnotes 5, 6, 7 and 8, respectively, and § 30.4 is proposed to be revised to read as follows:

§ 30.4 Preparation and signature of Shipper's Export Declarations.

(a) *General requirements (SED).* For purposes of this section, all references to preparing and filing the paper SED also pertain to preparing and filing the AES electronic record. The Shipper's Export Declaration (SED) or the AES electronic equivalent must be prepared and signed by a principal party in interest or by a forwarding agent authorized by a principal party in interest. The person who signs the SED must be in the United States at the time of signing. That person, whether the U.S. principal party in interest or agent, is responsible for the truth, accuracy, and completeness of the SED or AES electronic equivalent, except insofar as that person can demonstrate that he or she reasonably relied on information furnished by others. The Census Bureau recognizes ''routed export transactions'' as a subset of export transactions. A routed export transaction is where the foreign principal party in interest authorizes a U.S. forwarding or other agent to facilitate export of items from the United States. See paragraph (c) of this section for responsibilities of parties in a routed export transaction.

(1) *Exporter (U.S. principal party in interest*). For purposes of completing the SED, in all export transactions, the exporter required to be listed in box 1a of the SED or in the ''Exporter'' field of the AES record is the U.S. principal party in interest. The U.S. principal party in interest is the person in the United States that receives the primary benefit, monetary or otherwise, of the transaction. Generally that person is the U.S. seller, manufacturer, order party [4], or foreign entity, if in the U.S. when signing the SED. In most cases, the forwarding or other agent is not a principal party in interest. Note: The Export Administration Regulations (EAR) (15 CFR parts 730 through 799) defines the ''exporter'' as the person in the United States who has the authority of a principal party in interest to determine and control the sending of items out of the United States (see 15 CFR part 772 of the EAR).

(i) If a U.S. manufacturer directly sells merchandise for export to a foreign principal, the U.S. manufacturer must be listed as the exporter (U.S. principal party in interest) on the SED.

(ii) If a U.S. manufacturer sells merchandise, as a domestic sale, to a U.S. buyer (wholesaler/distributor) and that U.S. buyer sells the merchandise for export to a foreign principal, the U.S. seller (wholesaler/distributor) must be listed as the exporter (U.S. principal party in interest) on the SED.

(iii) If a U.S. order party directly arranges for the sale and export of merchandise to a foreign buyer, the U.S. order party must be listed as the exporter (U.S. principal party in interest) on the SED or AES record.

(2) *Forwarding agent.* The forwarding agent is the person in the United States who is authorized by the U.S. principal party in interest or, in the case of a routed transaction, the foreign principal party in interest to prepare and file the SED or its AES electronic equivalent, and/or perform the services required to facilitate the export of items from the United States. In routed export transactions, the forwarding agent and the exporter may be the same for compliance purposes under the EAR, but the forwarding agent is rarely the ''exporter'' in box 1a of the SED or in the ''exporter'' field of the AES record.

(3) *Principal parties in interest.* Those persons in a transaction that receive the primary benefit, monetary or otherwise, of the transaction. Generally, the principals in a transaction are the seller and the buyer. In most cases a forwarding or other agent is not a principal party in interest.

(b) *U.S. principal party in interest and forwarding agent responsibilities in preparing the SED (except in routed export transactions).*—(1) *Designating the forwarding agent.* The U.S. principal party in interest can prepare and file the SED or AES record, or it can authorize a forwarding agent to prepare and file the SED or AES record on its behalf. If the U.S. principal party in interest designates a forwarding agent to act on its behalf in completing the SED or AES record it must be in the form of a power of attorney or written authorization, or by signing the authorization box printed on the paper SED (box 23 on Form 7525–V and box 29 on Form 7525–V–ALT).

(2) *U.S. principal party in interest responsibilities in preparing the SED.* (i) If the U.S. principal party in interest prepares the SED or AES record themselves they are responsible for the accuracy of all the export information reported on the SED or AES record, for signing the paper SED, filing the paper SED with U.S. Customs, or transmitting the AES record to Customs.

(ii) If the U.S. principal party in interest authorizes a forwarding agent to complete the SED or AES record on its behalf the U.S. principal party in interest is responsible for:

(A) Providing the forwarding agent with the export information necessary to complete the SED or AES record;

(B) Providing the forwarding agent with a power of attorney or written authorizatIon to complete the SED or AES record, or sign the authorization box printed on the paper SED (box 23 on Form 7525–V and box 29 on Form 7525–V–ALT); and

(C) Maintaining the documentation to support the information provided to the forwarding agent for completion of the SED or AES record, as specified in § 30.11.

[4] The Order Party is that person in the United States who conducted the direct negotiations or correspondence with the foreign principal or ultimate consignee and who, as a result of these negotiations, received the order from the foreign principal or ultimate consignee.

(3) *Forwarding agent responsibilities in preparing the SED.* The forwarding agent, when authorized by a U.S. principal party in interest to prepare and sign the SED or prepare and file the AES record, is responsible for:

(i) Accurately preparing the SED or AES record based on information received from the U.S. principal party in interest;

(ii) Obtaining a power of attorney or written authorization to complete the SED or AES record, or obtaining a paper SED with a signed authorization;

(iii) Maintaining the documentation to support the information reported on the SED or AES record, as specified in § 30.11; and

(iv) Providing the U.S. principal party in interest with a copy of the export information filed in the form of a completed SED, an electronic facsimile, or in any other manner prescribed by the exporter.

(c) *U.S. principal party in interest and forwarding agent responsibilities in preparing the SED in ''routed export transactions.''*

(1) *Designating the forwarding agent.* In a routed export transaction, the forwarding agent must obtain a power of attorney or written authorization from the foreign principal party in interest to act on their behalf. If the foreign principal party in interest designates a U.S. forwarding agent to complete the SED or AES record, the U.S. principal party in interest must provide certain export information to such agent (see paragraph (c)(2) of this section). If the U.S. principal party in interest authorizes its own forwarding agent to complete the SED or AES record, it must follow the procedures specified in paragraph (b) of this section.

