from the date of this publication, comments relating to the proposed consent decree. Comments should be addressed to the Assistant Attorney General for the Environment and Natural Resources Division, Department of Justice, Washington, D.C. 20530, and should refer to *United States* v. *Conoco Pipe Line Company,* DOJ Ref #90–5–1–1–4208.

The proposed consent decree may be examined at the Office of the United States Attorney, 1200 Epic Center, 301 North Main, Wichita, Kansas 67202; the Region VII Office of the Environmental Protection Agency, Office of Regional Counsel, Air, Water, Toxics and General Law Branch, 726 Minnesota Avenue, Kansas City, Kansas 66101; and the Consent Decree Library, 1120 G Street, N.W., 4th Floor, Washington, D.C. 20005, (202) 624–0892. A copy of the proposed consent decree may be obtained in person or by mail from the Consent Decree Library, 1120 G Street, N.W., 4th Floor, Washington, D.C. 20005. In requesting a copy, please refer to the referenced case and enclose a check in the amount of $6.00 (25 cents per page reproduction costs), for a copy of the consent decree, payable to the Consent Decree Library.

Joel M. Gross,

Chief, Environmental Enforcement Section.

[FR Doc. 97–1318 Filed 1–17–97; 8:45 am]

BILLING CODE 4410–15–M

Notice of Consent Decree Pursuant to the Clean Water Act

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that a proposed consent decree in *United States* v.*Yaffe Iron and Metal Company, Inc.*, Civil Action No. 95–308–B, was lodged on December 30, 1996 with the United States District Court for the Eastern District of Oklahoma.

The proposed consent decree relates to Yaffe's twenty-acre metal reclamation facility located in Muskogee, Oklahoma. This facility is used to recover aluminum and copper from scrap metal. The complaint in this civil action alleges that Yaffe discharges process waste water to an unnamed, intermittent creek, (''UI Creek'') which is connected to Coody Creek, a tributary of the Arkansas River.

The proposed consent decree requires Yaffe to pay a civil penalty of $150,000.00, complete its application for a NPDES permit, and have performed, by an independent company, an environmental audit and correct all violations of environmental statutes disclosed by such audit.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed consent decree. Comments should be addressed to the Assistant Attorney General for the Environment and Natural Resources Division, Department of Justice, Washington, D.C. 20530, and should refer to *United States* v. *Yaffee Iron and Metal Company, Inc.*, DOJ Ref. #90–5–1–1–5019.

The proposed consent decree may be examined at the office of the United States Attorney, 33 U.S. Courthouse, 5th & Okmulgee Streets, Muskogee, Oklahoma 74401; the Region VI Office of the Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733; and at the Consent Decree Library, 1120 G Street, N.W., 4th Floor, Washington, D.C. 20005, (202) 624–0892. A copy of the proposed consent decree may be obtained in person or by mail from the Consent Decree Library, 1120 G Street, N.W., 4th Floor, Washington, D.C. 20005. In requesting a copy please refer to the referenced case and DOJ Reference Number and enclose a check in the amount of $26.75 (25 cents per page reproduction costs), payable to the Consent Decree Library.

Joel M. Gross,

Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 97–1319 Filed 1–17–97; 8:45 am]

BILLING CODE 4410–01–M

Drug Enforcement Administration

[Docket No. 94–54]

Rocco's Pharmacy; Revocation of Registration

On May 23, 1994, the then-Director, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Rocco's Pharmacy (Respondent) of Bristol, Pennsylvania, notifying the pharmacy of an opportunity to show cause as to why DEA should not revoke its DEA Certificate of Registration, AR8587125, and deny any pending applications for registration as a retail pharmacy under 21 U.S.C. 823(f), for reason that the pharmacy's continued registration would be inconsistent with the public interest pursuant to 21 U.S.C. 824(a)(4).

On July 5, 1994, the Respondent, through counsel, filed a timely request for a hearing, and following prehearing procedures, a hearing was held in Philadelphia, Pennsylvania on March 22, 1995, before Administrative Law Judge Mary Ellen Bittner. At the hearing, both parties called witnesses to testify, and introduced documentary evidence.

Following the hearing, but before post-hearing briefs were filed, on April 10, 1995, Respondent filed a Motion to Reopen the Record to Permit Testimony Regarding the Accuracy of the Pill Count (Motion to Reopen the Record), a Motion to Permit Oral Argument at the Conclusion of the Briefing Schedule (Motion for Oral Argument), and a Motion to Admit Character Reference Testimony into the Record. On April 19, 1995, the Government filed a Motion in Opposition to Respondent's Motion to Reopen the Record to Permit Testimony Regarding the Accuracy of the Pill Count, and on April 24, 1995, the Government filed a Motion in Opposition to Respondent's Motion to Permit Oral Argument. On May 10, 1995, the Administrative Law Judge issued a Memorandum to Counsel and Ruling on Motions granting Respondent's Motion to Admit Character Reference Testimony into the Record, and denying Respondent's Motion to Reopen the Record and Motion for Oral Argument.

Subsequently, both parties filed proposed findings of fact, conclusions of law and argument. Then on June 20, 1995, Respondent filed a Motion for Disqualification of Chief Administrative Law Judge Mary Ellen Bittner and Memorandum of Law in Support of Motion (Motion for Disqualification). On March 26, 1996, Judge Bittner issued her Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision, denying Respondent's Motion for Disqualification and recommending that Respondent's DEA Certificate of Registration be revoked. Thereafter, on April 18, 1996, Respondent filed its Exceptions to Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of the Administrative Law Judge, and on April 30, 1996, the record of these proceedings was transmitted to the Deputy Administrator.

Subsequently, on May 9, 1996, Respondent submitted a Motion for Leave to File Supplemental Exceptions as well as Supplemental Exceptions to Opinion and Recommended Rulings, Findings of Fact, Conclusions of Law and Decision of the Administrative Law Judge. Judge Bittner forwarded these filings to the Deputy Administrator on May 9, 1996. By letter dated May 10, 1996, the then-Deputy Administrator accepted for consideration Respondent's Supplemental Exceptions and provided the Government an opportunity to file a response to these exceptions. The Government filed its Response to

Respondent's Supplemental Exceptions on May 20, 1996.

The Acting Deputy Administrator has considered the record in its entirety, and pursuant to 21 CFR 1316.67, hereby issues his final order based upon findings of fact and conclusions of law as hereinafter set forth. The Acting Deputy Administrator adopts, except as specifically noted below, the Findings of Fact, Conclusions of Law and Recommended Ruling of the Administrative Law Judge, and his adoption is in no manner diminished by any recitation of facts, issues and conclusions herein, or of any failure to mention a matter of fact or law.

