

{attach form}; and mail to the following address: {insert address}].

**Note:** Your direction in this paragraph covers certain information about you that we might otherwise share with our affiliated companies. We may share other information about you with our affiliated companies as permitted by law.

By direction of the Commission.

**Donald S. Clark,**  
Secretary.

[FR Doc. 00-32391 Filed 12-21-00; 8:45 am]

**BILLING CODE 6750-01-P**

## DEPARTMENT OF COMMERCE

### United States Patent and Trademark Office

#### 37 CFR Parts 1 and 104

RIN 0651-AB22

#### Legal Processes

**AGENCY:** Office of the General Counsel, United States Patent and Trademark Office, Commerce.

**ACTION:** Proposed rule.

**SUMMARY:** The United States Patent and Trademark Office proposes rules relating to civil actions and claims involving the Office. Specifically, the rules will provide procedures for service of process, for obtaining Office documents and employee testimony, for indemnifying employees, and for making a claim against the Office under the Federal Tort Claims Act.

**DATES:** Submit comments on or before January 22, 2001.

**ADDRESSES:** Send all comments:

1. Electronically to "PBORulemaking@uspto.gov", Subject: "Legal Process Rules";

2. By mail to Director of the United States Patent and Trademark Office, Box 8, Washington, DC 20231, ATTN: Legal Process Rules; or

3. By facsimile to 703-305-9373, ATTN: Legal Process Rules.

A copy of any comments regarding the information collection requirements may instead be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, 725 17th Street, NW., Room 10235, Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Richard Torczon, 703-305-9035.

#### SUPPLEMENTARY INFORMATION:

#### Comment format

The Office prefers to receive comments in electronic form, either via the Internet or on a 3¼ inch diskette.

Comments submitted in electronic form should be submitted as ASCII text. Special characters and encryption should not be used.

#### Background

The Patent and Trademark Office Efficiency Act (PTOEA) (Public Law 106-113, 113 Stat. 1501A-572 (1999)) reestablished the Patent and Trademark Office as the United States Patent and Trademark Office, a performance-based organization with responsibility for its own operations. Consequently, the Office has responsibility for many functions formerly provided by the Department of Commerce. The rules proposed in this notice adopt the substance and scope of the existing Department of Commerce rules, but where possible the proposed rules have been streamlined and tailored to reflect the practices of the Office and its constituencies. These proposed rules have been organized into a single part for convenience.

#### General Provisions

The general provisions supply definitions, addresses, and a rule waiver provision that are generally applicable to the rules in this part. Filing of a petition to waive a rule will not in itself stay any action required of the petitioner. Section 1.17(h) of title 37 of the Code of Federal Regulations is amended to provide for a petition fee.

#### Service of Process

The Patent and Trademark Office had rules for the service of process. 37 CFR part 15 (1996). In recent years, however, the Patent and Trademark Office instead relied on the rules of the Department of Commerce, 15 CFR part 15, subpart A, which were substantially the same as the former Patent and Trademark Office rules. The Office will again issue its own rules to tailor the rules to the specific practices of the Office and to simplify the structure of the rules. The proposed rules ensure that service intended for the Office and its employees will be properly handled.

When the Office accepts service of process for an employee in an official capacity, the Marshal's or server's return of service form or receipt for registered or certified mail should be endorsed with the following statement: "Service accepted in official capacity only." The Office will not accept service for an employee in his or her individual capacity.

#### Employee Testimony and Production of Documents

The Patent and Trademark Office had rules for employee testimony and

document production. 37 CFR part 15a (1996). Those rules were specifically tailored to the practices of the Patent and Trademark Office and reflected case law regarding the quasi-judicial nature of many Patent and Trademark Office employees' positions. *Western Elec. Co. v. Piezo Technology, Inc.*, 860 F.2d 428, 431, 8 USPQ2d 1853, 1856 (Fed. Cir. 1988). The Patent and Trademark Office subsequently relied on Department of Commerce rules. 15 CFR part 15, subpart B. The Commerce rules materially differ from the former Patent and Trademark Office rules in two respects. First, the Department of Commerce rules do not address specific and recurrent problems associated with taking testimony from quasi-judicial officials at the Patent and Trademark Office. Second, the Department of Commerce rules include former employees within their scope. The Office will again issue its own rules tailored to the practices of the Office, but will follow the example of the Department of Commerce in including former employees within the scope of the rules (§ 104.2).