(2) *U.S. principal party in interest responsibilities in a ''routed export transaction.''* In a routed export transaction where the foreign principal party in interest designates a U.S. forwarding agent to prepare and file the SED or AES record, the U.S. principal party in interest must provide such forwarding agent with the following information to assist in preparing the SED or AES record:

(i) Name and address of the exporter (U.S. principal party in interest);

(ii) Exporter EIN (IRS) Number.;

(iii) Point of origin (State or FTZ);

(iv) Schedule B description of commodities;

(v) Domestic (D), foreign (F), or FMS (M) code;

(vi) Schedule B Number;

(vii) Quantity;

(viii) Upon request from the foreign principal party in interest or its agent, the Export Control Classification Number (ECCN) or with sufficient technical information to determine classification; and

(ix) Any information that it knows will affect the determination of license authority.

Note to paragraph (c)(2): For Items (c)(2)(viii) and (ix), where the foreign principal party in interest has assumed responsibility for determining and obtaining license authority, the EAR sets forth the information sharing requirements that apply, at 15 CFR 758.2(d).

(3) *Forwarding agent responsibilities in a ''routed export transaction.''* In a routed export transaction, the forwarding agent who is responsible for preparing the SED or AES record must provide the following export information on the SED or AES record:

(i) Date of exportation;

(ii) Bill of lading/airway bill number;

(iii) Ultimate consignee;

(iv) Intermediate consignee;

(v) Forwarding agent name and address;

(vi) Country of ultimate destination;

(vii) Loading pier;

(viii) Method of transportation;

(ix) Exporting carrier;

(x) Port of export;

(xi) Port of unloading;

(xii) Containerized;

(xiii) Weight;

(xiv) Value;

(xv) ECCN;

(xvi) License authority; and

(xvii) Signing the certification box on the paper SED (box 24 on Form 7525–V and box 36 on Form 7525–V–ALT). In a routed export transaction the U.S. principal party in interest must be listed as exporter (U.S. principal party in interest) on the SED or on the AES record.

Note to paragraph (c)(3): For Items (c)(3)(xv) and (xvi), where the foreign prinicipal party in interest has assumed responsibility for determining and obtaining license authority, the EAR sets forth the information sharing requirements that apply, at 15 CFR 758.2(a).

(d) *Information on the Shipper's Export Declaration (SED).* The data provided on the SED or AES electronic record shall be complete, correct, and based on personal knowledge of the facts stated or on information furnished by the parties involved in the export transaction. All parties involved in export transactions, including U.S. forwarding agents, should be aware that invoices and other commercial documents may not necessarily contain all the information needed to prepare the SED or AES record. The parties must ensure that all the information needed for completing the SED or AES record, including correct export licensing information, is provided to the forwarding agent for the purpose of correctly preparing the SED or AES record.

(e) *Authorizing a forwarding agent.* In a power of attorney or other written authorization, authority is conferred upon an agent to perform certain specified acts or kinds of acts on behalf of a principal (see 15 CFR 758.1(i) of the EAR). In cases where a forwarding agent is filing the export information on the SED or electronically using the AES, the forwarding agent must obtain a power of attorney or written authorization from a principal party in interest to file the information on their behalf. A power of attorney or written authorization should specify the responsibilities of the parties with particularity, and should state that the forwarding agent has authority to act on behalf of a principal party in interest as its true and lawful agent for purposes of the export transaction and in accordance with the laws and regulations of the United States.

(f) The SED shall be prepared in English and shall be typewritten or prepared in ink or other permanent medium (except indelible pencil). The use of duplicating processes, as well as the overprinting of selected items of information, is acceptable.

(g) All copies of the SEDs must contain all of the information called for in the signature space as to name of firm, address, name of signer, and capacity of signer. The original SED must be signed in ink, but signature on other copies is not required. The use of signature stamps is acceptable. A signed legible carbon or other copy of the export declaration is acceptable as an ''original'' of the SED.

3. Section 30.7 is proposed to be amended by revising paragraphs (d) and (e) to read as follows:

§ 30.7 Information required on Shipper's Export Declarations.

* * * * *

(d) *Name of exporter (U.S. principal party in interest) and exporter's Employer Identification Number (EIN).* The name and address (number, street, city, state, zip code) of the exporter (U.S. principal party in interest) and the exporter's (U.S. principal party in interest) EIN shall be entered where requested on the SED or AES electronic record. The EIN shall be the exporter's (U.S. principal party in interest) own and not another's EIN.

(1) *Name of exporter (U.S. principal party in interest).* The exporter (U.S. principal party in interest) named on the SED and in the exporter field on the AES record must be the U.S. principal

party in interest in the transaction. The exporter (U.S. principal party in interest) is the person in the United States that receives the primary benefit, monetary or otherwise, of the export transaction. Generally that person is the U.S. seller, manufacturer, order party, or foreign entity, if in the United States when signing the SED. In all export transactions, the U.S. principal party in interest must be listed in the ''Exporter (U.S. principal party in interest)'' block on the paper SED or in the ''exporter field'' in the AES record. (See § 30.4 for details on the specific reporting responsibilities of exporters (U.S. principal party in interest)).