The Acting Deputy Administrator finds James Rocco, Jr. has been a registered pharmacist since 1965, and has owned Respondent pharmacy since 1976. In August 1989, a confidential informant indicated to the Bristol Township Pennsylvania Police Department (Bristol P.D.) that an individual named Ozzie Willis was his source for pharmaceutical drugs and that Mr. Willis was obtaining controlled substances from Respondent without a prescription. Subsequently, Mr. Willis, while under surveillance, obtained controlled substances from Respondent without presenting a prescription and then gave the drugs to the confidential informant in exchange for money. Mr. Willis was then arrested in April 1990. At the time of his arrest, Mr. Willis' car was searched, revealing two empty prescription vials indicating that they had been filled with Percocet, a Scheduled II controlled substance, at another pharmacy, an envelope with 31 Tylenol with codeine #4 (Tylenol #4), a Schedule III controlled substance, a vial from another pharmacy containing 27 Percocet tablets and several loose pills.

Prior to 1990, Ozzie Willis had been found guilty in 1984 and 1986 of the unlawful sale of controlled substances. At the time of his arrest in April 1990, Mr. Willis agreed to cooperate in an investigation of Respondent. Mr. Willis was told that the Bristol P.D. could not promise him anything in exchange for his cooperation, but would testify on his behalf in any proceedings regarding his recent arrest. As part of his agreement with the Bristol P.D., Ozzie Willis was not to purchase controlled substances elsewhere or to go into Respondent pharmacy except when under police surveillance.

Consequently, Mr. Willis, while under surveillance, went to Respondent pharmacy on 15 occasions between April 30 and June 29, 1990 attempting to obtain controlled substances. On each occasion, Mr. Willis was equipped with a recording device and he and his car were thoroughly searched before he entered Respondent. He was under constant police surveillance from the time of the search until he entered the pharmacy and again from the time he left until he was searched again. He was not given advance notice of when an attempted controlled buy would occur.

Mr. Willis' first attempted buy was on April 30, 1990, when he went into Respondent with $40.00 and a prescription vial for prescription number 377809 dated April 18, 1989 for Ozzie Willis. Mr. Willis came out of Respondent with 90 tablets of Tylenol #4 in the prescription vial he brought into the pharmacy. The transcript of this visit reflects that Ozzie Willis stated, ''* * * so this is 40 here for a hundred for today, Social Security check come in I'll pay you 40 right? I didn't bother you last week remember that?'' to which Mr. Rocco replied, ''Yea, O.K.'' Mr. Rocco testified that he dispensed Tylenol #4 to Ozzie Willis pursuant to a telephone prescription from Dr. N. However, Dr. N testified at Mr. Rocco's subsequent criminal trial that while Ozzie Willis had previously been a patient of his, he no longer practiced in the area; he had last treated Ozzie Willis in August 1986; and had not authorized the April 30, 1990 prescription.

Ozzie Willis returned to Respondent on May 3, 1990. While Mr. Willis did not obtain any controlled substances on this occasion the transcript indicates that Mr. Willis asked for Percocet and Mr. Rocco replied, ''* * * I'll tell you what, I'll get a script tonight from a doctor, pick it up tomorrow * * *.'' Mr. Rocco testified at both his criminal trial and at the hearing before Judge Bittner that he would say anything to Mr. Willis to get him to leave the pharmacy because he was rude and obnoxious.

Mr. Willis went back to Respondent pharmacy the next day, May 4, 1990, and came out of Respondent with 30 Percocet tablets in a bottled marked UNI–ACE, a nonprescription pain reliever. Respondent introduced into evidence at the hearing a copy of a prescription for a J.C. dated May 2, 1990 for Percocet, and a copy of a receipt dated May 4, 1990 made out to Ozzie Willis listing two prescriptions for J.C. The transcript of this visit indicates that Ozzie Willis paid Mrs. Rocco $30.00, however there was no mention of J.C. and his prescriptions. Mr. Rocco testified at the hearing that he sold UNI–ACE to Ozzie Willis on May 4, 1990. However, there is nothing on the receipt introduced into evidence by Respondent indicating such a sale.

Ozzie Willis returned to Respondent on May 7, 1990. According to the Bristol police detective who testified at the hearing, Mr. Willis was given $40.00 and the same prescription bottle used on April 30, 1990. Mr. Willis came out of Respondent with 101 Tylenol #4 in the prescription bottle. A receipt introduced into evidence by Respondent indicated that Ozzie Willis picked up a prescription for S.C. and paid $40.00 on his account. Mr. Rocco testified at the criminal trial that he did not provide Tylenol #4 to Ozzie Willis on May 7, 1990.

According to the transcript, on May 9, 1990, Ozzie Willis went to Respondent and asked Mrs. Rocco to ''* * * ask Rocco if I can, can get some more Percs one day next week, either that or either Placidyls.'' Ozzie Willis did not obtain any controlled substances on this occasion.

Mr. Willis returned to Respondent pharmacy on May 16, 1990 with $40.00 and the prescription bottle used on April 30, 1990. He came out of Respondent without the $40.00 and with 100 Tylenol #4 in the prescription bottle. Respondent introduced into evidence a copy of call-in prescription number 409233 from Dr. N for Ozzie Willis for 100 APAP with codeine 60 mg. and a copy of a receipt dated May 16, 1990, indicating that Ozzie Willis paid $20.00 for ''Rx 409233'' and $20.00 for lottery tickets. According to the transcript of this visit, Ozzie Willis told Mr. Rocco, ''* * * I really need them Percs * * *. I done got part of the guy's money.'' Mr. Rocco replied, ''* * * I just got a script from that doctor, thought I'd get you 30 and that would be it. Thirty I got.'' Mr. Rocco told Ozzie Willis to check back with him in two weeks.

On May 18, 1990, Mr. Willis went to Respondent and asked Mr. Rocco if he had obtained ''the script from that other doctor,'' to which Mr. Rocco replied, ''No, not til the end of the month.'' Mr. Rocco testified that he assumed that at the time of this conversation that Ozzie Willis was showing him a bottle for a prescription that could not be filled until the following week.

Ozzie Willis returned to Respondent on May 24, 1990 with $100.00 and emerged with $60.00 and a prescription vial bearing prescription number 410166, indicating that Dr. N was the prescriber, and containing 30 Placidyl, a Schedule IV controlled substance. Respondent placed into evidence a copy of such a call-in prescription. The doctor testified at Mr. Rocco's criminal trial and denied ever having called in any of the prescriptions in question to Respondent.

On May 30, 1990, another controlled buy was attempted, but Ozzie Willis did not obtain any controlled substances.

While in the pharmacy, Mr. Willis told Mr. Rocco, ''I thought you said Percocet, on the first.'' Mr. Rocco replied, ''I'll let you know when I get that * * * from the doctor.''

On June 4, 1990, Ozzie Willis visited Respondent and asked Mr. Rocco, ''* * * did you see that doctor?'' to which Mr. Rocco replied, ''No, not yet.'' Mr. Willis then asked, ''You don't know when?'' and ultimately Mr. Rocco responded, ''Thursday morning, come in and see me then.''