The inclusion of former employees within the scope of the rules is appropriate since, in many cases, the rules serve to preserve privileges of the Office. The Office's privileges are not waived simply because an employee leaves the Office. Moreover, testimony by former employees may raise other legal issues that might be avoided or resolved if the Office is involved early in the process. *Cf. Friedman v. Lehman*, 40 USPQ2d 1206 (D.D.C. 1996) (affirming a sanction against a former Patent and Trademark Office employee for testifying about a patent on which he had worked). The scope of this subpart has been defined to exclude (§ 104.21(b)) testimony unrelated to official business and, for former employees, expert testimony that is not likely to involve an Office privilege. The exception for expert testimony by former employees is based on the policies of 18 U.S.C. 207(a)(1) and (j)(6), but the scope of the exception is not the same as the scope of this criminal statute. The exception has no effect on the scope of the criminal statute or the disciplinary rules. *Cf.* 37 CFR 10.111; *Friedman, supra*.

The former Patent and Trademark Office rules listed questions that employees would not be authorized to answer because the questioning would be impermissibly directed to

discovering the mental processes or expertise of a quasi-judicial official. 37 CFR 15a.6(b) (1996). These questions included:

- (1) Information about that employee's:
  - (i) Background.
  - (ii) Expertise.
  - (iii) Qualifications to examine or otherwise consider a particular patent or trademark application.
  - (iv) Usual practice or whether the employee followed a procedure set out in any Office manual of practice in a particular case.
  - (v) Consultation with another Office employee.
  - (vi) Understanding of:
    - (A) A patented invention, an invention sought to be patented, or patent application, patent, reexamination or interference file.
    - (B) Prior art.
    - (C) Registered subject matter, subject matter sought to be registered, or a trademark application, registration, cancellation, opposition, interference, or concurrent use file.
    - (D) Any Office manual of practice.
    - (E) Office regulations.
    - (F) Patent, trademark, or other law.
    - (G) The responsibilities of another Office employee.
  - (vii) Reliance on particular facts or arguments.
- (2) To inquire into the manner in and extent to which the employee considered or studied material in performing the quasi-judicial function.
- (3) To inquire into the bases, reasons, mental processes, analyses, or conclusions of that Office employee in performing the quasi-judicial function.

While all of these prohibitions remain valid, they are necessarily incomplete because it would be impossible to list every kind of question that would be considered impermissible under the case law. For instance, in *Western Electric*, fact questions were also deemed impermissible because they were "disruptive of the decisionmaking process and thereby interfere with the PTO's administrative functions" and also because they were inherently prejudicial. 860 F.2d at 432-33, 8 USPQ2d at 1857. Consequently, rather than codify an incomplete list of impermissible questions, the Office will rely on the case law and this notice as its basis for declining to authorize testimony in response to impermissible questions. The Office will not authorize testimony on the validity or enforceability of a patent or registered trademark.

The proposed rules require an employee who receives a subpoena to

forward the subpoena to the General Counsel immediately (§ 104.23(a)). The General Counsel will determine the extent to which the employee will comply with the subpoena. The General Counsel may instruct the employee, orally or in writing, not to give testimony or produce documents.

The proposed rules require (§ 104.23(c)(3)) that an affidavit accompany the subpoena to assist the General Counsel in making an informed decision regarding whether testimony or the production of a document should be authorized. The General Counsel may consult or negotiate with an attorney for a party, or with the party if not represented by an attorney, to refine or limit a demand so that compliance is less burdensome or to obtain information necessary to determine whether to authorize testimony or produce documents.

Whenever, in any proceeding involving the United States, a request is made by an attorney representing or acting under the authority of the United States, the General Counsel will make all necessary arrangements for the employee to give testimony on behalf of the United States (§ 104.25(a)(2)). Where appropriate, the General Counsel may require reimbursement to the Office of the expenses associated with an employee giving testimony on behalf of the United States.

The proposed rules on production of documents (especially § 104.29) do not affect rights under, and procedures governing public access to records pursuant to, the Freedom of Information Act (5 U.S.C. 552), the Privacy Act (5 U.S.C. 552a), or the Trade Secrets Act (18 U.S.C. 1905). Moreover, the proposed rules in this subpart do not create any right or benefit, substantive or procedural, enforceable by any party against the United States.