(2) *Exporter's (U.S. principal party in interest) Employer Identification Number (EIN).* An exporter *(U.S. principal party in interest)* shall report its own IRS EIN on the SED or AES record. If, and only if, no Internal Revenue Service EIN has been assigned to the exporter *(U.S. principal party in interest)*, the exporter's *(U.S. principal party in interest)* own Social Security Number (SSN), preceded by the symbol ''SS'' must be reported. In situations when a foreign principal party in interest who does not possess an EIN or SSN operates from within the U.S. to facilitate its own export, no EIN or SSN reporting requirement applies. Using another's EIN or SSN is prohibited. However, if no EIN or SSN is available, the DUNS (Dunn and Bradstreet) number, border crossing number, passport number, or any number assigned by U.S. Customs is required to be reported on the SED or the AES record.

(e) *Forwarding agent.* The name and address of the duly authorized forwarding agent (if any) of a principal party in interest or the foreign principal party in interest shall be recorded where requested on the SED or AES record. (See § 30.4 for details on the specific reporting responsibilities of forwarding agents).

* * * * *

Dated: September 21, 1999.

Kenneth Prewitt,

Director, Census Bureau.

[FR Doc. 99–25651 Filed 10–1–99; 8:45 am]

BILLING CODE 3510–07–P

federal register

Monday
October 4, 1999

Part V

Department of Housing and Urban Development

24 CFR Part 882

Section 8 Moderate Rehabilitation Program; Executing or Terminating Leases on Moderate Rehabilitation Units When the Remaining Term of the Housing Assistance Payments (HAP) Contract is for Less Than One Year; Interim Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 882

[Docket No. FR–4472–I–01]

RIN 2577–AB98

Section 8 Moderate Rehabilitation Program; Executing or Terminating Leases on Moderate Rehabilitation Units When the Remaining Term of the Housing Assistance Payments (HAP) Contract is for Less Than One Year

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Interim rule.

SUMMARY: The current program regulations for the Section 8 Moderate Rehabilitation Program state that the initial lease term between an owner and a family must be for at least one year. The regulation is silent on the requisite lease term when the Housing Assistance Payments (HAP) contract term expires in less than one year. The purpose of this interim rule is to implement the statutory language that requires that any initial lease term not extend beyond the term of the HAP contract. This interim rule also revises the program regulation to allow an owner and a public housing agency (PHA) to mutually agree to terminate a unit from the HAP contract if a unit becomes vacant and the term of the HAP contract is for less than one year.

DATES: *Effective Date:* November 3, 1999.

Comments Due Date: December 3, 1999.

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Office of General Counsel, Rules Docket Clerk, Room 10276, U.S. Department of Housing and Urban Development, Washington, DC 20410–0500. FAX comments will not be accepted. Communications should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection and copying on weekdays between 7:30 a.m. and 5:30 p.m. (eastern time) at the above address.

FOR FURTHER INFORMATION CONTACT: Gerald J. Benoit, Director, Real Estate and Housing Performance Division, Office of Public and Assisted Housing Delivery, Room 4210, U.S. Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410–5000; telephone: (202) 708–0477 (this is not a toll-free number). Persons with hearing or speech impairments may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

a. General

Section 8(d)(1)(B)(i) of the United States Housing Act of 1937 (42 U.S.C. 1437f) requires that the initial lease between the tenant and the owner be for at least one year or the term of the HAP contract, whichever is shorter. In most cases, Section 8 Moderate Rehabilitation dwelling leases will terminate concurrently with Housing Assistance Payments (HAP) contract expirations. In some cases, however, a dwelling lease may end prior to the expiration of the Moderate Rehabilitation HAP contract. A lease may end as a result of (1) an action by an owner to terminate tenancy in accordance with the lease addendum and program regulations; (2) a tenant's action to terminate the lease agreement; or (3) an action by a housing authority to terminate the family from the program for failure to comply with the family's obligations under the Statement of Family Responsibility and the owner chooses to terminate the lease with the family.

Section 882.403(d) of the program regulations at 24 CFR part 882 provides, in pertinent part, that the initial lease between the family and owner must be for at least one year. If a lease agreement ends with less than twelve months remaining on the HAP contract, § 882.403(d) effectively prohibits an owner from reoccupying the unit with a new family. Thus, Section 8 Moderate Rehabilitation owners may lose rental income on units because the remaining term of the HAP contract is for less than twelve months and § 882.512(a) prohibits an owner from occupying a unit under a HAP contract with an ineligible family (*i.e.* a family other than one participating in the Section 8 Moderate Rehabilitation program). The statutory language supersedes the limited regulatory language and requires PHAs to allow owners to enter into initial leases with assisted families for less than one year provided the lease does not extend beyond the term of the HAP contract.

b. Reoccupying a Unit for Less Than One Year

When a unit becomes vacant, and less than twelve months remain on the HAP contract, the lease agreement must clearly state that the lease is for less than one year and provide the date on which the HAP contract and Section 8 Moderate Rehabilitation assistance will terminate. Families renting Moderate Rehabilitation units with contracts that have terms of less than one year must be informed at their Section 8 briefing that when the Moderate Rehabilitation HAP contract expires, the units will be replaced with Section 8 tenant-based vouchers (in cases where the Moderate Rehabilitation HAP contract is not renewed in accordance with HUD procedures) and that they must find a suitable unit in which to relocate upon expiration of the Moderate Rehabilitation HAP contract or remain in the unit with tenant-based rental voucher assistance if the owner wishes to participate in the Section 8 rental voucher program.

c. Mutual Agreement To Terminate

If less than one year remains on the HAP contract and a unit becomes vacant, an owner and a PHA may mutually agree to terminate the unit from the HAP contract. An owner who will not be eligible for a one year HAP contract renewal or who does not wish to renew his Moderate Rehabilitation HAP contract, may choose to terminate the HAP contract on the vacant unit and rent to a market-rate tenant rather than execute an assisted lease for less than one year. An owner may possibly choose this course when, for example, costs involved in preparing the unit for a new assisted tenancy for less than twelve months would be greater than costs associated with terminating the assisted unit and renting to a market-rate tenant.