Ozzie Willis then went to Respondent on June 7, 1990, with $60.00 and when he exited the pharmacy, he had a white plastic bottle marked ''Pfeiffer 3+weight loss supplement'' which contained 100 Tylenol #4. The transcript indicates that Mrs. Rocco refers to a $40.00 charge. Respondent introduced into evidence a copy of a call-in prescription number 411301 from Dr. N for Ozzie Wills for 100 APAP with codeine 60 mg. and copy of a receipt dated June 7, 1990 indicating that Ozzie Willis paid $40.00 on account, including $20.00 for prescription number 411301. Again, Dr. N testified earlier that he had not called not called in any of the prescriptions for Ozzie Willis during the time period in question.

While in Respondent on June 12, 1990, Ozzie Willis said to Mrs. Rocco, ''He [apparently referring to Mr. Rocco] told me I could get Percocets the first of this month.'' Mrs. Rocco then told Mr. Willis to call Mr. Rocco the next day.

Ozzie Willis telephoned Respondent on June 13, 1990. During the conversation, Mr. Willis told Mr. Rocco, ''I was in yesterday and Mrs. Rocco told me to call you this morning about the Percocets I was supposed to get the first of the month.'' Mr. Rocco replied, ''yea, if I can get the script.'' Mr. Rocco indicated that the doctor was in the hospital and Ozzie Willis then asked, ''You got any idea when, cause I got people, got three guys waiting for them.'' Mr. Rocco responded, ''it probably won't be till the end of the month, he's supposed to be back the 25th, to work.'' Mr. Willis then asked if he could get some ''4's'' next week, apparently referring to Tylenol #4. Mr. Rocco replied, ''Yea, next week's fine.''

On June 20, 1990, Mr. Willis visited Respondent but did not obtain any controlled substances. During the conversation there was some discussion of whether Mr. Willis could ''get these this week.'' Mr. Rocco said, ''No sooner than Thursday,'' and then asked Mr. Willis, ''You gonna hold it or not?'' Mr. Willis responded affirmatively, and Mr. Rocco said, ''Yea cause it goes by days, everything's finally computerized, you can't, you know * * *.''

According to the transcript, on June 28, 1990 Ozzie Willis asked Mr. Rocco, ''Did the doctor, you tell me the 25th * * *'' and Mr. Rocco replied, ''yea, tomorrow morning come back * * *.'' According to Respondent's prescription log book, Ozzie Willis picked up two prescriptions for non-controlled substances for S.C.

On June 29, 1990, Ozzie Willis went into Respondent with $60.00 and returned with $30.00 and 30 Percocet in a small unlabeled box in a brown bag. Mr. Rocco testified that he did not dispense Percocet to Ozzie Willis on this occasion and that he never provided medication to Ozzie Willis, or to anyone else, in other than a properly labeled container. There was no prescription for Percocet for Ozzie Willis dated June 29, 1990 found at Respondent pharmacy.

Subsequent to the completion of the investigation, it was learned that Ozzie Willis was in Respondent on several occasions when he was not under surveillance by the Bristol P.D., and that he obtained controlled substances from other pharmacies between April 30 and June 29, 1990, both in violation of his agreement with the Bristol P.D. In addition, evidence was introduced into the record which indicated that both before and after the dates of the investigation, Ozzie Willis obtained controlled substances from other pharmacies pursuant to doctors' prescriptions.

Mr. Rocco testified that he had known Ozzie Willis for approximately 6–7 years before the investigation; that Mr. Willis was a very rude person; that he never came into the pharmacy as frequently as he did between April 30 and June 29, 1990; and that Ozzie Willis' prescriptions indicated that the medication was for back pain and perhaps arthritis. Mr. Rocco testified that because Ozzie Willis was so loud and obnoxious when he was in Respondent, Mr. Rocco would say anything and agree with Mr. Willis in order to get him out of the store. However, Mr. Rocco testified that he never provided Ozzie Willis with controlled substances except pursuant to what Mr. Rocco believed to be a proper prescription.

On July 23, 1990, a search warrant was executed at Respondent pharmacy by a number of officers of the Bristol P.D., an agent of the Pennsylvania Bureau of Narcotics Investigation (BNI), and an assistant district attorney. Given the number of people in Respondent during the execution of the warrant, it was very crowded and chaotic. Respondent's records pertaining to controlled substances, as well as its computer, were seized. No biennial inventory was found. Mr. and Mrs. Rocco cooperated with the search and showed the officers the various locations where the controlled substances and controlled substance records were kept. The BNI agent conducted a count of the Schedule II controlled substances on hand, however Mr. Rocco testified that it was not done under his ''direct supervision'' because he was getting things for the other officers.

Subsequent to the execution of the search warrant, a DEA investigator conducted an accountability audit of Respondent's handling of Percocet and its generic equivalents for the period May 1, 1989 through July 23, 1990. Since Respondent did not have a biennial inventory, the investigator first used a zero initial inventory figure for May 1, 1989. However, after reviewing Respondent's records, the investigator determined that while Respondent had not received any Percocet or its generic equivalents between May 1, and May 28, 1990 (the date of its first record of receipt), it had dispensed 1,708 dosage units. Therefore, the investigator used 1,708 as the initial inventory figure on the premise that Respondent could not have dispensed what it did not have. In its post-hearing filings, Respondent argued that the investigator's premise was incorrect because it contended that Respondent's first receipt of Percocet was May 25, 1990 and not May 28, 1990, and that it had dispensed 278 dosage units between May 25 and May 27, 1990. The Acting Deputy Administrator concludes that the investigator's interpretation of the records was correct. Pursuant to 21 CFR 1305.09(e), a purchaser of controlled substances (in this instance Respondent) is required to indicate the date of receipt of Schedule II controlled substances on the appropriate copy of the order form. Respondent introduced into evidence a copy of the order form signed by Mr. Rocco which indicates that the Percocet was received on May 28. It is possible that Respondent is confused and that May 25 is the date the Percocet was shipped by the wholesaler, but it was not the date received. Accordingly, the Acting Deputy Administrator finds that the initial inventory figure of 1,708 was proper.

Respondent's records, as well as summaries from the wholesaler, indicated that Respondent received 27,000 dosage units of Percocet and its generic equivalents during the audit period. Therefore, Respondent was accountable for 28,708 dosage units.

The DEA investigator did not conduct the closing inventory, but used the

figure provided to her by the BNI agent who conducted the count of drugs on hand during the execution of the search warrant. The BNI agent testified at the hearing that it was unusual to conduct a pill count during execution of a warrant and both Mr. and Mrs. Rocco testified that it was chaotic with so many people in the store. However, the BNI agent repeatedly asked both Mr. and Mrs. Rocco where all of the Schedule II controlled substances were located. The BNI agent testified that in conducting the count, she used a pill counter, but since that is not very reliable, she verified the count by hand. Mrs. Rocco stated that she did not see the agent doing a hand count. However, as noted above, it was very crowded and chaotic in the store.