#### Employee Indemnification

The Patent and Trademark Office operated under Department of Commerce rules for employee indemnification, 15 CFR part 15, subpart D. The Office will issue its own rules to tailor the rules to the specific practices of the Office and to simplify the structure of the rules. Essentially, the Office adopts the requirements of the lead agency, the Department of Justice (28 CFR part 14), for filing requests for indemnification.

#### Federal Tort Claims Act Claims

The Patent and Trademark Office operated under Department of Commerce rules (15 CFR part 2) for claims under the Federal Tort Claims Act (28 U.S.C. 2672). The Office will

issue its own rules to tailor the rules to the specific practices of the Office and to simplify the structure of the rules.

The Federal Tort Claims Act provides a limited waiver of the United States Government's sovereign immunity contingent, in part, on submission of a tort claim to the affected agency for an administrative determination. The Office of the General Counsel will record the time and date the claim was received. The claim may then be forwarded to the business unit involved in the claim or another appropriate business unit within the Office and request that an investigation be conducted. The business unit will conduct an investigation, prepare a file, obtain additional information as necessary, and prepare a recommendation for award or denial of the claim. If the amount of the proposed award exceeds \$25,000 (in which case, approval by the Attorney General is required), or if consultation with the Department of Justice is appropriate (28 CFR 14.6), the General Counsel will provide liaison with the Department of Justice.

#### Regulatory Flexibility Act

The Office's Acting General Counsel certified to the Chief Counsel for Advocacy, Small Business Administration, that the changes proposed in this notice, if adopted, would not have a significant impact on a substantial number of small entities (Regulatory Flexibility Act, 5 U.S.C. 605(b)). This rulemaking substantially adopts rules in effect for the Department of Commerce, but modifies the rules to make them more specific to the United States Patent and Trademark Office, which in some cases simplifies the structure of the rules. Since few proceedings within the scope of this rulemaking typically arise over the course of a year, and since very few involve small businesses, the Office anticipates only a slight impact on a minimal number of small businesses annually.

#### Executive Order 13132

##### *Federalism Assessment*

This rulemaking does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (August 4, 1999).

#### Executive Order 12866

##### *Regulatory Planning and Review*

This rulemaking has been determined to be not significant for purposes of Executive Order 12866 (September 30, 1993).

## Paperwork Reduction Act

This notice of proposed rulemaking contains information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The Office's Records Officer is submitting an information collection package to the Office of Management and Budget (OMB) for review and approval of the proposed information collections.

Section 104.4 authorizes petitions to waive rules under this part. Such petitions are expected to be rare (assumed to be one each year for the purposes of this analysis). Section 104.12 sets requirements for addressing and forwarding service of process. Section 104.23 sets requirements for addressing and explaining demands for testimony. Section 104.25 requires employees giving unauthorized testimony to provide written summary of the testimony to the General Counsel. Section 104.33 sets requirements for requesting indemnification. Section 104.42 sets addressing requirements for tort claims.

The title, description, and respondent description of the information collection is shown below with an estimate of the annual reporting burdens. Included in this estimate is the time for reviewing instructions, gathering, and maintaining the data needed, and completing and reviewing the collection of information. The principal impact of the changes in this notice of proposed rulemaking is to tailor Department of Commerce rules to the specific context of the United States Patent and Trademark Office.

*OMB Number:* 0651-00xx.

*Title:* Legal processes.

*Form Numbers:* None.

*Type of Review:* New collection.

*Affected Public:* Individuals or households, businesses or other for-profit, not-for-profit institutions, Federal Government, and state, local, or tribal governments.

*Estimated Number of Respondents:* 186.

*Estimated Time Per Response:* 0.16 hours.

*Estimated Total Annual Burden Hours:* 29.2 hours.

*Needs and Uses:* The information is necessary to settle claims under the Federal Tort Claims Act (28 U.S.C. 2672), to indemnify employees involved in Office-related litigation (28 U.S.C. part 14), and to determine whether and how to respond to litigation or to requests for discovery involving the Office or its employees.

*Comments are invited on:* (1) whether the collection of information is necessary for proper performance of the

functions of the agency; (2) the accuracy of the agency's estimate of the burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information to respondents.

Interested persons are requested to send comments regarding these information collections, including suggestions for reducing this burden, to Richard Torczon, c/o Office of the General Counsel, United States Patent and Trademark Office, Washington, DC 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, ATTN: Desk Officer for the United States Patent and Trademark Office.

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.