If an owner agrees to terminate the vacant unit from the HAP contract, the housing authority must amend the HAP contract to reflect the reduced number of units. Both the housing authority and owner must sign and date the amendment. The housing authority should attach the amendment to the original HAP contract. In addition, the housing authority must send a copy of the HAP contract amendment to the Section 8 Financial Management Center (FMC). Upon receipt of the amendment, the Section 8 FMC will enter the change into HUDCAPS.

d. This Interim Rule

For the reasons set forth above, § 882.403(d) is revised to permit an initial lease for at least one year or the term of the HAP contract, whichever is shorter. If the initial term of the lease is for less than one year because the remaining term of the HAP contract is for less than one year, the Owner and the PHA may mutually agree to terminate the unit from the HAP contract. The provision that any renewal

or extension of the lease term may not extend beyond the remaining term of the HAP contract remains unchanged.

e. Justification for Interim Rule

In general, the Department publishes a rule for public comment before issuing a rule for effect, in accordance with its own regulations on rulemaking at 24 CFR part 10. Part 10, however, provides in § 10.1 for exceptions from that general rule where the Department finds good cause to omit advance notice and public participation. The good cause requirement is satisfied when the prior public procedure is ''impracticable, unnecessary, or contrary to the public interest.''

The Department finds that good cause exists to publish this interim rule for effect without first soliciting public comment. To require public comment first would be impracticable and contrary to the public interest. In keeping with the statute, this rule allows leases for terms of less than twelve months where the remaining term of the HAP contract is less than twelve months. It also permits the Owner and the PHA to mutually agree to terminate a unit from the HAP contract where the remaining term of the HAP contract is for less than one year. The existing rule would continue a prohibition that would prevent an owner from reoccupying a vacant unit with a new family.

II. Findings and Certifications

Environmental Impact

A Finding of No Significant Impact with respect to the environment for this rule has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332). The Finding of No Significant Impact is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk, Office of the General Counsel, U.S. Department of Housing and Urban Development, Room 10276, 451 Seventh Street, SW, Washington, DC 20410.

Federalism Impact

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, Federalism, has determined that the policies contained in this rule do not have significant impact on States or their political subdivisions, or the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. As a result, the rule is not subject to review under the Order. The rule merely provides an exception to allow leases for terms of less than twelve months under the Moderate Rehabilitation Program.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments, and on the private sector. The Secretary, in accordance with UMRA, has reviewed this rule before publication and by approving it has determined that it does not impose any Federal mandates on any State, local, or tribal governments, or on the private sector that will result in the expenditure of State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year.

Impact on Small Entities

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this rule before publication and by approving it certifies that this rule will not have a significant impact on a substantial number of small entities, because it does not place major burdens on housing authorities or housing owners. The rule merely provides an exception to allow leases for terms of less than twelve months under the Moderate Rehabilitation Program. Nevertheless, the Department is sensitive to the fact that the uniform application of requirements on entities of differing sizes often places a disproportionate burden on small entities. The Department, therefore, is soliciting alternatives for compliance from small entities.

List of Subjects for 24 CFR Part 882

Grant programs—housing and community development, Homeless, Lead poisoning, Manufactured homes, Rent subsidies, Reporting and recordkeeping requirements.

Accordingly, 24 CFR part 882 is amended as follows:

PART 882—SECTION 8 MODERATE REHABILITATION PROGRAM

1. The authority citation for part 882 continues to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437f, and 3535(d).

2. Revise paragraph (d) of § 882.403 to read as follows:

§ 882.403 ACC, housing assistance payments contract, and lease.

* * * * *

(d) *Term of Lease.* (1) The initial lease between the family and the Owner must be for at least one year or the term of the HAP contract, whichever is shorter. In cases where there is less than one year remaining on the HAP contract, the owner and the PHA may mutually agree to terminate the unit from the HAP contract instead of leasing the unit to an eligible family.

(2) Any renewal or extension of the lease term for any unit must in no case extend beyond the remaining term of the HAP contract.

Dated: August 13, 1999.

Deborah Vincent,

General Deputy Assistant Secretary for Public and Indian Housing.

[FR Doc. 99–25733 Filed 10–1–99; 8:45 am]

BILLING CODE 4210–33–P

federal register

Monday
October 4, 1999

Part VI

Department of Justice

Bureau of Prisons

28 CFR Part 571

Release Gratuities, Transportation, and Clothing: Aliens; Proposed Rule

DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Part 571

[BOP–1097–P]

RIN 1120–AA93

Release Gratuities, Transportation, and Clothing: Aliens

AGENCY: Bureau of Prisons, Justice.

ACTION: Proposed rule.

SUMMARY: In this document, the Bureau of Prisons is proposing to amend its regulations on release gratuities, transportation, and clothing to limit the release gratuity available to aliens. Only aliens released to immigration authorities for the purpose of release or transfer to a community corrections center will be provided $10 cash. Aliens being released for the purpose of deportation, exclusion, or removal, or aliens detained or serving 60 days or less in a contract facility will not receive a release gratuity of $10. This amendment is intended to reduce costs by providing the $10 gratuity only to those aliens whom the Bureau determines have a need for a gratuity.

DATES: Comments due by December 3, 1999.

ADDRESSES: Rules Unit, Office of General Counsel, Bureau of Prisons, HOLC Room 754, 320 First Street, NW., Washington, DC 20534.

FOR FURTHER INFORMATION CONTACT: Roy Nanovic, Office of General Counsel, Bureau of Prisons, phone (202) 514–6655.

SUPPLEMENTARY INFORMATION: The Bureau of Prisons is proposing to amend its regulations on release gratuities, transportation, and clothing (28 CFR 571, subpart C). Current regulations on this subject were published in the **Federal Register** on May 21, 1991 (56 FR 23480) and were amended on September 10, 1996 (61 FR 47795).