During questioning at the hearing regarding her notes of the pill count, the BNI agent stated that she would not know which specific types of generic equivalents of Percocet she counted since she listed everything under Percocet, specifying each bottle by the manufacturer, not the name of the substance, However, the BNI agent testified that she counted all of the Percocet and generic equivalents shown to her by the Roccos. The BNI agent concluded that Respondent had 2,657 dosage units of Percocet and its generic equivalents on hand on July 23, 1990.

Respondent argues that the closing inventory is inaccurate since the BNI agent's notes do not reflect the generic manufacturers for oxycet and roxicet and therefore those substances were not counted. Both Mr. and Mrs. Rocco testified that they believed that throughout 1990, Respondent always maintained some oxycet and roxicet. Order forms introduced into evidence by Respondent indicate that both oxycet and roxicet were purchased during the audit period. However the Acting Deputy Administrator agrees with the Administrative Law Judge that Respondent offered no definitive evidence that oxycet and roxicet were on hand on July 23, 1990, and given Respondent's overall dispensing pattern of Percocet it would not be unreasonable to find that there might not have been any on hand on that date.

In its Supplemental Exceptions, Respondent also argues that the closing inventory figure in the computation chart is inaccurate due to a mathematical error. Respondent contends that the BNI agent's notes indicate that the closing figure should have been 4,248 dosage units rather than 2,657, since the BNI agent failed to add in 1,591 which was noted as ''Perc Gen'' in her notes. The Acting Deputy Administrator finds that this argument is without merit. As the Government asserts, ''Perc Gen'' is most likely referring to Percodan, not Percocet. This assertion is supported by the BNI agent's working papers which were put into evidence by Respondent where a listing of the controlled substances counted indicates 1,591 next to ''Percodan''. Therefore, the Acting Deputy Administrator finds that the closing inventory figure used by the DEA investigator in conducting the audit of Percocet and its generic equivalents was correct.

To determine how much Percocet and its generic equivalent were sold by Respondent during the audit period, the DEA investigator looked at both Respondent's prescription records, as well as reports required to be filed with the BNI regarding all Schedule II prescriptions dispensed. In reviewing the records, it was revealed that during the audit period, 21 prescriptions found at Respondent pharmacy were not listed in the BNI reports, and 21 different prescriptions listed in the reports were not found in Respondent's records. In arriving at the sales figure for the audit, the DEA investigator included all of these prescriptions in the total amount dispensed. In its Motion to Reopen the Record, Respondent argued that the sales figure was inaccurate since the DEA investigator did not look at Respondent's Schedule III–V prescription files to see if any prescriptions for Percocet or its generic equivalent were misfiled. The Acting Deputy Administrator finds this argument to be without merit since the DEA investigator testified at both the criminal trial and the hearing before Judge Bittner that she reviewed all of the prescription files, including Schedules III–V, to look for prescriptions for Percocet or its generic equivalent.

The audit revealed that Respondent could not account for 2,167 dosage units of Percocet and its generic equivalent.

The DEA investigator testified that during the course of her review of the records seized during execution of the search warrant, she found only one prescription for Ozzie Willis. It was dated May 24, 1990 for Placidyl and indicated that it had been called in by Dr. N. As noted above, Dr. N previously testified that he did not authorize this prescription. In addition, the investigator's review of the BNI reports filed by Respondent did not reveal any prescriptions listed for Ozzie Willis.

As a result of the investigation, criminal charges were brought against Mr. Rocco. Neither party submitted direct evidence regarding these charges and/or their disposition. However, it appears based upon Respondent's assertions in its post-hearing filing and statements made by the DEA investigator that testified in these proceedings, that Mr. Rocco was charged with seven counts of dispensing controlled substances without a prescription; that the jury was hung on six of those counts and found Mr. Rocco not guilty of the seventh; that rather than retry Mr. Rocco, he was accepted into an Accelerated Rehabilitation Disposition program in March 1992; and pursuant to that program, all charges against Mr. Rocco were dropped in March 1994.

Respondent introduced into evidence a number of character references from various members of his community, all stating that they had known Mr. Rocco for many years and attesting to his personal and professional integrity, his professional expertise and his concern for his customers.

On April 10, 1996, after the hearing was concluded but prior to the filing of post-hearing briefs, Respondent submitted its Motion to Reopen the Record, Motion for Oral Argument, and Motion to Admit Character Reference Testimony into the Record. The Government did not oppose Respondent's Motion regarding character reference testimony, and on May 10, 1995, Judge Bittner granted this motion and received Respondent's character reference letters into evidence.

In its Motion to Reopen the Record, Respondent argues that it was prejudiced by the Government's failure to comply with the Prehearing Ruling issued by the Administrative Law Judge. Respondent argues that the Prehearing Ruling ordered the Government to advise Respondent in writing of the documents that were used as the basis for the pill count and the preparation of the computation chart, and that Respondent did not receive a copy of the BNI agent's notes regarding her pill count taken during the execution of the search warrant on July 23, 1990, until the hearing in this matter. In support of its Motion, Respondent also argues that the BNI agent was uncertain about generic equivalents of Percocet; that the DEA investigator's starting inventory of 1,708 dosage units of Percocet was incorrect because it failed to account for a shipment Respondent received on May 25, 1989; that the sales figure on the computation chart was incorrect because it failed to take into account six misfiled prescriptions; that the closing inventory must have been inaccurate because Respondent dispensed more generic oxycodone with APAP between the date of the closing inventory and its next shipment than it would have had

on hand according to the inventory; that the circumstances in which the closing inventory was taken were unfair to Respondent; that its May 1991 inventory showed a surplus; and that reopening the record to permit Respondent to adduce new evidence is required in the interests of justice and would not unduly burden the Government or waste judicial resources.

In denying Respondent's motion, Judge Bittner found that ''[t]here is no indication that [the DEA investigator] relied on any documents (the BNI agent) drafted in preparing the computation chart.'' Judge Bittner therefore found ''no merit to Respondent's contention that the Government failed to comply with the prehearing ruling.'' Judge Bittner also found that Respondent's argument that it dispensed more generic form of Percocet than the closing inventory plus subsequent receipts is ''untenable'' inasmuch as the BNI agent's notes are ambiguous regarding whether her figures referred to Percocet or its generic equivalents. Further, in rejecting Respondent's Motion to Reopen the Record, Judge Bittner found that there was no showing that Respondent could not have found the allegedly misfiled prescriptions earlier, and that an order form in evidence as a Respondent exhibit, correctly shows that May 28, 1989 was the date Respondent first received Percocet or its generic equivalent after May 1, 1989.

As the Government correctly asserts in its Opposition to Respondent's Motion to Reopen the Record, neither the DEA regulations nor the Administrative Procedure Act provide for the submission of additional evidence after the hearing has been concluded and the record closed. The Deputy Administrator has previously held that he has discretionary authority to request that a record be reopened to receive newly discovered evidence on the basis that a final order must be issued based upon a full and fair record. See *Robert M. Golden, M.D.*, 61 FR 24,808 (1996). In *Golden*, the Deputy Administrator concluded that, ''to prevail on such a motion, the moving party must who that the evidence sought to be introduced (1) was previously unavailable and (2) would be material and relevant to the matters in dispute.''