### List of Subjects

#### 37 CFR Part 1

Administrative practice and procedure, Claims, Courts, Freedom of information, Inventions and patents, Tort claims, Trademarks.

#### 37 CFR Part 104

Administrative practice and procedure, Claims, Courts, Inventions and patents, Tort claims.

For the reasons stated in the preamble, the United States Patent and Trademark Office amends 37 CFR chapter I 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. 2(b)(2), unless otherwise noted.

2. Section 1.17 is amended by revising paragraph (h) to read as follows:

#### § 1.17 Patent application processing fees.

\* \* \* \* \*

(h) For filing a petition to the Commissioner under one of the following sections 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.

§ 1.84—for accepting color drawings or photographs.

§ 1.91—for entry of a model or exhibit.

§ 1.102—to make an application special.

§ 1.103(a)—to suspend action in an application.

§ 1.138(c)—to expressly abandon an application to avoid publication.

§ 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.

§ 1.644(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 an interference settlement agreement.

§ 1.741(b)—to accord a filing date to an application under 1.740 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 a retroactive license.

§ 104.4—for waiver of a rule in part 104 of this title.

\* \* \* \* \*

3. Revise the heading of subchapter B to read as follows:

### SUBCHAPTER B—ADMINISTRATION

4. Add part 104 to subchapter B to read as follows:

### PART 104—LEGAL PROCESSES

#### Subpart A—General Provisions

Sec.

104.2 Definitions.

104.3 Address for mail and service; telephone number.

104.4 Waiver of rules.

#### Subpart B—Service of Process

104.11 Scope and purpose.

104.12 Acceptance of service of process.

#### Subpart C—Employee Testimony and Production of Documents in Legal Proceedings

104.21 Scope and purpose.

104.23 Demand for testimony or production of documents.

104.25 Expert or opinion testimony.

104.29 Demands or requests in legal proceedings for records protected by confidentiality statutes.

#### Subpart D—Employee Indemnification

104.31 Scope.

104.33 Procedure for requesting indemnification.

#### Subpart E—Tort Claims

104.42 Procedure for filing claims.

104.44 Finality of settlement or denial of claims.

**Authority:** 35 U.S.C. 2(b)(2), 10, 23, 25; 44 U.S.C. 3101, except as otherwise noted.

### PART 104—LEGAL PROCESSES

#### Subpart A—General Provisions

##### § 104.2 Definitions.

*Demand* means a request, order, or subpoena for testimony or documents for use in a legal proceeding.

*Director* means the Director of the United States Patent and Trademark Office.

*Document* means any record, paper, and other property held by the Office, including without limitation, official letters, telegrams, memoranda, reports, studies, calendar and diary entries, maps, graphs, pamphlets, notes, charts, tabulations, analyses, statistical or informational accumulations, any kind of summaries of meetings and conversations, film impressions, magnetic tapes, and sound or mechanical reproductions.

*Employee* means any current or former officer or employee of the Office, including any individual subject to the jurisdiction, supervision, or control of the Office.

*Legal proceeding* means any pretrial, trial, and posttrial stages of existing or reasonably anticipated judicial or administrative actions, hearings, investigations, or similar proceedings before courts, commissions, boards or other tribunals, foreign or domestic. This phrase includes all phases of discovery as well as responses to formal or informal requests by attorneys or others involved in legal proceedings.

*Office* means the United States Patent and Trademark Office, including any operating unit in the United States Patent and Trademark Office, and its predecessors, the Patent Office and the Patent and Trademark Office.

*Official business* means the authorized business of the Office.

*General Counsel* means the General Counsel of the Office.

*Testimony* means a statement in any form, including personal appearances before a court or other legal tribunal, interviews, depositions, telephonic, televised, or videotaped statements or any responses given during discovery or similar proceedings, which response would involve more than the production of documents, including a declaration under 35 U.S.C. 25 or 28 U.S.C. 1746.

*United States* means the Federal Government, its departments and agencies, individuals acting on behalf of the Federal Government, and parties to the extent they are represented by the United States.

##### § 104.3 Address for mail and service; telephone number.

(a) Mail under this part should be addressed to General Counsel, United States Patent and Trademark Office, P.O. Box 15667, Arlington, VA 22215.

(b) Service by hand should be made during business hours to the Office of the General Counsel, Crystal Park Two, Suite 714, 2121 Crystal Drive, Arlington, Virginia.