Current provisions on release gratuities in § 571.21(e) specify that with the exception of aliens serving 60 days or less in contract facilities, each alien released to immigration authorities is to have $10 cash. The Bureau is proposing that aliens being released for the purpose of deportation, exclusion, or removal not be provided a $10 gratuity. As these inmates are to become the responsibility of the Immigration and Naturalization Service, providing a $10 gratuity from the Bureau is not appropriate.

Interested persons may participate in this proposed rulemaking by submitting data, views, or arguments in writing to the Rules Unit, Office of General Counsel, Bureau of Prisons, 320 First Street, NW., HOLC Room 754, Washington, DC 20534. Comments received during the comment period will be considered before final action is taken. Comments received after the expiration of the comment period will be considered to the extent practicable. All comments received remain on file for public inspection at the above address. The proposed rule may be changed in light of the comments received. No oral hearings are contemplated.

Executive Order 12866

This rule falls within a category of actions that the Office of Management and Budget (OMB) has determined not to constitute ''significant regulatory actions'' under section 3(f) of Executive Order 12866 and, accordingly, it was not reviewed by OMB.

Executive Order 12612

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Regulatory Flexibility Act

The Director of the Bureau of Prisons, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact upon a substantial number of small entities for the following reasons: This rule pertains to the correctional management of offenders committed to the custody of the Attorney General or the Director of the Bureau of Prisons, and its economic impact is limited to the Bureau's appropriated funds.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by § 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Plain Language Instructions

We try to write clearly. If you can suggest how to improve the clarity of these regulations, call or write Roy Nanovic at the address listed above.

List of Subjects in 28 CFR Part 571

Prisoners.

Kathleen Hawk Sawyer,

Director, Bureau of Prisons.

Accordingly, pursuant to the rulemaking authority vested in the Attorney General in 5 U.S.C. 552(a) and delegated to the Director, Bureau of Prisons in 28 CFR 0.96(o), part 551 in subchapter C of 28 CFR, chapter V is proposed to be amended as set forth below.

SUBCHAPTER D—COMMUNITY PROGRAMS AND RELEASE

PART 571—RELEASE FROM CUSTODY

1. The authority citation for 28 CFR part 571 continues to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 3565; 3568–3569 (Repealed in part as to offenses committed on or after November 1, 1987), 3582, 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4161–4166 and 4201–4218 (Repealed as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984, as to offenses committed after that date), 5031–5042; 28 U.S.C. 509, 510; U.S. Const., Art. II, Sec. 2; 28 CFR 0.95–0.99, 1.1–1.10.

2. In § 571.21, paragraph (e) is revised to read as follows:

§ 571.21 Procedures.

* * * * *

(e) Staff will ensure that each alien released to immigration authorities for the purpose of release or transfer to a community corrections center has $10 cash. This provision does not apply to aliens being released for the purpose of deportation, exclusion, or removal, or to

aliens detained or serving 60 days or less in contract facilities.

[FR Doc. 99–25726 Filed 10–1–99; 8:45 am]

BILLING CODE 4410–05–P

federal register

Monday
October 4, 1999

Part VII

The President

Proclamation 7227—100th Anniversary of the Veterans of Foreign Wars

Executive Order 13138—Continuance of Certain Federal Advisory Committees

Federal Register
Vol. 64, No. 191
Monday, October 4, 1999

Presidential Documents

Title 3—

The President

Proclamation 7227 of September 30, 1999

100th Anniversary of the Veterans of Foreign Wars

By the President of the United States of America

A Proclamation

As a free Nation, we must always remember that our achievements in peace have been built on the sacrifices of our veterans in war. We owe a profound debt to brave Americans like the members of the Veterans of Foreign Wars of the United States who knew their duty and did it well—even at the risk of their freedom and their lives, and we are proud to honor the VFW as it celebrates its 100th anniversary.

Each VFW member has given double service to our Nation by answering the call to duty in the Armed Forces and by joining the VFW. Whether raising the morale of our men and women in uniform, helping veterans receive their much-deserved benefits, providing scholarships for our youth, or bringing hope and help to families and communities in need, these veterans have upheld the highest standards of service and citizenship. Perhaps most important, they are the living reminder of the countless men and women who have served and sacrificed throughout past decades to defend our Nation and preserve the liberties we hold so dear. VFW members and their fallen comrades have carried the torch of freedom both at home and in distant lands, and America remains forever grateful.

We have a solemn responsibility to ensure that all our veterans enjoy the quality of life they deserve. On Veterans Day last year, I was proud to sign into law the Veterans Programs Enhancement Act. This legislation improves a wide range of benefits and programs, including an increase in compensation payments to veterans with disabilities as well as benefits to the survivors of Americans who died serving our country.

The small groups of Spanish-American War veterans who first banded together in 1899 could not have envisioned that their numbers would grow to more than two million strong, or that the VFW would come to have such an enormous positive influence on the lives of generations of veterans, their families, and communities throughout our Nation. As we celebrate the centennial of the VFW, we honor these veterans for all they have done to build a proud past for our Nation and to ensure a brighter future for us all.

Recognizing the contribution of the Veterans of Foreign Wars to the continued strength of our country and success of our democracy, the Congress, by H.J. Res. 34, has called on the President to issue a proclamation in observance of September 29, 1999, as the ''100th Anniversary of the Veterans of Foreign Wars.'' On this day, let us reflect with pride on our great country and remember with gratitude the contributions of the many loyal and courageous veterans who have given so much of themselves both at home and around the world to preserve our freedom.

NOW, THEREFORE, I, WILLIAM J. CLINTON, President of the United States of America, do hereby proclaim September 29, 1999, as the 100th Anniversary of the Veterans of Foreign Wars. I urge all Americans to recognize this day with appropriate programs, ceremonies, and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-ninth day of September, in the year of our Lord nineteen hundred and ninety-nine, and of the Independence of the United States of America the two hundred and twenty-fourth.