Respondent was on notice as of May 23, 1994, the date of the Order to Show Cause that Respondent's failure to keep complete and accurate records regarding controlled substances would be an issue in this case. By October 1994, Respondent was provided a copy of the audit computation chart. Other than the BNI agent's notes regarding the pill count, there is no evidence in Respondent's motion that other information was previously unavailable.

Regarding the closing inventory, Respondent contends that the Government did not comply with the Prehearing Ruling since it failed to turn over the BNI agent's notes regarding the pill count in advance of the hearing. Judge Bittner disagreed with this contention, seemingly confining her order to those documents relied upon by the DEA investigator in preparing the computation chart. Since the Acting Deputy Administrator was not a party to the prehearing discussions, it is difficult to know what was actually agreed to regarding the underlying documents to the computation chart. However, a plain reading of Judge Bittner's Prehearing Ruling appears to support Respondent's contention. The Prehearing Ruling orders the Government counsel to advise counsel for Respondent ''in writing what documents was used as the basis for the inventory count on July 23, 1990, and the subsequent preparation of the computation chart.'' Therefore, the Acting Deputy Administrator disagrees with the Administrative Law Judge that the Government did not violate the Prehearing Ruling.

However, the Acting Deputy Administrator does not find that the Government's failure to turn over the notes was intentional, since Government counsel asserts that she was not aware of the notes herself and apparently mistakenly thought, as did the Administrative Law Judge, that she only needed to turn over what the Government witness relied upon in preparing the computation chart. The DEA investigator testified that in obtaining the closing inventory figure she relied upon the verbal representation of the BNI agent.

Respondent argued that its failure to obtain the BNI agent's notes prior to the hearing put it at an unfair disadvantage and the record should be reopened. The Acting Deputy Administrator disagrees. First, the only aspect of the audit that the notes pertain to is the closing inventory. Therefore, the failure to turn over the notes regarding the pill count does not give rise to the entire audit being reopened. Respondent was clearly on notice regarding the other parts of the audit, and had ample opportunity to prepare for the hearing. Second, Respondent argues that the notes of the pill count indicate that the BNI agent did not count oxycet and roxicet and therefore the closing inventory figure is incorrect. The transcript of the hearing clearly indicates that Respondent thoroughly questioned the BNI agent as to whether she counted all of the percocet and its generic equivalents. Respondent also questioned both Mr. and Mrs. Rocco regarding its stock of the substances, and introduced into evidence copies of orders forms indicating the purchase of the substances during the audit period.

Consequently, the Acting Deputy Administrator finds that Respondent was not prejudiced by not being provided the BNI agent's notes in advance of the hearing. Therefore, while not agreeing with the Administrative Law Judge regarding whether there was a violation of the Prehearing Ruling, the Acting Deputy Administrator does agree with her denial of the motion to reopen the record. Respondent did not present any evidence that, other than the BNI agent's notes, the evidence was previously unavailable. Further, Respondent was not prejudiced by not receiving the notes earlier since it had the opportunity to not only question the BNI agent about the pill count, but also introduced other evidence in the record regarding oxycet and roxicet.

In its Motion for Oral Argument, Respondent argued that oral argument after filing of the briefs would effectively summarize testimony from the criminal proceeding which is in evidence in this proceeding; that it would facilitate the Administrative Law Judge's understanding of the parties' positions; and that it would not substantially prejudice the Government. In denying Respondent's Motion, Judge Bittner stated that she was ''not persuaded * * * that oral argument would significantly assist [her] in preparing a decision in this proceeding * * *.'' She further stated that her denial of the motion is ''without prejudice to Respondent's right to raise in its posthearing brief the issues it intended to argue orally.''

As the Government correctly notes, there is nothing in the regulations governing these proceedings that provides for oral argument following the filing of briefs. Consequently, the Acting Deputy Administrator finds that it is in the Administrative Law Judge's discretion whether or not to permit oral argument.

On June 20, 1995, Respondent filed a Motion for Disqualification of the Chief Administrative Law Judge. Respondent contends that the ''Judge in this case has exhibited open and obvious favoritism to the Government which not only shatters the appearance of impartiality, but in fact demonstrates actual pro-Government bias * * *.'' Respondent argues that the Administrative Law Judge's admonishment of Respondent's counsel for failing to request a subpoena more in advance of the proceeding is

evidence of their bias. The Acting Deputy Administrator concludes that any statement made regarding the timing of the subpoena of the BNI agent is irrelevant to his decision in this matter. The BNI agent ultimately appeared and testified at the hearing, and this final order is based upon the testimony and documentary evidence introduced at the hearing.

Respondent argues that the Administrative Law Judge's bias is exhibited by her mischaracterization of her own Prehearing Ruling by finding that the Government did not violate the Ruling by failing to turn over the BNI agent's notes regarding the pill count to Respondent's counsel. While, the Acting Deputy Administrator has already found that it appears that the Administrative Law Judge did mischaracterize her Prehearing Ruling, such a mischaracterization in no way warrants disqualification. The regulations governing these proceedings provide for the filing of exceptions when a party disagrees with a finding, conclusion and/or ruling of the Administrative Law Judge. Respondent availed himself of this opportunity, and the Acting Deputy Administrator concurs with Respondent's contention that the Prehearing Ruling was mischaracterized. However, as previously discussed, the discovery of the BNI agent's notes was not significant enough to reopen the record since the notes only affected the closing inventory, and Respondent questioned the BNI agent about the closing inventory at the hearing.

Respondent further argues that the Administrative Law Judge was biased in her ruling denying Respondent's Motion to Reopen the Record, as evidenced by her acceptance of the DEA investigator's interpretation of when controlled substances were first received by Respondent after May 1, 1989, without allowing Respondent an opportunity to introduce evidence to rebut the interpretation. The Acting Deputy Administrator finds no evidence of bias in this ruling since he concurs with Judge Bittner's conclusion. First, since Respondent was on notice of the computation chart well in advance of the hearing, it had more than ample opportunity to prepare for this aspect of the audit. Respondent's lack of preparation does not warrant reopening the record. Second, even if Respondent had been allowed to present evidence regarding the initial inventory after the record had been closed, the Acting Deputy Administrator's conclusion would not change. Respondent's own order form signed by Mr. Rocco demonstrates that Respondent received the controlled substances in question on May 28, 1989.

Respondent also argues that the Administrative Law Judge's denial of Respondent's Motion for Oral Argument evidences Judge Bittner's bias in that ''the Government enjoyed an effective veto power.'' Respondent contends that Judge Bittner's denial of this motion is ''difficult to rationalize on any basis other than the fact that the Government opposed it.'' As stated previously, the regulations do not provide for oral argument following submission of the briefs, therefore, to grant such a request would be extraordinary. Consequently, the Acting Deputy Administrator does not find Judge Bittner's denial of Respondent's motion unreasonable since as she stated, she was ''not persuaded at this time that oral argument would significantly assist [her] in preparing a decision in this proceeding * * *.''