(c) The Office of the General Counsel may be reached by telephone at 703-305-9035 during business hours.

##### § 104.4 Waiver of rules.

In extraordinary situations, when the interest of justice requires, the General Counsel may waive or suspend the rules of this part, sua sponte or on petition of an interested party to the Director, subject to such requirements as the General Counsel may impose. Any petition must be accompanied by the petition fee set forth in § 1.17(h) of this title.

#### Subpart B—Service of Process

##### § 104.11 Scope and purpose.

(a) This subpart sets forth the procedures to be followed when a summons or complaint is served on the Office or on the Director or an employee in his or her official capacity.

(b) This subpart is intended, and should be construed, to ensure the efficient administration of the Office and not to impede any legal proceeding.

(c) This subpart does not apply to subpoenas, the procedures for which are set out in subpart C of this part.

(d) This subpart does not apply to service of process made on an employee personally on matters not related to official business of the Office or to the official responsibilities of the employee.

##### § 104.12 Acceptance of service of process.

(a) Any summons or complaint to be served in person or by registered or certified mail or as otherwise authorized by law on the Office, on the Director, or on an employee in his or her official capacity, shall be served as indicated in § 104.3.

(b) Any employee of the Office served with a summons or complaint shall immediately notify, and shall deliver the summons or complaint to, the Office of the General Counsel.

(c) Any employee receiving a summons or complaint shall note on the

summons or complaint the date, hour, and place of service and whether service was by hand or by mail.

(d) When a legal proceeding is brought to hold an employee personally liable in connection with an action taken in the conduct of official business, rather than liable in an official capacity, the employee by law is to be served personally with process. Service of process in this case is inadequate when made only on the General Counsel. An employee sued personally for an action taken in the conduct of official business shall immediately notify and deliver a copy of the summons or complaint to the General Counsel.

(e) An employee sued personally in connection with official business may be represented by the Department of Justice at its discretion (28 CFR 50.15 and 50.16).

(f) The Office will only accept service of process for an employee in the employee's official capacity.

#### Subpart C—Employee Testimony and Production of Documents in Legal Proceedings

##### § 104.21 Scope and purpose.

(a) This subpart sets forth the policies and procedures of the Office regarding the testimony of employees as witnesses in legal proceedings and the production or disclosure of information contained in Office documents for use in legal proceedings pursuant to a demand.

(b) Exceptions. This subpart does not apply to any legal proceeding in which:

(1) An employee is to testify regarding facts or events that are unrelated to official business; or

(2) A former employee is to testify as an expert in connection with a particular matter in which the former employee did not participate personally while at the Office.

##### § 104.23 Demand for testimony or production of documents.

(a) Whenever a demand for testimony or for the production of documents is made upon an employee, the employee shall immediately notify the General Counsel at the telephone number or addresses in § 104.3 and make arrangements to send the subpoena to the General Counsel promptly.

(b) An employee may not give testimony, produce documents, or answer inquiries from a person not employed by the Office regarding testimony or documents subject to a demand or a potential demand under the provisions of this subpart without the approval of the General Counsel. The General Counsel may authorize the provision of certified copies not

otherwise available under part 1 of this title subject to payment of applicable fees under § 1.19 of this chapter.

(c)(1) *Demand for testimony or documents.* A demand for the testimony of an employee under this subpart shall be addressed to the General Counsel as indicated in § 104.3.

(2) *Subpoenas.* A subpoena for employee testimony or for a document shall be served in accordance with the Federal Rules of Civil or Criminal Procedure or applicable state procedure, and a copy of the subpoena shall be sent to the General Counsel as indicated in § 104.3.

(3) *Affidavits.* Except when the United States is a party, every demand shall be accompanied by an affidavit or declaration under 28 U.S.C. 1746 or 35 U.S.C. 25(b) setting forth the title of the legal proceeding, the forum, the requesting party's interest in the legal proceeding, the reason for the demand, a showing that the desired testimony or document is not reasonably available from any other source, and, if testimony is requested, the intended use of the testimony, a general summary of the desired testimony, and a showing that no document could be provided and used in lieu of testimony.

(d) Failure of the attorney to cooperate in good faith to enable the General Counsel to make an informed determination under this subpart may serve as a basis for a determination not to comply with the demand.

(e) A determination under this subpart to comply or not to comply with a demand is not a waiver or an assertion of any other ground for noncompliance, including privilege, lack of relevance, or technical deficiency.