William J. Clinton

[FR Doc. 99–25957
Filed 10–1–99; 9:23 am]
Billing code 3195–01–P

Presidential Documents

Executive Order 13138 of September 30, 1999

Continuance of Certain Federal Advisory Committees

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in accordance with the provisions of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), it is hereby ordered as follows:

Section 1. Each advisory committee listed below is continued until September 30, 2001.

(a) Committee for the Preservation of the White House; Executive Order 11145, as amended (Department of the Interior).

(b) Federal Advisory Council on Occupational Safety and Health; Executive Order 12196, as amended (Department of Labor).

(c) National Partnership Council; Executive Order 12871, as amended (Office of Personnel Management).

(d) President's Advisory Commission on Educational Excellence for Hispanic Americans; Executive Order 12900 (Department of Education).

(e) President's Board of Advisors on Historically Black Colleges and Universities; Executive Order 12876 (Department of Education).

(f) President's Board of Advisors on Tribal Colleges and Universities; Executive Order 13021, as amended (Department of Education).

(g) President's Commission on White House Fellowships; Executive Order 11183, as amended (Office of Personnel Management).

(h) President's Committee of Advisors on Science and Technology; Executive Order 12882 (Office of Science and Technology Policy).

(i) President's Committee on the Arts and the Humanities; Executive Order 12367, as amended (National Endowment for the Arts).

(j) President's Committee on the International Labor Organization; Executive Order 12216, as amended (Department of Labor).

(k) President's Committee on the National Medal of Science; Executive Order 11287, as amended (National Science Foundation).

(l) President's Committee on Mental Retardation, Executive Order 12994 (Department of Health and Human Services).

(m) President's Council on Physical Fitness and Sports; Executive Order 12345, as amended (Department of Health and Human Services).

(n) President's National Security Telecommunications Advisory Committee, Executive Order 12382, as amended (Department of Defense).

(o) Trade and Environment Policy Advisory Committee; Executive Order 12905 (Office of the United States Trade Representative).

(p) President's Export Council; Executive Order 12131, as amended (Department of Commerce).

Sec. 2. Notwithstanding the provisions of any other Executive order, the functions of the President under the Federal Advisory Committee Act that are applicable to the committees listed in section 1 of this order, except that of reporting annually to the Congress, shall be performed by the head of the department or agency designated after each committee, in accordance

with the guidelines and procedures established by the Administrator of General Services.

Sec. 3. The following Executive orders, or sections thereof, which established committees that have terminated and whose work is completed, are revoked:

(a) Executive Order 13017, as amended by Executive Orders 13040 and 13056, establishing the Advisory Commission on Consumer Protection and Quality in the Health Care Industry;

(b) Executive Order 13038, establishing the Advisory Committee on Public Interest Obligation of Digital Television Broadcasters, as amended by section 5 of Executive Order 13062, and Executive Orders 13065, 13081, and 13102;

(c) Section 5 and that part of section 6(f) of Executive Order 13010, as amended by section 3 of Executive Order 13025, Executive Order 13041, sections 1, 2, and that part of section 3 of Executive Order 13064, and Executive Order 13077, establishing the Advisory Committee to the President's Commission on Critical Infrastructure Protection;

(d) Executive Order 13037, as amended by Executive Orders 13066 and 13108, establishing the Commission to Study Capital Budgeting;

(e) Executive Order 13050, establishing the President's Advisory Board on Race;

(f) Executive Order 12852, as amended by Executive Orders 12855, 12965, 12980, 13053, and 13114, establishing the President's Council on Sustainable Development; and

(g) Executive Order 12961, as amended by Executive Order 13034, establishing the Presidential Advisory Committee on Gulf War Veterans' Illnesses.

Sec. 4. Sections 1 through 4 of Executive Order 13062 are superseded.

Sec. 5. Executive Order 12131, as amended, is further amended by adding in section 1-102(a) a new paragraph as follows: ''(9) Department of Energy.''

Sec. 6. Executive Order 13115 is amended by adding the Department of the Treasury and the Office of National Drug Control Policy to the Interagency Task Force on the Roles and Mission of the United States Coast Guard, so that the list in section 1(b) of that order shall read as follows:

''(1) Department of State;

(2) Department of the Treasury;

(3) Department of Defense;

(4) Department of Justice;

(5) Department of Commerce;

(6) Department of Labor;

(7) Department of Transportation;

(8) Environmental Protection Agency;

(9) Office of Management and Budget;

(10) National Security Council;

(11) Office of National Drug Control Policy;

(12) Council on Environmental Quality;

(13) Office of Cabinet Affairs;

(14) National Economic Council;

(15) Domestic Policy Council; and

(16) United States Coast Guard.''

Sec. 7. Executive Order 12367, as amended, is further amended as follows:

(a) in section 1, the text ''the director of the International Communication Agency,'' is deleted;

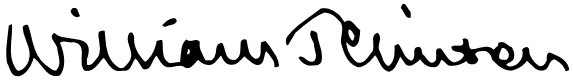
(b) in section 2, delete the first sentence and insert in lieu thereof ''The Committee shall advise, provide recommendations to, and assist the Presi-

dent, the National Endowment of the Arts, the National Endowment for the Humanities, and the Institute of Museum and Library Services on matters relating to the arts and the humanities. The Committee shall initiate and assist in the development of (i) ways to promote public understanding and appreciation of the arts and the humanities; (ii) ways to promote private sector support for the arts and humanities; (iii) ways to evaluate the effectiveness of Federal support for the arts and humanities and their relationship with the private sector; (iv) the planning and coordination of appropriate participation (including productions and projects) in major national cultural events, including the Millennium; (v) activities that incorporate the arts and the humanities in government objectives; and (vi) ways to promote the recognition of excellence in the fields of the arts and the humanities.''; and

(c) in section 3(b), add the following sentence after the first sentence: ''Private funds accepted under the National Endowment for the Arts' or the National Endowment for the Humanities' gift authority may also be used to pay expenses of the Committee.''