Finally, Respondent argues that ''the very structure of Administrative Law Judges inherently raises suspicions about their capacity for judicial independence.'' As Judge Bittner noted in her opinion, ''the Supreme Court of the United States and various United States Courts of Appeals have found that the Administrative Procedure Act 5 U.S.C. 551 et. seq., safeguards the procedural and substantive due process rights of parties to administrative proceedings and the independence of the Administrative Law Judges who hear them.'' See, e.g., *Butz* v. *Economou*, 438 U.S. 478, 513–15 (1978); *Nash* v. *Califano*, 613 F.2d 10, 14–16 (2d Cir. 1980).

The Acting Deputy Administrator concludes that other than her mischaracterization of the Prehearing Ruling, Judge Bittner's rulings in this matter have been correct based upon a careful consideration of the evidence and the laws and regulations governing these proceedings. The Acting Deputy Administrator is not persuaded by Respondent's arguments that the Administrative Law Judge has exhibited pro-Government bias in this matter. Accordingly, Respondent's Motion for Disqualification was properly denied.

Pursuant to 21 U.S.C. 823(f) and 824(a)(4), the Deputy Administrator may revoke a DEA Certificate of Registration and deny any pending applications, if he determines that the continued registration would be inconsistent with the public interest. Section 823(f) requires that the following factors be considered:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing, or conducting research with respect to controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety. These factors are to be considered in the disjunctive; the Deputy Administrator may rely on any one or a combination of factors and may give each factor the weight he deems appropriate in determining whether a registration should be revoked or an application for registration be denied. See Henry J. Schwartz, Jr., M.D., Docket No. 88–42, 54 FR 16.422 (1989).

Regarding factor one, there is no evidence in the record that any action has been taken by any state agency against either Respondent pharmacy or Mr. Rocco, therefore, this factor is not relevant in determining the public interest in this case. Respondent argues in his exceptions that the Administrative Law Judge should have considered this lack of state action in Respondent's favor in rendering her recommendation. The Acting Deputy Administrator concludes that this factor should be given no weight since there is no evidence in the record that a hearing was conducted by a state agency and no action was taken or that the state agency formally reviewed the evidence and declined to take action.

Regarding factor two, Respondent's experience in dispensing controlled substances, Mr. Rocco has been a practicing pharmacist for over 30 years. It has introduced letters into evidence form various members of the community attesting to Mr. Rocco's professionalism and value to the community. While the other evidence in the record regarding this factor covers a relatively small portion of Mr. Rocco's 30 years as a pharmacist, his dispensing to Ozzie Willis and the results of the audit covering an approximately 14 month period of time raise serious concerns regarding Respondent's continued registration.

Respondent contends that Mr. Rocco only dispensed controlled substances to Ozzie Willis pursuant to what he believed to be valid prescriptions. Respondent argues that either Dr. N authorized the prescription or Mr. Willis called the prescriptions into the pharmacy since he knew Dr. N's DEA registration number. However, the Acting Deputy Administrator, like Judge Bittner, does not credit this explanation

for the drugs provided on April 30, May 16, May 24, and June 7, 1990. Dr. N testified in Mr. Rocco's criminal proceeding that he did not authorize any of these prescriptions, and other than the May 24th prescription for Placidyl, none of these prescriptions were found in Respondent's records seized during execution of the search warrant.

On the other occasions, May 4, May 7, and June 29, 1990, when Ozzie Willis came out of Respondent pharmacy with controlled substances, Respondent argues that Mr. Willis had had an opportunity to plant the drugs. While Respondent argues in its exceptions that Mr. Willis might have had a motive to plant incriminating evidence on Respondent's premises, the Acting Deputy Administrator finds that this argument is speculative. The transcripts of Mr. Willis' visits, as well as the fact that no evidence was presented that anyone saw Ozzie Willis planting and/or retrieving the drugs belie such a theory. As Judge Bittner noted in her opinion, ''on May 3 Mr. Rocco told Mr. Willis that he would obtain a prescription that night; on subsequent visits Mr. Rocco repeatedly said he would see a doctor and/or obtain a prescription, on June 13 Mr. Rocco said that the doctor in question was hospitalized until June 25, and on June 28 Mr. Rocco told Mr. Willis to come back the next day.'' Therefore, the Acting Deputy Administrator agrees with Judge Bittner that ''it is reasonable to infer * * * that on May 4 and June 29 Mr. Rocco carried out his previously stated intention to provide Percocet to Mr. Willis'' rather than that the drugs were planted.

Respondent argues that the fact that no Percocet prescriptions for Ozzie Willis were found at Respondent pharmacy supports the theory that Mr. Rocco was only talking about obtaining a prescription from a doctor to get Ozzie Willis out of the pharmacy. However, the Acting Deputy Administrator finds that nothing in the transcript of Mr. Willis' visits indicates that a prescription would be written in Ozzie Willis' name, but just that Mr. Rocco needed to obtain a prescription from a doctor before he could give Mr. Willis any Percocet.

Regarding the May 7th visit, Respondent argues that Ozzie Willis had an opportunity to plant the Tylenol #4 obtained on that occasion. Again, the Acting Deputy Administrator finds this argument to be speculative. Mr Willis was not given advance notice when he would be sent into the pharmacy, and there was no evidence presented that anyone saw Mr. Willis planting and/or retrieving the drugs.

Respondent contends that he only dispensed controlled substances in properly labeled containers, but that Ozzie Willis switched the controlled substances into the other containers. The Acting Deputy Administrator finds this argument also to be speculative. Since Mr. Willis was searched and under surveillance going into the pharmacy and after coming out of the pharmacy, he would have had to switch containers in the store. Like with the theory that Mr. Willis planted drugs, there is no evidence in the record that anyone saw Ozzie Willis switching containers while in the pharmacy. In addition, on May 24, 1990, Mr. Willis emerged from Respondent with Placidyl in a properly labeled container even though the prescription was not authorized by Dr. N. If as Respondent argues, Mr. Willis was switching containers, it would follow that he would have switched the container on this occasion also.

The Acting Deputy Administrator finds the transcripts of conversations between the Roccos and Mr. Willis of considerable significance in evaluating Respondent's experience in dispensing controlled substances. On May 3, 1990, Ozzie Willis asked for Percocet, and Mr. Rocco replied, ''I'll tell you what, I'll get a script tonight from a doctor, pick it up tomorrow * * *.'' The next day, Ozzie Willis came out of Respondent pharmacy with 30 Percocet tablets in a UNI–ACE bottle.

On May 9, 1990, Ozzie Willis asked Mrs. Rocco to ''ask Rocco if I can, can get some *more* Percs one day next week, either that or either Placidyls.'' (emphasis added). The Acting Deputy Administrator finds it noteworthy that since no Percocet prescriptions for Ozzie Willis were found at Respondent pharmacy, why would Mr. Willis ask for ''more Percs'', unless he had been dispensed the Percocets without a valid prescription.