(f) *Noncompliance.* If the General Counsel makes a determination not to comply, but the subpoena is not withdrawn or modified and Department of Justice representation cannot be arranged, the employee should appear at the time and place set forth in the subpoena. If legal counsel cannot appear on behalf of the employee, the employee should produce a copy of these rules and state that the General Counsel has advised the employee not to provide the requested testimony or to produce the requested document. If a legal tribunal rules that the demand in the subpoena must be complied with, the employee shall respectfully decline to comply with the demand, citing *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

#### § 104.25 Expert or opinion testimony.

(a)(1) If the General Counsel authorizes an employee to give testimony in a legal proceeding not

involving the United States, the testimony, if otherwise proper, shall be limited to facts within the personal knowledge of the employee. Employees, with or without compensation, shall not provide expert testimony in any legal proceedings regarding Office information, subjects, or activities except on behalf of the United States or a party represented by the United States Department of Justice.

(2) The General Counsel may authorize an employee to appear and give the expert or opinion testimony upon the requester showing, pursuant to § 104.4 of this part, that exceptional circumstances warrant such testimony and that the anticipated testimony will not be adverse to the interest of the Office or the United States.

(b)(1) If, while testifying in any legal proceeding, an employee is asked for expert or opinion testimony regarding Office information, subjects, or activities, which testimony has not been approved in advance in writing in accordance with the regulations in this subpart, the witness shall:

(i) Respectfully decline to answer on the grounds that such expert or opinion testimony is forbidden by this subpart;

(ii) Request an opportunity to consult with the General Counsel before giving such testimony; and

(iii) Explain that upon such consultation, approval for such testimony may be provided.

(2) If the tribunal conducting the proceeding then orders the employee to provide expert or opinion testimony regarding Office information, subjects, or activities without the opportunity to consult with the General Counsel, the employee shall respectfully refuse to provide such testimony, citing *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

(c) If an employee is unaware of the regulations in this subpart and provides expert or opinion testimony regarding Office information, subjects, or activities in a legal proceeding without the aforementioned consultation, the employee shall, as soon after testifying as possible, inform the General Counsel that such testimony was given and provide a written summary of the expert or opinion testimony provided.

(d) Proceeding where the United States is a party. In a proceeding in which the United States is a party or is representing a party, an employee may not testify as an expert or opinion witness for any party other than the United States.

#### § 104.29 Demands or requests in legal proceedings for records protected by confidentiality statutes.

Demands in legal proceedings for the production of records, or for the testimony of employees regarding information protected by the confidentiality provisions of the Patent Act (35 U.S.C. 122), the Privacy Act (5 U.S.C. 552a), the Trade Secrets Act (18 U.S.C. 1905), or any other confidentiality statute, must satisfy the requirements for disclosure set forth in those statutes and associated rules before the records may be provided or testimony given. Where the General Counsel determines an applicable confidentiality statute requires disclosure, this subpart will not apply.

#### Subpart D—Employee Indemnification

##### § 104.31 Scope.

The procedure in this subpart shall be followed if a civil action or proceeding is brought, in any court, against an employee (including the employee's estate) for personal injury, loss of property, or death, resulting from the employee's activities while acting within the scope of the employee's office or employment. When the employee is incapacitated or deceased, actions required of an employee should be performed by the employee's executor, administrator, or comparable legal representative.

##### § 104.33 Procedure for requesting indemnification.

(a) After being served with process or pleadings in such an action or proceeding, the employee shall within five (5) calendar days of receipt, deliver to the General Counsel all such process and pleadings or an attested true copy thereof, together with a fully detailed report of the circumstances of the incident giving rise to the court action or proceeding.

(b)(1) An employee may request indemnification to satisfy a verdict, judgment, or award entered against that employee only if the employee has timely satisfied the requirements of paragraph (a) of this section.

(2) No request for indemnification will be considered unless the employee has submitted a written request through the employee's supervisory chain to the General Counsel with:

(i) Appropriate documentation, including copies of the verdict, judgment, appeal bond, award, or settlement proposal;

(ii) The employee's explanation of how the employee was acting within the scope of the employee's employment; and

(iii) The employee's statement of whether the employee has insurance or any other source of indemnification.