Sec. 8. Executive Order 12345, as amended, is further amended by deleting the first sentence of section 2(b) and inserting in lieu thereof the following three sentences. ''The council shall be composed of twenty members appointed by the President. Each member shall serve a term of 2 years and may continue to serve after the expiration of their term until a successor is appointed. A member appointed to fill an unexpired term will be appointed for the remainder of such term.''

Sec. 9. This order shall be effective September 30, 1999.



THE WHITE HOUSE,
September 30, 1999.

[FR Doc. 99–25958
Filed 10–1–99; 9:23 am]
Billing code 3195–01–P

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CFR PARTS AFFECTED DURING OCTOBER

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3 CFR

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H.J. Res. 68/P.L. 106–62

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40–49	(869–038–00091–1)	17.00	Apr. 1, 1999
50–299	(869–038–00092–0)	21.00	Apr. 1, 1999
300–499	(869–038–00093–8)	37.00	Apr. 1, 1999
500–599	(869–038–00094–6)	11.00	Apr. 1, 1999
600–End	(869–038–00095–4)	11.00	Apr. 1, 1999
27 Parts:			
1–199	(869–038–00096–2)	53.00	Apr. 1, 1999

Title	Stock Number	Price	Revision Date
200–End	(869–038–00097–1)	17.00	Apr. 1, 1999
28 Parts:			
0-42	(869–034–00098–3)	36.00	July 1, 1998
43-end	(869-034-00099-7)	32.00	July 1, 1999
29 Parts:			
0–99	(869–034–00100–4)	28.00	July 1, 1999
100–499	(869–038–00101–2)	13.00	July 1, 1999
500–899	(869–034–00102–1)	40.00	[8] July 1, 1999
900–1899	(869–034–00103–3)	20.00	July 1, 1998
1900–1910 (§§ 1900 to 1910.999)	(869–034–00104–7)	46.00	July 1, 1999
1910 (§§ 1910.1000 to end)	(869–034–00105–5)	28.00	July 1, 1999
1911–1925	(869–034–00106–3)	18.00	July 1, 1999
1926	(869–034–00107–1)	30.00	July 1, 1999
1927–End	(869–034–00108–0)	43.00	July 1, 1999
30 Parts:			
1–199	(869–034–00109–8)	35.00	July 1, 1999
200–699	(869–038–00110–1)	30.00	July 1, 1999
*700–End	(869–034–00111–0)	35.00	July 1, 1999
31 Parts:			
0–199	(869–038–00112–8)	21.00	July 1, 1999
200–End	(869–034–00113–1)	46.00	July 1, 1998
32 Parts:			
1–39, Vol. I		15.00	[2] July 1, 1984
1–39, Vol. II		19.00	[2] July 1, 1984
1–39, Vol. III		18.00	[2] July 1, 1984
1–190	(869–034–00114–4)	46.00	July 1, 1999
191–399	(869–034–00115–7)	51.00	July 1, 1998
*400–629	(869–034–00116–1)	32.00	July 1, 1999
*630–699	(869–034–00117–9)	23.00	July 1, 1999
700–799	(869–034–00118–1)	26.00	July 1, 1998
800–End	(869–034–00119–5)	27.00	July 1, 1999
33 Parts:			
1–124	(869–034–00120–3)	29.00	July 1, 1998
*125–199	(869–034–00121–7)	41.00	July 1, 1999
200–End	(869–034–00122–0)	30.00	July 1, 1998
34 Parts:			
1–299	(869–034–00123–8)	27.00	July 1, 1998
300–399	(869–034–00124–1)	25.00	July 1, 1999
400–End	(869–034–00125–4)	44.00	July 1, 1998
35	(869–034–00126–2)	14.00	July 1, 1998
36 Parts			
*1–199	(869–034–00127–6)	21.00	July 1, 1999
200–299	(869–034–00128–9)	21.00	July 1, 1998
*300–End	(869–034–00129–2)	38.00	July 1, 1999
37	(869–034–00130–1)	27.00	July 1, 1998
38 Parts:			
0–17	(869–034–00131–9)	34.00	July 1, 1998
18–End	(869–034–00132–2)	41.00	July 1, 1999
***39**	(869–034–00133–1)	24.00	July 1, 1999
40 Parts:			
1–49	(869–034–00134–3)	31.00	July 1, 1998
50–51	(869–034–00135–1)	24.00	July 1, 1998
52 (52.01–52.1018)	(869–034–00136–0)	28.00	July 1, 1998
52 (52.1019–End)	(869–034–00137–8)	33.00	July 1, 1998
53–59	(869–034–00138–6)	17.00	July 1, 1998
60	(869–034–00139–4)	53.00	July 1, 1998
*61–62	(869–034–00140–3)	19.00	July 1, 1999
63	(869–034–00141–6)	57.00	July 1, 1998
*64–71	(869–034–00143–8)	11.00	July 1, 1999
72–80	(869–034–00143–2)	36.00	July 1, 1998
81–85	(869–034–00144–1)	31.00	July 1, 1998
86	(869–034–00144–9)	53.00	July 1, 1998
87-135	(869–034–00146–7)	47.00	July 1, 1998
136–149	(869–034–00147–5)	37.00	July 1, 1998
150–189	(869–034–00148–3)	34.00	July 1, 1998
*190–259	(869–034–00150–1)	23.00	July 1, 1999
260–265	(869–034–00150–9)	29.00	July 1, 1998
266–299	(869–034–00151–3)	30.00	July 1, 1998
300–399	(869–034–00152–1)	26.00	July 1, 1998