Ozzie Willis told Mr. Rocco on May 16, 1990, ''* * * I really need them Percs * * * I done got part of the guy's money.'' Mr. Rocco replied, ''* * * I just got a script from that doctor, thought I'd get you 30 and that would be it. Thirty I got.'' Mr. Rocco told Mr. Willis to come back in two weeks. The Acting Deputy Administrator finds significant that two weeks before this visit, on May 4th, Ozzie Willis came out of Respondent's pharmacy with 30 Percocet after being told the day before that Mr. Rocco would get a prescription from a doctor.

On May 18, 1990, Ozzie Willis asked Mr. Rocco, ''* * * you get the script from that other doctor?'' Mr. Rocco replied, ''No, not til the end of the month.'' On May 30, 1990, Mr. Rocco stated, ''I'll let you know when I get that.'' Then on June 4, 1990, Mr. Willis asked Mr. Rocco, ''did you see that doctor?'' Mr. Rocco replied, ''no, not yet * * *. Thursday morning, come in and see me then.'' During a telephone conversation on June 13, 1990, Mr. Willis asked about ''the Percocets I was supposed to get the first of the month.'' Mr. Rocco replied, ''Yeah, not this month though.'' Mr. Willis then stated, ''last month you told me, the first of June,'' to which Mr. Rocco answered, ''* * * if I can get the script * * * but I haven't got the script.'' Mr. Rocco went on to explain that the doctor went into the hospital. Mr. Willis asked, ''You got any idea when, cause I got people, got three guys waiting for them.'' Mr. Willis replied, ''* * * it probably won't be till the end of the month he's supposed to be back the 25th, to work.''

Then on June 28, 1990, Mr. Willis asked about the doctor and Mr. Rocco stated, ''Yea, tomorrow morning come back.'' On June 29th Ozzie Willis came out of Respondent pharmacy with 30 Percocet in a small unlabeled box in a brown bag.

The Acting Deputy Administrator concludes that these transcripts show that Ozzie Willis and Mr. Rocco were discussing the dispensing of Percocet to Mr. Willis without a valid prescription.

Respondent contends that Ozzie Willis was unreliable and dishonest; that he wrongly stated that Respondent was his source of controlled substances; and that the entire investigation was tainted because Ozzie Willis violated his agreement with the Bristol P.D. by going to Respondent when he was not under surveillance and by continuing to obtain controlled substances from other sources during the investigation. The Acting Deputy Administrator finds that given the criminal trial testimony and printouts from various pharmacies admitted into evidence in this proceeding, as well as the contents of Ozzie Willis' car at the time of his arrest on April 30, 1990, it is clear that Mr. Willis was obtaining controlled substances from places other than Respondent pharmacy. The Acting Deputy Administrator also finds that Ozzie Willis clearly violated his cooperation agreement with the Bristol P.D. and was convicted two times previously of offenses relating to drugs. However, the Acting Deputy Administrator concludes that regardless of these facts, the evidence is clear that Ozzie Willis obtained controlled substances from Respondent without a valid prescription.

Respondent's inability to account for over 2,000 dosage units of Percocet and its generic equivalents over an approximately 14 month period of time is of serious concern to the Acting Deputy Administrator in evaluating Respondent's experience in dispensing controlled substances.

Regarding factor three, other than Respondent's assertions in its post-hearing filing, there is virtually no evidence in the record regarding this factor, However, it appears that criminal charges against Mr. Rocco were ultimately dismissed after his successful participation in an Accelerated Rehabilitation Disposition program. Therefore, since there is no evidence of a conviction regarding controlled substances, the Acting Deputy Administrator concurs with Judge Bittner's finding that this factor does not weigh against Respondent's continued registration.

As to factor four, the Acting Deputy Administrator concurs with Judge Bittner's conclusion that ''Respondent's failure to comply with state law and the Controlled Substances Act and its implementing regulations weigh in favor of a finding that its continued registration would not be in the public interest.'' Respondent's dispensing of controlled substances without a valid prescription to Ozzie Willis was in violation of 21 U.S.C. 829 and 21 CFR 1306.11 and 1306.21 Further, his dispensing of some of these substances in improperly labeled containers violated 21 CFR 1306.14 and 1306.24.

In addition, the review of Respondent's records seized during the execution of the search warrant on July 23, 1990 revealed recordkeeping violations, First, Respondent failed to comply with state law as evidenced by the reports it filed with BNI regarding its dispensing which did not indicate 21 prescriptions which were found in Respondent's files. Second, Respondent violates 21 U.S.C. 827 and 21 CFR 1304.04 as evidenced by the 21 prescriptions noted on the BNI reports that were not found in Respondent's records seized from the pharmacy. Respondent also violated 21 CFR 1304.13, by failing to maintain a biennial inventory. Finally, Respondent violated 21 U.S.C. 827 and 21 CFR 1304.21, by failing to maintain complete and accurate records of controlled substances as evidenced by the shortage of Percocet revealed by the DEA accountability audit.

Respondent argued in its exceptions that in assessing Respondent's compliance with applicable state and Federal laws and regulations, the Administrative Law Judge's decision ''was heavily dependent on her interpretation of the meaning of audiotaped conversations,'' and that ''she relied entirely on typed transcripts'' rather than listening to the tapes themselves. The transcripts of the conversations are all that are in evidence in this proceeding, and there is no indication in the transcript of the hearing in this matter that Respondent objected to their admission into evidence. Therefore, the Acting Deputy Administrator finds that the Administrative Law Judge did not err in relying on these transcripts in rendering her recommended decision.

Respondent also argues that the Administrative Law Judge improperly relied upon hearsay testimony of Dr. N that he did not authorize the call-in prescriptions in question in this proceeding and that Judge Bittner erred in finding that Dr.N had no motivation to lie, and in ignoring the possibility that Ozzie Willis, knowing Dr. N's DEA number could have called the prescriptions in to Respondent's pharmacy. The Acting Deputy Administrator has considered these arguments and is not persuaded by them, particularly since only one of these prescriptions was found in Respondent's records seized during execution of the search warrant.

The Acting Deputy Administrator does however concur with Respondent's exception regarding the Administrative Law Judge's reliance as evidence of unlawful dispensing on the discovery of a prescription profile in Ozzie Willis' name spelled backwards. There is no evidence in the record regarding this profile other than the fact that it was discovered and therefore the Acting Deputy Administrator does not rely upon it as evidence of unlawful dispensing of controlled substances and Respondent pharmacy.

Respondent also argues that the Administrative Law Judge ignored the prescription for J.C. for Percocet dated May 2, 1990 which was picked up by Ozzie Willis on May 4th. However, the Acting Deputy Administrator notes that on May 3, 1990, Mr. Rocco told Ozzie Willis that he'd get a prescription from a doctor that night and for Mr. Willis to pick up the Percocet the next day. Therefore, the Acting Deputy Administrator concurs with the Administrative Law Judge's finding that Respondent dispensed Percocet on May 4, 1990 without a valid prescription.