### Subpart E—Tort Claims

**Authority:** 28 U.S.C. 2672; 35 U.S.C. 2(b)(2); 44 U.S.C. 3101; 28 CFR part 14.

#### § 104.42 Procedure for filing claims.

Administrative claims against the Office filed pursuant to the administrative claims provision of the Federal Tort Claims Act (28 U.S.C. 2672) and the corresponding Department of Justice regulations (28 CFR part 14) shall be filed with the General Counsel as indicated in § 104.3.

#### § 104.44 Finality of settlement or denial of claims.

Only a decision of the Director or the General Counsel regarding settlement or denial of any claim under this subpart may be considered final for the purpose of judicial review.

Dated: December 11, 2000.

#### Q. Todd Dickinson,

*Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.*

[FR Doc. 00-32314 Filed 12-21-00; 8:45 am]

BILLING CODE 3510-16-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[CO-001-0044b; FRL-6875-4]

#### Approval and Promulgation of Air Quality Implementation Plans; State of Colorado; Colorado Springs Revised Carbon Monoxide Maintenance Plan and Approval of a Related Revision

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing approval of the revised Colorado Springs carbon monoxide (CO) maintenance plan, that is designed to keep the area in attainment for CO through 2010, and revisions to Colorado's Regulation No. 13 "Oxygenated Fuels Program" for the removal of the requirement for the implementation of the wintertime oxygenated fuels program in El Paso County and the Colorado Springs area. The revised maintenance plan and revisions to Regulation No. 13 were submitted by the Governor on May 10, 2000. In the Final Rules section of this **Federal Register**, EPA is approving the State's State Implementation Plan (SIP) revisions, involving the revised

maintenance plan and the changes to Regulation No. 13, as a direct final rule without prior proposal because the Agency views these SIP revisions as noncontroversial and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this rule, no further activity is contemplated in relation to this rule. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time.

**DATES:** Comments must be received in writing by January 22, 2001.

**ADDRESSES:** Written comments may be mailed to: Richard R. Long, Director, Air and Radiation Program, Mailcode 8P-AR, United States Environmental Protection Agency, Region VIII, 999 18th Street, Suite 300, Denver, Colorado 80202-2466.

Copies of the documents relevant to this action are available for public inspection between 8:00 a.m. and 4:00 p.m., Monday through Friday at the following office:

United States Environmental Protection Agency, Region VIII, Air Program, 999 18th Street, Suite 300, Denver, Colorado 80202-2466.

**FOR FURTHER INFORMATION CONTACT:** Tim Russ, Air and Radiation Program, Mailcode 8P-AR, United States Environmental Protection Agency, Region VIII, 999 18th Street, Suite 300, Denver, Colorado 80202-2466; Telephone number (303) 312-6479.

**SUPPLEMENTARY INFORMATION:** See the information provided in the Direct Final action of the same title which is located in the Rules section of this **Federal Register**.

Dated: September 14, 2000.

#### Patricia D. Hull,

*Acting Regional Administrator, Region VIII.*

[FR Doc. 00-32301 Filed 12-21-00; 8:45 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 216

[Docket No.000801223-0223-01; I.D. 062000A]

RIN 0648-AO24

#### Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Operation of a Low Frequency Sound Source by the North Pacific Acoustic Laboratory

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

**ACTION:** Notice of proposed rulemaking; request for comments.

**SUMMARY:** NMFS has received a request from the University of California San Diego, Scripps Institution of Oceanography (Scripps), for a Letter of Authorization (LOA) to take a small number of marine mammals incidental to the continued operation of a low frequency (LF) sound source previously installed off the north shore of Kauai by the Acoustic Thermometry of Ocean Climate (ATOC) project. By this notice, NMFS is proposing regulations to govern that take. In order to grant the exemption and issue the regulations, NMFS must determine that these takings will have no more than a negligible impact on the affected species and stocks of marine mammals. NMFS invites comment on the application and the proposed regulations.

**DATES:** Comments and information must be postmarked no later than February 5, 2001. Comments will not be accepted if submitted via e-mail or the Internet.

Comments regarding the burden-hour estimate or any other aspect of the collection of information requirement contained in this rule should be sent to the Chief, and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: NOAA Desk Officer, Washington, DC 20503.

**ADDRESSES:** Comments should be addressed to Donna Wieting, Chief, Marine Mammal Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3226. A copy of the application, which contains the references used in this document, may be obtained by writing to this address or by telephoning the contacts listed here (see **FOR FURTHER INFORMATION CONTACT**). A copy