400–424	(869–034–00153–0)	33.00	July 1, 1998
425–699	(869–034–00154–8)	42.00	July 1, 1998
700–789	(869–034–00155–6)	41.00	July 1, 1998
790–End	(869–034–00156–4)	22.00	July 1, 1998
41 Chapters:			
1, 1–1 to 1–10		13.00	[3] July 1, 1984
1, 1–11 to Appendix, 2 (2 Reserved)		13.00	[3] July 1, 1984
3–6		14.00	[3] July 1, 1984
7		6.00	[3] July 1, 1984
8		4.50	[3] July 1, 1984
9		13.00	[3] July 1, 1984
10–17		9.50	[3] July 1, 1984
18, Vol. I, Parts 1–5		13.00	[3] July 1, 1984
18, Vol. II, Parts 6–19		13.00	[3] July 1, 1984
18, Vol. III, Parts 20–52		13.00	[3] July 1, 1984
19–100		13.00	[3] July 1, 1984
1–100	(869–034–00157–2)	13.00	July 1, 1998
*101	(869–034–00159–4)	39.00	July 1, 1999
*102–200	(869–034–00160–8)	16.00	July 1, 1999
*201–End	(869–034–00161–6)	15.00	July 1, 1999
42 Parts:			
1–399	(869–034–00161–1)	34.00	Oct. 1, 1998
400–429	(869–034–00162–9)	41.00	Oct. 1, 1998
430–End	(869–034–00163–7)	51.00	Oct. 1, 1998
43 Parts:			
1–999	(869–034–00164–5)	30.00	Oct. 1, 1998
1000–end	(869–034–00165–3)	48.00	Oct. 1, 1998
44	(869–034–00166–1)	48.00	Oct. 1, 1998
45 Parts:			
1–199	(869–034–00167–0)	30.00	Oct. 1, 1998
200–499	(869–034–00168–8)	14.00	Oct. 1, 1998
500–1199	(869–034–00169–6)	30.00	Oct. 1, 1998
1200–End	(869–034–00170–0)	39.00	Oct. 1, 1998
46 Parts:			
1–40	(869–034–00171–8)	26.00	Oct. 1, 1998
41–69	(869–034–00172–6)	21.00	Oct. 1, 1998
70–89	(869–034–00173–4)	8.00	Oct. 1, 1998
90–139	(869–034–00174–2)	26.00	Oct. 1, 1998
140–155	(869–034–00175–1)	14.00	Oct. 1, 1998
156–165	(869–034–00176–9)	19.00	Oct. 1, 1998
166–199	(869–034–00177–7)	25.00	Oct. 1, 1998
200–499	(869–034–00178–5)	22.00	Oct. 1, 1998
500–End	(869–034–00179–3)	16.00	Oct. 1, 1998
47 Parts:			
0–19	(869–034–00180–7)	36.00	Oct. 1, 1998
20–39	(869–034–00181–5)	27.00	Oct. 1, 1998
40–69	(869–034–00182–3)	24.00	Oct. 1, 1998
70–79	(869–034–00183–1)	37.00	Oct. 1, 1998
80–End	(869–034–00184–0)	40.00	Oct. 1, 1998
48 Chapters:			
1 (Parts 1–51)	(869–034–00185–8)	51.00	Oct. 1, 1998
1 (Parts 52–99)	(869–034–00186–6)	29.00	Oct. 1, 1998
2 (Parts 201–299)	(869–034–00187–4)	34.00	Oct. 1, 1998
3–6	(869–034–00188–2)	29.00	Oct. 1, 1998
7–14	(869–034–00189–1)	32.00	Oct. 1, 1998
15–28	(869–034–00190–4)	33.00	Oct. 1, 1998
29–End	(869–034–00191–2)	24.00	Oct. 1, 1998
49 Parts:			
1–99	(869–034–00192–1)	31.00	Oct. 1, 1998
100–185	(869–034–00193–9)	50.00	Oct. 1, 1998
186–199	(869–034–00194–7)	11.00	Oct. 1, 1998
200–399	(869–034–00195–5)	46.00	Oct. 1, 1998
400–999	(869–034–00196–3)	54.00	Oct. 1, 1998
1000–1199	(869–034–00197–1)	17.00	Oct. 1, 1998
1200–End	(869–034–00198–0)	13.00	Oct. 1, 1998
50 Parts:			
1–199	(869–034–00199–8)	42.00	Oct. 1, 1998
200–599	(869–034–00200–5)	22.00	Oct. 1, 1998
600–End	(869–034–00201–3)	33.00	Oct. 1, 1998

Title	Stock Number	Price	Revision Date
CFR Index and Findings Aids	(869–038–00047–4)	48.00	Jan. 1, 1999
Complete 1998 CFR set		951.00	1998
Microfiche CFR Edition:			
Subscription (mailed as issued)		247.00	1998
Individual copies		1.00	1998
Complete set (one-time mailing)		247.00	1997
Complete set (one-time mailing)		264.00	1996

[1] Because Title 3 is an annual compilation, this volume and all previous volumes should be retained as a permanent reference source.

[2] The July 1, 1985 edition of 32 CFR Parts 1–189 contains a note only for Parts 1–39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1–39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

[3] The July 1, 1985 edition of 41 CFR Chapters 1–100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.

[5] No amendments to this volume were promulgated during the period January 1, 1998 through December 31, 1998. The CFR volume issued as of January 1, 1997 should be retained.

[7] No amendments to this volume were promulgated during the period April 1, 1998, through April 1, 1999. The CFR volume issued as of April 1, 1998, should be retained.

[8] No amendments to this volume were promulgated during the period July 1, 1998, through July 1, 1999. The CFR volume issued as of July 1, 1998, should be retained.