Respondent also argues that the audit was improperly based on hearsay statements from an employee of Respondent's wholesaler. First, the Acting Deputy Administrator finds that hearsay is clearly admissible in administrative proceedings. See *Klinestiver* v. *Drug Enforcement Administration,* 606 F.2d 1128 (D.C. Cir. 1979). Second, in conducting the audit, the DEA investigator sought information from the wholesaler to verify Respondent's own records which it is required to maintain pursuant to the Controlled Substances Act.

The Acting Deputy Administrator finds the Respondent clearly violated both state and Federal laws and regulations relating to controlled substances and therefore factor four is highly relevant in determining whether Respondent's continued registration is in the public interest.

Regarding factor five, the Acting Deputy Administrator concurs with the Administrative Law Judge's finding that ''Mr. Rocco's apparent dishonesty and refusal to accept responsibility for his misconduct does not augur well for his future responsibility if permitted to retain his DEA registration.'' In a previous case, the Administrator found that a pharmacist's ''refusal to acknowledge the impropriety of his dispensing practices * * * give[s] rise to the inference that [he] is not likely to act more responsibly in the future.'' Medic-Aid Pharmacy, 55, FR 30,043 (1990). Like Judge Bittner, the Acting Deputy Administrator has considered Respondent's character references, however they do not outweigh the evidence of Respondent's improper dispensing and recordkeeping. Consequently, this factor weighs against Respondent's continued registration.

The Acting Deputy Administrator agrees with Judge Bittner, that based upon a careful consideration of the factors enumerated in 21 U.S.C. 823(f), the record as a whole establishes that Respondent's continued registration would be inconsistent with the public interest. Respondent pharmacy's dispensing of controlled substances without a valid prescription, the shortage of Percocet and its generic equivalents revealed by the accountability audit, its violations of applicable laws and regulations, and Mr. Rocco's continued denials of any wrongdoing whatsoever support such a conclusion. Therefore, the Acting Deputy Administrator concludes that revocation of Respondent's DEA Certificate of Registration is an appropriate remedy.

Respondent asserts in its exceptions that the Administrative Law Judge improperly focused on the same misconduct in her analysis of three of the five factors. The Acting Deputy Administrator concludes that there is no merit to this argument, finding that there is nothing in the statute that

precludes the same behavior from being considered under multiple factors. DEA has consistently considered the same conduct under more than one factor. See Robert M. Golden, M.D., 61 FR 24,808 (1996); Herman E. Walker, Jr., M.D., 60 FR 52,705 (1995).

Respondent, in its post-hearing filings further argues that DEA's failure to initiate administrative proceedings against Respondent's DEA Certificate of Registration sooner or to immediately suspend Respondent's registration pursuant to 21 U.S.C. 824(d), ''is inconsistent with a contention that continued registration would violate the public interest.'' The Acting Deputy Administrator finds no merit to this argument. First, an immediate suspension of a registration pursuant to 21 U.S.C. 824(d) can only be utilized by DEA when a finding has been made ''that there is an imminent danger to the public health or safety.'' Since a registration is immediately suspended without first providing an opportunity for a hearing, clearly Congress did not intend this tool to be used in every instance where DEA alleges that continued registration would be inconsistent with the public interest. Therefore, the Acting Deputy Administrator rejects Respondent's contention that, ''* * * rather than put this case on the fast track, the DEA put it on a slow track which belies any contention about threats to the public interest.''

Second, as to DEA's failure to initiate proceedings sooner, the Acting Deputy Administrator finds that while passage of time, alone is not dispositive, it is a consideration in assessing whether Respondent's continued registration is inconsistent with the public interest. See Norman Alpert, M.D., 58 FR 67,420 (1993). However, in Alpert, the then-Acting Administrator found significant, ''Respondent's recognition of the serious abuse of his privileges as a DEA registrant, and his sincere regret for his actions.'' In this case, Mr. Rocco continues to deny that the pharmacy has misused its DEA registration. Therefore, the Acting Deputy Administrator concludes that the fact that DEA did not initiate proceedings sooner is outweighed by Respondent's continued denial of wrongdoing.

Accordingly, the Acting Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b) and 0.104 hereby orders that DEA Certificate of Registration AR8587125, issued to Rocco's Pharmacy, be, and it hereby is, revoked and any pending applications for renewal of such registration, be, and they hereby are, denied. This order is effective February 20, 1997.

Dated: January 14, 1997.

James S. Milford,

Acting Deputy Administrator.

[FR Doc. 97–1385 Filed 1–17–97; 8:45 am]

BILLING CODE 4410–09–M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 97–005]

NASA Advisory Council; 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 meeting of the NASA Advisory Council.

DATES: February 6, 1997, 9:00 a.m. to 3:00 p.m.; and February 7, 1997, 1:00 p.m. to 3:00 p.m.

ADDRESSES: National Aeronautics and Space Administration, Room 9H40, 300 E Street, SW, Washington, DC 20546–0001.

FOR FURTHER INFORMATION CONTACT: Ms. Anne L. Accola, Code Z, National Aeronautics and Space Administration, Washington, DC 20546–0001, 202/358–0682.

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:

—Update on Activities at NASA
—Top Technology Developments
—National Space Biomedical Research Institute
—Cross-enterprise Coordination of Exobiology
—Launch Vehicle Policy
—NASA Relationship with ASEB
—Technology and Commercialization Advisory Committee Restructuring
—Committee Reports
—Discussion of Findings and Recommendations

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 visitor's register.

Dated: January 13, 1997.

Leslie M. Nolan,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 97–1282 Filed 1–17–97; 8:45 am]

BILLING CODE 7510–02–M

[Notice 97–004]

NASA Advisory Council, Earth Systems Science and Applications Advisory Committee (ESSAAC); 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 meeting of the NASA Advisory Council, Earth Systems Science and Applications Advisory Committee.

DATES: January 29–30, 1997, 8:30 a.m. to 5:00 p.m.

ADDRESSES: National Aeronautics and Space Administration, Conference Room 7H46, 300 E Street, S.W., Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Dr. Robert A. Schiffer, Code YS, National Aeronautics and Space Administration, Washington, DC 20546, (202) 358–1876.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the seating capacity of the room. The provisional agenda for the meeting is as follows:

—Update of Mission to Planet Earth
—Biennial Review—Role for ESSAAC
—General Discussion
—Progress Towards and EOSDIS Federation
—EOSDIS Cost Analysis
—Summary and General Discussion

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: January 13, 1997.

Leslie M. Nolan,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 97–1281 Filed 1–17–97; 8:45 am]

BILLING CODE 7510–01–M

NUCLEAR REGULATORY COMMISSION

Proposed Generic Communication; Effectiveness of Ultrasonic Testing Systems in Inservice Inspection Programs

AGENCY: Nuclear Regulatory Commission.

ACTION: Extension of public comment period.